JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
PO BOX 629
RALEIGH, NORTH CAROLINA 27602

REPLY TO:
DIAL: (919) 716-6000
FAX: (919) 716-6050

April 26, 2023

Shonta Dunston, Chief Clerk
The North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-432

**Re: Docket No. E-2, Sub 1314; E-2, Sub 1315; E-7, Sub 1288; E- 7, Sub 1289**

Dear Ms. Dunston:

Please find attached a corrected version of the Comments of the Attorney General's Office filed in these dockets on April 25, 2023. The originally filed version of these comments inadvertently omitted the attached exhibits. The substance of the comments is unchanged. By copy of this letter, these corrected comments are being served on all parties to these dockets.

The AGO apologizes for any inconvenience caused by these omissions. Please contact me if you have any questions.

Thank you,

Electronically submitted
/s/Tirrill Moore
Assistant Attorney General
temoore@ncdoj.gov

**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**
**DOCKET NO. E-2, Sub 1315**
**DOCKET NO. E-7, Sub 1288**
**DOCKET NO. E-2, Sub 1314**
**DOCKET NO. E-7, Sub 1289**

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| | | |
|---|---|---|
| DOCKET NO. E-2, Sub 1315<br>DOCKET NO. E-7, Sub 1288<br><br>Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC Requesting Approval of Clean Energy Impact Program<br><br>DOCKET NO. E-2, Sub 1314<br>DOCKET NO. E-7, Sub 1289<br><br>Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Green Source Advantage Choice Program and Rider GSAC | ) | **COMMENTS OF THE ATTORNEY GENERAL'S OFFICE** |

The North Carolina Attorney General's Office (AGO) respectfully submits these comments regarding Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC's (DEC) (together, Duke or the Companies) joint applications for approval of the Clean Energy Impact Program (CEI), the Green Source Advantage Choice Program (GSA Choice), and Rider GSAC (together, the Programs). The AGO supports offering customers ways to access additional clean energy. However, as designed, the Programs have the potential to mislead customers while not meaningfully supporting the adoption of clean energy. The AGO recommends that the Commission deny the Companies' applications and order the development of Programs that provide customers meaningful ways to support our State's efforts to decarbonize.

On January 27, 2023, Duke filed its joint petitions for approval of the Programs.[1] Both Programs allow customers to voluntarily purchase Clean Energy Environmental Attributes (CEEAs) from the Companies in order to expand access to clean energy options. These CEEAs consist of renewable energy certificates (RECs) and carbon emission reduction attributes.

Under the CEI program, residential and small business customers may purchase CEEAs from the Companies to cover all or a portion of their energy needs. Customers with contract demands under 1,000 kW are eligible to participate. Eligible customers may purchase block sizes of 250 kWh or 1,000 kWh. RECs attributable to the purchased blocks would be tracked and retired with the North Carolina Renewable Energy Tracking System ("NC-RETS"), while the "carbon emission reduction attribute would be separately tracked, recorded, and retired[.]"[2] The blocks are purchased on a month-to-month basis with the price set based on the national market rate for RECs plus an administrative fee.[3]

The GSA Choice program is available for larger commercial and industrial customers with either: (1) a Maximum Annual Peak Demand of at least 1 MW, or (2) an aggregated Maximum Annual Peak Demand at multiple locations in the

---

[1] Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Petition for Approval of Clean Energy Impact Program, Docket Nos. E-7 Sub 1288 and E-2, Sub 1315 (Jan. 27, 2023) (CEI Application); Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Petition for Approval of Green Source Advantage Choice Program, Docket Nos. E-7 Sub 1289 and E-2, Sub 1314 (Jan. 27, 2023) (GSA Choice Application).

[2] CEI Application at 7.

[3] The national market rate for RECs typically includes "carbon emission reduction attributes," which are excluded from North Carolina's definition of RECs under N.C.G.S. § 62-133.8(a)(6).

Companies' service territories of at least 5 MW.[4] The GSA Choice program has two tracks for obtaining CEEAs: (1) from generating assets owned by the Companies or third-party-owned assets that have an executed power purchase agreement with the Companies, (referred to as "Available Renewable Energy Resources"), or (2) via a three-party agreement between the Companies, the customer, and a renewable developer (referred to as "GSA Facility PPA"), which the Companies propose to limit to 250 MW per year. The Companies propose that any resources procured through the GSA Facility PPA option would directly reduce the amount of renewable generation that the Companies are required to procure under their combined Carbon Plan and Integrated Resource Plans.[5] The GSA Choice program also includes an option to include energy storage.

