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By Fax, Mail and Word-Perfect Disk

The Regulatory Assistance Project
177 Water St.
Gardiner, Maine 04345-2149

re: Uniform Disclosure Standards for New England

Dear Folks:

I write to follow up on my many oral and written communications with you over the last month or so about your proposed Uniform Disclosure standards. My comments represent the position of the Grand Council of the Crees, and the New England Coalition for Energy Efficiency and the Environment. I believe that other groups, including NRDC and the Vermont Independent Power Producers Association, have submitted or plan to submit similar comments.

1. Summary of the Problem -- No Disclosure At All Would Be Better Than

The Proposed Label.

Sometimes partial disclosure, though accurate on its face, is inherently deceptive . Your proposed label exemplifies this problem.

Imagine that Niagara Mohawk or NYPA is building a new nuclear power plant on the New York shore of Lake Champlain and that GMP or CVPS contracted to buy much of that energy . If your proposed label is adopted, prospective customers of GMP or CVPS would be informed only that some of the energy will be an "import" from outside New England. The label, while purporting to provide useful environmental disclosure upon which to base an energy selection choice, will be silent about the nuclear power plant just upwind from Vermont which will use Lake Champlain to cool its reactors. The label will

be filled with relatively useless detail about air emissions from GMP's or CVPS's average mix.

It does not require analysis of Federal Trade Commission precedent to understand that labeling of this sort is deceptive and counterproductive.

The same absurdity arises from the label for every power source whose major hazard is not an air emission, and for even horrendous air polluters from outside New England, since your label mandates anonymity for imports. Consider the example of a large coal or oil-fired plant upwind in New York, such as the Half-Moon plant which was upwind of a Vermont wilderness area and which was rightfully defeated under prior law but under deregulation and your label would become only an anonymous and benign "import" into New England. Vermont consumers who wished to avoid this source would remain ignorant.

And consider the Hydro-Quebec example. Chairman Cowart and the two other Commissioners of the Vermont Public Service Board found it was against the public good of Vermonters to purchase *any* energy from new facilities in Quebec because of the likely loss of migratory birds in Vermont, arising from the destruction of necessary migratory bird habitat in Quebec. Many species of migratory ducks, geese, loons, raptors and songbirds are at risk. Under your proposed label, the Board's well-documented findings would become irrelevant. Energy from Hydro-Quebec will be a benign and anonymous "import". In contrast, a relatively harmless co-generation plant in Boston or Burlington will have its air emissions splashed across the consumer's label. Under what theory is this useful disclosure that enables informed consumer choice?

Given a choice between your label and no label, the choice is clear. No label would be preferable.

2. The Proposal Falls Below FTC Standards

Section 5 of the FTC Act prohibits unfair or deceptive advertising. The FTC standards are not aspirational. They set a minimum and enforceable floor below which commerce cannot be conducted. A large body of case law has applied the Act, and more recently, as you know, the Commission has issued (1992) and then revised (1996) "Guidelines for the Use of Environmental Marketing Claims". Your proposal falls below these standards.

In FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), Chief Justice Warren addressed the question 'whether it is a deceptive trade practice [under section 5 of the act]... to represent falsely that a televised test, experiment or demonstration provides a viewer with visual proof of a product, regardless of whether the product claim itself is true.' The Court agreed with the FTC that this is deceptive. Although the subject of this case -- demonstrations of how "Rapid Shave" shaves sandpaper -- appears unrelated to energy sales and is somewhat humorous, the principle of the case is directly applicable to your draft, and is of deep concern to my clients.

The FTC and Colgate-Palmolive agreed that the key issue was whether the misrepresented fact is one which would constitute a material factor in a purchaser's decision whether to buy. The FTC argued further that it was not just those facts which pertain to the substantive qualities of the product, but "*any fact so long as it materially induces a purchaser's decision to buy*". The Supreme Court agreed. Chief Justice Warren wrote that the consumer is entitled to dictate his or her choice by 'caprice or by fashion or perhaps by ignorance', so that *any* deception that affects a purchase is relevant even if not pertaining to the substantive qualities of product.

Obviously, in the energy context, many consumers similarly will rely upon the fuel source pie-chart and air-emissions bar graph you propose. These are wholly silent on environmental harms other than air emissions, and wholly silent on what the imports consist of, yet represent to the public that they constitute the minimum information necessary upon which to make an environmentally conscious energy purchase choice. This is substantially more misleading than the Rapid Shave ad. It does pertain to the qualities of the product.

