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January 25, 2008

Federal Trade Commission/Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-135 (Annex O)
Washington, DC 20580

Re: Carbon Offset Workshop—Comment, Project No. P074207

To Whom It May Concern:

On behalf of the Offices of Attorney General of the States of Arkansas, California, Connecticut, Delaware, Illinois, Maine, Mississippi, New Hampshire, Oklahoma, and Vermont (“the States”), we are writing to comment, from a consumer protection standpoint, on the issue of carbon offsets and renewable energy certificates.

I. Introduction

According to the Nobel Peace Prize-winning scientists of the Intergovernmental Panel on Climate Change (the IPCC), “there is *very high confidence* that the net effect of human activities since 1750 has been one of warming” and that “discernible human influences extend beyond average temperature to other aspects of climate.”¹ (Emphasis added.) In this century, melting ice caps, rising sea levels, increased desertification, and consequent human dislocation and civil strife are expected to intensify absent strong and concerted action to lower greenhouse gas emissions from human activity.² In the words of Ban Ki-Moon, Secretary General of the United Nations, “slowing—and reversing—these threats [of climate change] are the defining challenge of our age.”³ And, the experts tell us, we have very little time to take decisive action.

¹ IPCC Fourth Assessment Report, *Climate Change 2007: Synthesis Report, Summary for Policymakers* at 4-5, available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

² See IPCC, *Summary for Policymakers*, in *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf#page=3>.

³ Secretary General’s address to the IPCC upon the release of the Fourth Assessment Synthesis Report (Valencia, Spain, Nov. 17, 2007).

In the United States, public concern over climate change is driving people and businesses to look for ways to address the problem, including reducing individual and corporate “carbon footprints”— thus reaping the reward of personal satisfaction or enhanced sales. In partial response to this growing concern, new global markets in carbon offsets and renewable energy certificates (RECs) have arisen. The market for the former is now estimated to exceed \$100 million, but also, according to some sources, is anticipated to multiply 40-fold within the next three or four years.⁴

As demonstrated at the recent workshop convened by the Federal Trade Commission, these growing markets in carbon offsets and RECs raise many complex issues, some of which we address below. However, given the newness of the markets, we believe that a key first step to insuring their integrity and the protection of consumers is to undertake efforts to understand consumer perceptions of the claims made by and about these intangible products.

II. Ongoing Concerns

The key question of what constitutes a “real” offset of carbon emissions remains difficult to answer and the subject of much debate among stakeholders. The lack of common standards and definitions, along with the intangible nature of carbon offsets, makes it difficult if not impossible for consumers to verify that they are receiving what they paid for and creates a significant potential for deceptive claims.

Consumer marketing claims occur in two contexts: representations made in conjunction with the sale of carbon offsets (and RECs) directly to consumers; and representations made by companies about their carbon footprint or their products’ or services’ carbon footprint. Given reports that estimate 80 percent of offset purchases are currently made by companies, the latter subset of claims may, for the moment, be the more important.

Among the difficult issues embedded in the offer and sale of carbon offsets and RECs are these:

- *Additionality.* While there appears to be a conceptual consensus that carbon offsets should be “additional,” there is broad disagreement over the meaning of additionality. Some stakeholders take the position that to be additional, the money raised from the sale of offsets must cause a project that would not otherwise be built to go forward (“financial additionality”). Others, including the U.S. Environmental Protection Agency, argue that it is sufficient if offsets are generated by newer projects that

⁴ See “Voluntary Carbon Offsets—Getting What You Pay For,” Testimony of Derik Broekhoff before the House Select Committee on Energy Independence and Global Warming (July 18, 2007), at 5, and sources cited therein.

perform with lower emissions than the vast majority of existing projects, even if they would have gone forward without the money raised from selling offsets (“performance-based additionality”).⁵ Ultimately, the FTC must look to consumers—not stakeholders—to determine what additionality criteria will be necessary to substantiate a “carbon offset” certificate or marketing claims of “carbon neutrality” made on the basis of the purchase of carbon offsets. As the FTC noted at page 10 of its announcement in the Federal Register, the FTC’s Guides “focus on the way in which consumers understand environmental claims and not necessarily the technical or scientific definition of various terms.”