Section 5, subsection 4 of House Bill 951, Session Law 2021-165, required the Commission to:

> [E]stablish a rider for a voluntary program that will allow industrial, commercial, and residential customers who elect to purchase from the electric public utility renewable energy or renewable energy credits, including in any program in which the identified resources are owned by the utility . . . , to offset their energy consumption, which shall ensure that customers who voluntarily elect to purchase renewable energy or renewable energy credits through such programs bear the full direct and indirect cost of those purchases, and that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs.

The Companies state that the Programs are intended to satisfy the requirements of this subsection; however, as described below, they do not.

---

[4] GSA Choice Application at 7.
[5] GSA Choice Application at 6.

RECs are legal instruments that separate certain attributes of renewable energy from the underlying electricity, such that the two can be independently traded or used. RECs have been used by the Companies to achieve compliance with the State's Renewable Energy Portfolio Standard since the enactment of Senate Bill 3, Session Law 2007-397 in 2008. However, under N.C.G.S. § 62-133.8(a)(4), the definition of RECs "does not include the related emission reductions, including, but not limited to, reductions of sulfur dioxide, oxides of nitrogen, mercury, or carbon dioxide." The CEEAs offered through the Programs therefore bundle a REC with the related emissions reductions.

## I. THE PROGRAMS HAVE THE POTENTIAL TO MISLEAD CUSTOMERS.

The AGO's primary concern is that the Programs, as they are currently designed, have the potential to mislead customers into thinking that they are supporting the addition of renewable resources to the Companies' systems when they are not. The Programs' applications and proposed tariffs exacerbate this confusion by stating that the Programs will allow customers to "support renewable energy,"[6] "to help reduce carbon emissions,"[7] that "[e]nergy associated with [CEEAs] displaces energy that often would have otherwise been produced from traditional non-renewable generating facilities,"[8] and that customers "request[] an annual amount of renewable capacity to be developed or procured on the Customer's behalf."[9] Together, these statements imply that a customer's purchase

[6] CEI Application at 5.
[7] CEI Application at 2.
[8] CEI Application, Appendix A, at 1.
[9] GSA Choice Application, Appendix B, at 2.

of CEEAs would lead to additional renewable energy sources being developed or would displace fossil fuel generating resources. This is not the case.

Under the Programs, the Companies intend to sell CEEAs to customers without adjusting the system-wide procurement of renewable resources or the system-wide environmental attributes. For example, the Companies do not intend to subtract out carbon emissions reductions attributable to the CEEAs from their carbon emissions reduction accounting under the Carbon Plan.[10] The Companies do not intend to subtract out carbon emission reductions attributable to the CEEAs from their corporate carbon emissions reduction goals.[11] The Companies have not stated whether they will adjust the Scope 2 emissions reported to customers to account for CEEAs sold to program participants.[12] Therefore, despite the Companies' contention that the Programs' design will "create certainty to ensure there is no double counting of environmental claims," it appears as though carbon emissions reductions will be counted by both the Companies and purchasing customers.

The Federal Trade Commission (FTC) publishes guides for the use of environmental marketing claims, which are intended to help companies avoid environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. 16 C.F.R. Part 260. The FTC's guides apply to

---

[10] Duke Response to AGO GSA Data Request 1-6(a) (attached as AGO Exhibit 1); Duke Response to AGO CEI Data Request 1-6(a) (attached as AGO Exhibit 2).
[11] AGO Exhibit 1 at 1-6(b); AGO Exhibit 2 at 1-6(b).
[12] Scope 2 emissions are the emissions resulting from the generation of electricity a customer purchases. Carbon Emissions Education, Duke Energy, https://www.duke-energy.com/energy-education/energy-savings-and-efficiency/calculate-your-carbon-footprint ("As an electric company, Duke Energy is most able to affect your Scope 2 emissions, or those resulting from the production of electricity.).

environmental marketing to consumers as well as to businesses.[13] 16 C.F.R. § 260.15(d) states that "[i]f 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."[14] N.C.G.S. § 75-1.1 similarly prohibits unfair and deceptive acts and practices. The FTC Act "may be used as guidance in determining the scope and meaning of G.S. 75-1.1."[15] The Programs would seem to run afoul of the FTC's guidance.