Just as in Colgate-Palmolive it was deceptive to give viewers the impression that they themselves had objective proof of a claim over and above the seller's word, so here it is deceptive to give readers the impression that the pie-chart and bar graph represent the known environmental external costs of the purchase. Where Quebec hydro is the "import", there are known impacts on several aspects of "the human environment", including reduction of New England's migratory bird population, possible extinction of certain species of birds, destruction of wild Canadian rivers, production of greenhouse gasses, and of course the devastation inflicted upon the culture and livelihoods of the Cree and Inuit peoples. Where Midwestern coal-fired power is the "import", it would be similarly misleading to tell consumers only that the energy is from "outside New England" or from "Ohio".

Your proposal calls for including air-emission data from imports once the source region adopts comparable disclosure standards. No doubt Hydro-Quebec will move quickly to conform. So long as the only environmental hazard disclosed is air emissions, this will accentuate the deceptive nature of the labels.

Recent case law re-affirms that the standard addresses not the literal truth or falsity of the representation but the overall impression it creates. See, e.g. FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp.851 (D.Mass. 1992).

The FTC's 1996 "Guidelines for the Use of Environmental Marketing Claims" make this point repeatedly. Section 260.6(c) states: "An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication". Section 260.6(d) mandates: "Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception."

The FTC guidelines continue the long line of FTC precedents which hold that statements, like your proposed label, that are absolutely correct may be misleading because of the context they omit. For example, in issuing the 1996 guidelines the Commission used “recyclable” trash bags and non-chlorine-bleached wrappers as illustrations of true but impermissibly misleading representations:

A trash bag is labeled “recyclable” without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

A product wrapper is printed with the claim “Environmentally Friendly”. Textual comments on the wrapper explain that the wrapper is “Environmentally Friendly because it was not chlorine bleached, a process that has been shown to create harmful substances”. The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the “Environmentally Friendly” claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the “Environmentally Friendly” claim would be deceptive.

The consumer research you have presented in the proposal (and in your other publications) reveals that consumers will rely upon relatively simple standards of comparison. Your proposed label is simple and comprehensible, and will be relied upon. It will convey to the consumer that it contains the minimum information necessary to compare environmental costs. It does not.

3. Suggested Changes in the Labeling

We suggest that the label be modified as follows.

First, instead of allowing sellers to say “Imports from outside New England” or “Imports from Canada”, require the corporate identity of the source be stated and that the principal fuels of that source be identified. For example, for a hypothetical Midwestern coal source the label would say “**Imported from RAP Power Co. of Ohio; uses high-sulfur coal and natural gas.**” Or, for Hydro-Quebec, the label would say: “**Imported from Hydro-Quebec of the Province of Quebec; uses large-scale hydro.**”

If the power is being sold by a power marketer, and has a mixture of sources, the disclosure would be “**Imported from RAP Power Marketers; uses coal, gas, and renewables**”.

Second, and equally important, the label must include a box entitled **Other Environmental Impacts** and the existing “Air Emissions” box title must be changed to say **Air Emissions From New England Sources** . Because of the difficulty of reliably

quantifying impacts other than air emissions, and because of the problem you discuss of regions without comparable disclosure systems, in order to provide useful information to consumers we need only mention the types of harms associated with the principal fuels from imports and some ballpark figures on magnitudes of harm. To use the same three examples as above, plus one in-region example:

Other Environmental Impacts

Environmental Impacts other than from Air Emissions, and from sources outside the region

1. RAP Power Co: Uses primarily High-Sulfur Coal, which contributes to acid rain and greenhouse warming.

2. Hydro-Quebec: Uses large-scale hydro-electric dams, which flood habitat required by [insert state name, e.g. Massachusetts] migratory birds and displace native peoples; also similar greenhouse gas production per kwh as gas-fired co-generation.

3. RAP Power Marketers: Uses coal, which contributes to acid rain and greenhouse warming; gas, which contributes to greenhouse warming; and renewables.

4. Vermont Yankee: Uses nuclear power; waste shipped to Texas.

4. Concluding comments.

Each New England state, and New York, is coming to terms with this issue. What you propose may, I fear, cause irreparable harm to the environment for all Americans, as well as the native peoples of Quebec. Unless your proposal is substantially revised, I believe it will be the position of many environmentally concerned legislators and citizens that it would be preferable to have no label at all, and simply to rely on FTC standards and existing state consumer fraud law to regulate disclosures in this area. If your label is adopted by statute, the effect will be to supersede and weaken each state's consumer fraud statute.

Sincerely,

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Registrant 4265 under Foreign Agents
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