- *Renewable energy certificates as “carbon offsets.”* There is also substantial disagreement among stakeholders on the question of whether selling a REC as a “carbon offset” is always, sometimes, or never deceptive. This debate is linked in part to the differing standards for additionality. Some regard offsets as limited to actions that directly reduce emissions from an existing practice (e.g., capturing emissions from an existing landfill), and question whether REC projects are actually displacing generation from existing fossil fuel plants as opposed to meeting an increased demand for power. For others, the question is linked to the debate over the standard for additionality, where a financial test would allow offsets to be sold only if the sale of RECs caused a renewable energy project to go forward. Here, once again, what matters most is consumer perception.
- *Baseline emissions.* While there is little disagreement over the need to calculate the baseline emissions from a project, for many project types there is a lack of agreed-upon standards for quantification of those baseline emissions. Rather, there are competing standards. The concern here is that this lack of common standards allows for the inflation of baselines—directly increasing the quantity of offsets—and leading to deceptive claims.
- *Benefit quantification.* Similarly, there are no common standards for quantifying the emissions reductions from offset projects. Aside from the technical differences in measurement formulas and techniques, there can be disagreements over what to count (e.g., are indirect increases in emissions subtracted?) and when to count it.

⁵ For an example of a “tool” used to evaluate additionality see United Nations Framework Convention on Climate Change, *Tool for the demonstration and assessment of additionality* (EB 36, Annex 13) (Nov. 30, 2007), http://cdm.unfccc.int/methodologies/PAmethodologies/AdditionalityTools/Additionality_tool.pdf.

- *Avoiding double-counting of offsets.* Because carbon offsets and RECs are intangible products, there must be safeguards against the double-selling of the offset or REC. Part of the solution to this problem is the creation of registries for the retirement of offsets and RECs. However, the existence of multiple registries and the possibility that the same offset or REC is being claimed by multiple entities creates uncertainty.⁶

III. Recommendations

Against this background of complexity and uncertainty, the States offer the following recommendations to the Federal Trade Commission:

1. *Research on consumer perceptions.* Before any decision can be made on several key attributes of “carbon offsets” (such as “additionality” and the treatment of RECs as offsets) and the use of associated terms (such as “carbon neutral”), it is necessary to understand how consumers perceive these claims and terms. What features of an offset do consumers consider to be material? What are their expectations about additionality? What do they consider to be an acceptable delay in the occurrence of sequestration or other offsetting of CO₂ emissions? How are certifications perceived? To answer these and similar questions, the FTC should seek out pertinent consumer perception research or, in the absence of adequate information, commission such research itself.

⁶ See 1999 NAAG Environmental Marketing Guidelines for Electricity (“NAAG Guidelines,” accessible at <http://www.atg.state.vt.us/display.php?pubsec=4&curdoc=462>), sec. 2(b) (Comment), in connection with a related concept, substantiating the generation characteristics of electricity marketed as “green,”

For any claim that is based on a tagging system, the supplier should have certificates that reliably establish that, for the period relevant to the claim, the supplier purchased the sole rights to the claimed attributes in an amount adequate to meet consumption demand for the product consistent with the claimed attributes. In addition, no more than one certificate should be issued for any one unit of power. To help consumers understand what they are buying, it is recommended that the claim be accompanied by a clear and prominent disclosure of the use of a tagging system to substantiate the claim. Furthermore, any claim about current or future attributes that is based on the purchase of certificates requires competent and reliable evidence to support the expectation that the generators of electricity from whom the certificates are purchased will produce sufficient electricity to meet reasonably anticipated demand for the attributes they represent. Unless state law allows otherwise, marketers are cautioned to avoid making claims based on a tagging system that state or imply that the supplier has actually purchased the power itself—as opposed to its environmental attributes—from the preferred generators.

2. *Research on the efficacy of disclosure.* There is a serious concern that given the complexity and intangibility of offsets and RECs, ordinary consumers will not make informed decisions but rather will be heavily influenced and easily deceived by non-material information. Consider two recent studies commissioned by the FTC that cast doubt on a longstanding reliance on disclaimers as an adequate corrective to deceptive use of endorsements and testimonials.⁷ If anything, carbon offsets are much more complex and new to the public than testimonial marketing. The alternative, if warranted, would be to rely less on disclosure as a cure for deceptive practices and more on standardization of attributes and definitions.

In seeking to determine the extent to which disclosure would be useful to consumers, one possible disclosure model to research is a uniform “Carbon Facts” box prominently placed in all marketing materials, containing basic information on the carbon offset product to which it applies, information that is comprehensible without any significant prior knowledge. Another concept to consider is requiring an initial disclosure that states, in so many words, that the best means to ensure that a consumer’s contribution to global greenhouse gas emissions is reduced is to cut the individual’s own emissions.