By way of relevant example, the FTC has previously reviewed claims that Green Mountain Power Corporation, an electric utility in Vermont, had deceived customers by claiming environmental benefits of renewable generation while selling RECs to third parties. The FTC stated that:

> 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 sum, 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.[16]

Recently, this Commission addressed this issue in *Order Granting Optima's Request for Declaratory Ruling*, Docket No. E-100, Sub 131 (Dec. 20, 2022). In

---

[13] 16 C.F.R. § 260.1(c) ("These guides also apply to business-to-business transactions.").
[14] The federal definition of RECs includes the environmental attributes; therefore, the RECs that the FTC's guides are discussing are more analogous to CEEAs than North Carolina's RECs.
[15] *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).
[16] Letter from Federal Trade Commission, Bureau of Consumer Protection to Green Mountain Power Corporation (Feb. 5, 2015) (attached as AGO Exhibit 3) (emphasis added).

that docket, the Companies acknowledged the need to avoid double counting under both N.C.G.S. § 75-1.1 and 15 U.S.C. § 45, stating:

> [C]onsistent with anti-fraud laws and regulations, [RECs] are automatically deemed retired as soon as the Duke Utilities make claims about generating renewable electricity using the renewable gas. Were these environmental attributes (VERs) to have any other disposition, whether by the Duke Utilities or the developer, the fuel would not be renewable. . . . [and] would clearly result in the Duke Utilities engaging in greenwashing and deceptive environmental claims, because neither the fuel nor the resulting electricity would be renewable.[17]

Duke's comments noted that FTC Commissioner Rohit Chopra previously stated that "[i]n the case of energy consumption, consumers must often take the information sellers provide at face value, as they lack the resources to verify the accuracy of their statements independently."[18] Duke pointed out "[t]he FTC's position is that the common sense understanding of everyday consumers will control, and 'technical compliance' with other regulations will not provide a defense to greenwashing and deceptive environmental claims."[19]

The Commission ultimately rejected Duke's argument that environmental attributes must be retired by the Companies in order to avoid double counting. In support, the Commission noted that "N.C.G.S. § 62-133.8, enacted as part of Senate Bill 3 (SB3) in 2007, does not deal directly with any of these greenhouse gas or carbon-related environmental attributes, and to the extent it does, it expressly excludes any such environmental attributes from the definition of a

---

[17] Joint Reply Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC Regarding Optima MH, LLC's Motion, Docket No. E-100, Sub 113 at 7-8 (Apr. 12, 2021).
[18] *Id.* at 9 (citing Statement of Commissioner Rohit Chopra at 4 (Dec. 22, 2020), available at: https://www.ftc.gov/system/files/documents/public_statements/1585238/20201222_final_chopra_statement_on_energyguide_rule.pdf).
[19] *Id.* at 8-9.

REC."[20] Here, the Programs not only explicitly include environmental attributes in addition to the REC, but N.C.G.S. § 62-110.9 *does* "deal directly with any of these greenhouse gas or carbon-related environmental attributes." The Commission's Order stated that "RECs may be unbundled from the energy itself produced using a renewable energy resource, and claims that energy is renewable is contingent on the energy retaining that intangible renewable attribute" and that "'[b]y selling RECs, a company has transferred its right to characterize its electricity as renewable.'"[21]

Finally, the potential for double counting creates economic risks for both the Companies and corporate customers. In 2022, the Securities and Exchange Commission (SEC) published proposed rules that would require companies to provide certain climate-related information in their registration statements and annual reports.[22] For example, the proposed rule would "require [companies] to disclose the role that carbon offsets or RECs play in the registrant's climate-related business strategy"[23] and "to disclose their Scopes 1 and 2 emissions."[24] Making false or misleading statements related to emissions reduction under this proposed rule would potentially open up the Companies and customers to liability.[25]

---

[20] *Order Granting Optima's Request for Declaratory Relief*, Docket No. E-100, Sub 113 at 19 (Dec. 20, 2022).
[21] *Id.* at 20.
[22] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Red. 21,334 (Apr. 11, 2022).
[23] 87 Fed. Reg. at 21,355
[24] 87 Fed. Reg. at 21,377.
[25] *See, e.g.,* 15 U.S.C. §§ 78j, 78r(a).