3. *Consumer education.* Pending the outcome of further study, the FTC should work to educate consumers about carbon offsets, RECs, and their relationship to climate change. Tips for consumers should at least cover the following:
 - a. The best means to ensure that your contribution to global greenhouse gas emissions is reduced is to cut your own emissions. (Include advice on where consumers can go to calculate their carbon footprint and get tips on how to cut their emissions.)
 - b. As state or federal governments create greenhouse gas caps, consumers may want to investigate purchasing from these recognized programs.
 - c. When purchasing a carbon offset or REC, look for disclosures that discuss the following:
 - i. The name, location and ownership of the project(s) to which your money is going;
 - ii. Why this project was chosen by the seller;

⁷ With respect to the Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255, see Manoj Hastak & Michael B. Mazis, *The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement* (report submitted to FTC, Sept. 30, 2003), and Manoj Hastak & Michael B. Mazis, *Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements* (report submitted to FTC, Sept. 22, 2004).

- iii. Why this project is not “business as usual” or already required by law;
 - iv. How the emissions reductions are measured and monitored;
 - v. Whether the reductions are verified by an independent source;
 - vi. Whether there are safeguards to prevent the emissions reduction from being sold twice;
 - vii. When the emissions reductions will occur and what happens if they do not occur; and
 - viii. Whether there are additional environmental benefits from the project.
- d. There is broad disagreement over whether, in order for a carbon offset to be real and additional, (i) its sale must cause a project that would not otherwise be built to go forward, or (ii) it is enough that a project that generates offsets is among the lowest emitting in its class—even if the project would have gone forward without the sales of offsets.
- e. When electricity is generated from a source that does not emit greenhouse gases (e.g., wind, solar, small hydro), the generator may sell the electricity and its emissions attributes jointly as zero emissions power, or as two separate products: (i) generic electricity (with no representation of its environmental characteristics); and (ii) a renewable energy credit or REC. There is disagreement over whether a renewable energy credit or REC should be considered a “carbon offset.”
4. *Interim enforcement.* Also pending the outcome of further study, the FTC should act to enforce its existing Guides for the Use of Environmental Marketing Claims (“the Guides”) to address overly general or broad representations relating to carbon offsets and RECs.⁸ To aid it in this process, we suggest that the Commission refer to the NAAG Guidelines with respect to general principles (sec. 2), substantiation (including avoiding double-counting) (sec. 2(b)), general environmental claims (secs. 3 and 4(j)), the definition of “renewable” (sec. 4(b)), and certifications (sec. 4(g)).

Likewise, the FTC should presently enforce the requirement of substantiation⁹ in connection with such claims as those relating to project description, baseline and emission reduction calculations, ownership (no double selling), independent verification, and ongoing monitoring. Substantiation of a “carbon offset” should require competent and reliable evidence of a number of other characteristics, including:

⁸ See 16 C.F.R. §§ 260.6(c) (prohibiting overstatement of environmental attribute or benefit) and 260.7(a) (prohibiting misrepresentation of general environmental benefit).

⁹ See 16 C.F.R. § 260.5.

- a. Evidence tracing the claimed emission reduction or carbon sequestration back to a specific project or projects;
- b. Evidence that the project, or the practices employed at the project to reduce emissions, have not been undertaken for the purpose of complying with any existing laws or regulations;
- c. Evidence that the resulting emissions reduction or carbon sequestration is not being claimed or sold more than once;
- d. Evidence that the projects or practices are actually carried out and are permanent, which might include evidence of monitoring and verification;
- e. Evidence that the project or the practices do not result in “leakage,” or, in other words, an increase in emissions elsewhere; and
- f. Reliable scientific evidence—as defined in the FTC’s Green Guides—of the measurement of the emissions reduction or sequestration claimed, which would include evidence of both baseline calculations and emission or sequestration data.

A December 2006 report from Clean Air Cool Planet entitled *A Consumer’s Guide to Retail Carbon Offset Providers* summed up the market in carbon offsets this way: “In the absence of a clear quality standard for offsets, a reliable provider certification process, or effective disclosure and verification protocols, the retail market remains a ‘consumer beware’ market.” However, the FTC, and by extension, the States, can and need to do better than to preside over a “consumer beware” market. Particularly given the rising importance of—perhaps the *need for*—carbon offset-type products in the market, we cannot afford to settle for less. Instead, we need to ensure, by law, that carbon offsets are real, additional, verifiable, enforceable, and accompanied by some system that will permit average consumers to make informed decisions as to whether and what to buy.

Thank you for your consideration.

Sincerely,



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David A. Zonana
Deputy Attorney General
California Attorney General’s Office

cc: The States (by email)