The only way to avoid potentially misleading customers via double counting emissions reduction benefits is to ensure that the CEEAs used under the Programs are generated by renewable resources that are not being used to satisfy any other emissions reduction goal—whether it be the Companies' corporate carbon emission reduction goal or the requirements of N.C.G.S. § 62-110.9. The Companies have claimed that the FTC has rejected a similar "additionality" requirement under 16 C.F.R. Part 260, but that is inaccurate.[26] In support of that position, the Companies cited the FTC's Proposed Revisions to Guidelines, Guides for the Use of Environmental Claims in Marketing, 75 Fed. Reg. 63,552, 63,595-97 (Oct. 15, 2010). In that proposal, the FTC acknowledged that many aspects of the "additionality" policy debate were beyond its purview; however, it specifically addressed regulatory additionality and held:

> When consumers purchase carbon offsets, they expect that they are supporting a reduction in greenhouse gas emissions. If the law mandates a particular emission reduction, however, that reduction will occur whether or not someone buys an offset for the activity. In other words, if a company sells an offset based on a mandatory emission reduction, the purchaser is essentially funding that company's regulatory compliance activities. Therefore, in such situations, the proposed Guides advise marketers that offset sales are deceptive.[27]

Therefore, the Commission should order the Companies to propose revisions to the Programs that ensure that CEEAs sold are derived from renewable generation that has not been used to satisfy regulatory compliance requirements or to meet corporate carbon emission reduction goals.[28]

---

[26] Duke Response to GSA Choice Public Staff Data Request 2-3.
[27] 75 Fed. Red. 63,597 (Oct. 15, 2010).
[28] *See also* Regulatory Surplus, United States Environmental Protection Agency (Feb. 5, 2023), https://www.epa.gov/green-power-markets/regulatory-

## II. THE PROGRAMS ARE CONTRARY TO THE PUBLIC POLICY OF THE STATE.

Even if the Commission does not agree that the Programs have the potential to mislead customers, the applications should be denied as they are contrary to the public policy of the State. N.C. Const. Art. XIV, § 5 establishes that it is the policy of the State to "conserve and protect its lands and waters for the benefit of all its people" and, to that end, requires the State to "control and limit the pollution of our air and water." Further, it is the policy of the State that utility programs "encourage and promote harmony between public utilities, their users and the environment."[29] To that end, House Bill 951 was passed by the General Assembly with bipartisan support and signed by Governor Cooper on October 13, 2021. Section 1 of House Bill 951, codified as N.C.G.S. § 62-110.9, established multiple carbon dioxide emissions reduction targets for electric utilities through 2050.

Recognizing the continued need for our State to address greenhouse gas emissions outside of the power sector, Governor Cooper signed Executive Order No. 246 on January 7, 2022 (E.O. 246). E.O. 246 set a policy goal to reduce statewide greenhouse gas emissions by 50 percent by 2030 and to reach net-zero emissions by 2050. Together, these actions reflect a recognition that the reduction of greenhouse gases, including carbon dioxide, is an issue of critical importance to our State. As they are currently designed, the Programs do not lead to additional carbon emissions reductions and may in fact hamper that goal.

---

surplus#:%7E:text=This%20is%20referred%20to%20as,renewable%20energy%20certificates%20(RECs).

[29] N.C.G.S. § 62-2(5).

The Companies' position is that N.C.G.S. § 62-110.9 regulates "direct emissions from electric generation facilities through actual measurements at the stack [rather than] through [RECs] or environmental attributes."[30] The question of how compliance with N.C.G.S. § 62-110.9 is measured is an open question of law. However, that is a question that the Commission need not answer in this proceeding nor is this the appropriate docket to address an issue of such critical importance. Instead, the Commission should deny the Companies' applications as filed because the Programs do not meaningfully advance the State's policy of reducing carbon emissions.

Finally, section 5, subsection 4 of House Bill 951 requires, "that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs." As the Programs are currently designed, non-participating customers may be disadvantaged. As CEEAs are purchased under the Programs, the characteristics of the Companies' system will—or at least should—change to reflect that the carbon emissions attributes have been retired. Because the carbon emissions attributes are removed from the Companies' systems, non-participating customers will now be purchasing energy that is more carbon intensive than they would otherwise have been purchasing. As discussed above, these types of changes have material impacts for customers with reporting requirements or corporate carbon emissions reductions goals.

---

[30] AGO Exhibit 1; AGO Exhibit 2.

## III. CONCLUSION

The AGO supports expanding access to clean energy to help advance our State's decarbonization efforts; however, the proposed Programs have the potential to mislead customers while not meaningfully supporting the adoption of clean energy. Therefore, the Commission should deny the Companies' applications and order the Companies to design, and file for approval, programs that allow customers to purchase CEEAs that are additional to those required under the Companies' approved Carbon Plan and corporate carbon emission reduction goals.

Respectfully submitted this the 25th of April, 2023.


JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Tirrill Moore
Assistant Attorney General
temoore@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6000
Facsimile: (919) 716-6050

## CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing COMMENTS OF THE ATTORNEY GENERAL'S OFFICE upon the parties of record in this proceeding by email, this the 25th day of April, 2023.

/s/ Tirrill Moore
Assistant Attorney General

**DUKE ENERGY PROGRESS, LLC AND DUKE ENERGY PROGRESS, LLC**
**JOINT PETITION FOR APPROVAL OF**
**GREEN SOURCE ADVANTAGE CHOICE PROGRAM**
**E-7, SUB 1289 & E-2, SUB 1314**
**North Carolina Attorney General's Office (AGO) Request No. 1**
**Date Requested: February 20, 2023**
**Date Due: March 2, 2023**

**AGO Legal Contact:** **Tirrill Moore**
**Phone #: (919) 716-0141**
**Email: temoore@ncdoj.gov**

1. The AGO adopts as its own all of the Data Requests (individually or collectively) of all other parties, whether written or oral, formal or informal, propounded to Duke Energy Progress, LLC (DEP) or Duke Energy Carolinas, LLC (DEC) (together, the Company) in this proceeding. All such requests should be treated by the Company as being independently asked by the AGO as of the date such requests are received by the Company, and the Company's initial and revised responses to such formal or informal Data Requests should be provided accordingly. This request applies to any Data Requests that have been propounded to the Company since the commencement of this proceeding as well as going forward.

2. Please provide copies of all Data Requests from other parties in this proceeding when they are received by the Company.

3. Please provide copies of all the Company's responses to Data Requests from other parties in this proceeding as soon as they are transmitted by the Company to the party making the request.

4. Please provide all Data Requests issued by the Company to other parties in this proceeding as soon as they are submitted to the party.

5. Please provide all responses received by the Company to Data Requests issued by the Company to other parties as soon as the responses are received by the Company.

6. Refer to the Joint Petition at page 7.

    a. Describe how "carbon emission reduction attributes" that are retired on behalf of a customer will be accounted for when determining the Company's carbon reductions pursuant N.C.G.S. § 62-110.9.

    **Response:** The Companies are focusing their HB951 compliance on direct emissions from electric generation facilities through actual measurements at the stack and will not measure compliance with HB951 carbon reduction targets through Renewable Energy Certificates ("RECs") or environmental attributes. The Clean Energy Environmental Attributes

("CEEAs") (RECs, as defined in N.C. Gen. § 62-133.8(a)(6), plus the carbon attribute) can be retired on behalf of DEP and DEC customers to offset their Scope 2 emissions.

b. Describe how "carbon emission reduction attributes" that are retired on behalf of a customer will be accounted for when determining achievement of the Company's corporate goal of "a 50% reduction in $CO_2$ emissions from electricity generation in 2030 on the way to net-zero $CO_2$ by 2050."[1]

**Response:** The corporate goal is measured by enterprise-wide reduction in emissions from generating resources as measured at the stack.

c. Please describe in detail how the Company will ensure that "carbon emission reduction attributes" are not double counted under different regulatory programs.

**Response:** The Companies intend to develop tracking and reporting tools for CEEAs that will include the "carbon emission reduction attributes". This effort will help create certainty to ensure there is no double-counting of environmental claims. In addition, the Companies are expecting all participating facilities to register as renewable energy facilities, and the RECs will be retired on behalf of the customers in NC-RETs. They will not be used for compliance obligations, to ensure there is no double- counting.

Because the CEEAs are being retired within the same jurisdiction, they cannot be counted off-system.

7. The Joint Petition states that CEEAs will be from "both utility-owned generation assets and third-party-owned generation assets that have a purchase power agreement." Please confirm whether this includes renewable energy derived from the Company's net metering programs.

   **Response:** It is currently not contemplated to include renewable energy derived from the Company's net metering programs in Green Source Advantage (GSA) Choice.

8. Please describe the rationale for capping the program capacity at 4,000 MW.

   **Response:** This capacity contemplates a 10-15 year build out of renewables on Duke Energy's system in the Carolinas and would be fulfilled over time and consistent with all resource portfolios developed in the initial Carbon Plan over that time horizon.

---

[1] Duke Energy Corporate Climate Change Goals, https://www.duke-energy.com/our-company/environment/global-climate-change.

**DUKE ENERGY PROGRESS, LLC AND DUKE ENERGY PROGRESS, LLC**
**JOINT PETITION FOR APPROVAL OF CLEAN ENERGY IMPACT PROGRAM**
**E-7, SUB 1288 & E-2, SUB 1315**
**North Carolina Attorney General's Office (AGO) Request No. 1**
**Date Requested: February 20, 2023**
**Date Due: March 2, 2023**

**AGO Legal Contact:** **Tirrill Moore**
**Phone #: (919) 716-0141**
**Email: temoore@ncdoj.gov**

1. The AGO adopts as its own all of the Data Requests (individually or collectively) of all other parties, whether written or oral, formal or informal, propounded to Duke Energy Progress, LLC (DEP) or Duke Energy Carolinas, LLC (DEC) (together, the Company) in this proceeding. All such requests should be treated by the Company as being independently asked by the AGO as of the date such requests are received by the Company, and the Company's initial and revised responses to such formal or informal Data Requests should be provided accordingly. This request applies to any Data Requests that have been propounded to the Company since the commencement of this proceeding as well as going forward.

2. Please provide copies of all Data Requests from other parties in this proceeding when they are received by the Company.

3. Please provide copies of all the Company's responses to Data Requests from other parties in this proceeding as soon as they are transmitted by the Company to the party making the request.

4. Please provide all Data Requests issued by the Company to other parties in this proceeding as soon as they are submitted to the party.

5. Please provide all responses received by the Company to Data Requests issued by the Company to other parties as soon as the responses are received by the Company.

6. Refer to the Joint Petition at page 7.

   a. Describe how "carbon emission reduction attribute[s]" that are retired on behalf of a customer will be accounted for when determining the Company's carbon reductions pursuant N.C.G.S. § 62-110.9.

      Response: The Companies are focusing their HB951 compliance on direct emissions from electric generation facilities through actual measurements at the stack and will not measure compliance with HB951 carbon reduction targets through Renewable Energy Certificates ("RECs") or environmental attributes. The Clean Energy Environmental Attributes ("CEEAs"), which are RECs, as defined in N.C. Gen. Stat. § 62-133.8(a)(6), plus the carbon emission reduction attribute, can be retired on behalf of DEP and DEC customers to offset their Scope 2 emissions.

b. Describe how “carbon emission reduction attribute[s]” that are retired on behalf of a customer will be accounted for when determining achievement of the Company’s corporate goal of “a 50% reduction in $CO_2$ emissions from electricity generation in 2030 on the way to net-zero $CO_2$ by 2050.”[1]

**Response:** The corporate goal is measured by enterprise-wide reduction in emissions from generating resources as measured at the stack.

c. How will the Company ensure that “carbon emission reduction attribute[s]” are not double counted under different regulatory programs?

**Response:**
The Companies intend to develop tracking and reporting tools for CEEAs that will include the “carbon emission reduction attributes.” This effort will help create certainty to ensure there is no double counting of environmental claims. In addition, the Companies are expecting all facilities to register as renewable energy facilities. The RECs will be retired in NC-RETs and will not be used for compliance obligations, to ensure there is no double counting.

Because the CEEAs are being retired within the same jurisdiction, they cannot be counted off-system.

7. The Joint Petition states that CEEAs will be from “renewable energy resources owned or contracted for by the Companies.” Please confirm whether this includes renewable energy derived from the Company’s net metering programs.

**Response:** It is currently not contemplated to include renewable energy derived from the Companies’ net metering programs in Clean Energy Impact.

[1] Duke Energy Corporate Climate Change Goals, https://www.duke-energy.com/our-company/environment/global-climate-change.

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



Bureau of Consumer Protection
Division of Enforcement
James A. Kohm
Associate Director
Direct Dial: (202) 326-2640
Fax: (202) 326-2558

February 5, 2015

R. Jeffrey Behm, Esq.
Sheehey Furlong & Behm P.C.
Gateway Square
30 Main Street
Post Office Box 66
Burlington, Vermont 05402

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.

* * * * *

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