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

Office of the Director
Bureau of Consumer Protection

December 15, 1999

Joseph Colvin
President and CEO
Nuclear Energy Institute
1776 I Street, N.W.
Suite 400
Washington, DC 20006

Dear Mr. Colvin:

This letter states the views of the staff of the Federal Trade Commission ("FTC") with respect to a matter that the National Advertising Division of the Council of Better Business Bureaus, Inc. ("NAD") has referred to us, relating to certain advertisements that the Nuclear Energy Institute ("NEI") has run concerning environmental aspects of nuclear power generation. For reasons that will be explained below, FTC staff have determined not to recommend any law enforcement action in response to the referral.

Background

The Natural Resources Defense Council, joined by about a dozen other environmental advocacy groups and other organizations[1] (collectively "NRDC"), initiated this matter by asking NAD to investigate certain advertisements that NEI placed in several publications. NEI is a trade association whose members, it states, include "all utilities licensed to operate commercial nuclear power plants in the United States, nuclear power plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees such as hospitals and universities, and other organizations and individuals involved in the nuclear energy industry." NEI's advertisements, which consist of a few sentences of text in non-technical language accompanying colorful photographs, make certain claims as to the environmental benefits of nuclear power.

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[1] Those other groups are: Citizens Action Coalition of Indiana, Center for Energy Efficiency and Renewable Technologies, Clean Energy Group, Environmental Defense Fund, Environmental Law and Policy Center of the Midwest, Green Mountain Energy Resources, Legal Environmental Assistance Foundation, Nuclear Energy Information Service, Nuclear Information and Resource Service, Pace Energy Project, Public Citizen Critical Mass Energy Project, Union of Concerned Scientists, and United States Public Interest Research Group.

First, the advertisements make the general claim that nuclear power is "environmentally clean," and that it supplies electricity "without polluting the environment." Second, they state that generation of nuclear power "produces no greenhouse gas emissions," and that nuclear plants "don't burn anything to produce electricity, so they don't pollute the air." Third, they claim that nuclear power generation does not pollute the water, stating that it "generates electricity without polluting air and water." The advertisements appeared in a number of publications.

NAD, after consideration of the parties' submissions, issued a decision in November 1998, upholding the challenge. NAD first found that the advertisements did not amount to "political" or "issue" advertising, and were therefore within its review jurisdiction. On the merits, NAD concluded that the environmental claims contained in the advertisements were not supportable, and recommended that NEI refrain from making such claims.

First, concerning the general environmental claim, NAD referenced the FTC's Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260, which note that unqualified general claims of environmental benefit "may convey a wide range of meanings to consumers," and are therefore difficult to substantiate adequately. NAD found "that consumers can reasonably interpret the claim to mean that electricity generated by nuclear power is produced without any negative impact on the environment." Since there is not yet any permanent disposal system for radioactive waste, and since the process of enriching the uranium that fuels nuclear reactors emits greenhouse gases, NAD concluded that the claim of no negative environmental impact is not substantiated.

Second, NAD found that the claim that nuclear power plants "don't burn anything to produce electricity, so they don't pollute the air," while perhaps technically true, is misleading in its failure to disclose that the uranium enrichment process produces greenhouse gases. Third, NAD found misleading the claim that nuclear power generation does not result in water pollution. Since the Clean Water Act defines "pollutant" to include heat that is discharged into water, and since once-through cooling systems do in fact discharge heat into water, NAD found that the claim was not supportable.

NEI, in its response to NAD's decision, took issue with two of NAD's conclusions. First, it disagreed with NAD's determination that the advertisements were within NAD's review jurisdiction. Second, it noted that the life-cycle analysis that NAD applied to the zero-emissions claim was a novel approach that the Federal Trade Commission had not passed upon. It also expressed the view that NAD should broadly disseminate its guidance on this point to emphasize its applicability to claims of environmental benefits that might be made with respect to any product. NEI thereafter appealed the decision to the National Advertising Review Board, but the Board declined to entertain the appeal, finding that the appeal was procedurally defective.

NEI subsequently ran another advertisement in which it made a zero-emissions claim using wording similar to that which appeared in the earlier advertisements: "These plants don't burn anything to generate electricity, so they don't pollute the air." NRDC brought this advertisement to the attention of NAD, which notified NEI that the advertisement conflicted with

its November 1998 recommendation, and requested that NEI bring the advertisement into compliance with the recommendation. When NEI declined to do so, NAD referred the matter, on June 2, 1999, to the FTC.[2]

Analysis

At the outset, we must determine whether the FTC has jurisdiction to review the advertisements in question. The FTC's jurisdiction extends to trade practices that are "in or affecting commerce." 15 U.S.C. § 45(a). Trade practices consisting of speech fall within this jurisdictional grant only if they can be characterized as "commercial speech" for purposes of First Amendment free-speech analysis. *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 541 (1988).

We believe that a difficult question is presented as to whether the advertisements in question amount to commercial speech, rather than fully protected speech. On the one hand, the advertisements address important public policy issues in a manner that appears calculated to reach legislators and other opinion leaders. The advertisements were not concentrated in local publications in states where consumers currently can choose their electricity supplier, but were placed primarily in publications with a national readership, and in some publications that are read almost exclusively by those who make or seek to influence public policy.[3] Contemporaneous evidence regarding the advertising campaign that NEI has submitted to the FTC tends to support NEI's position that the advertisements were aimed at opinion leaders: the advertising campaign was conceived as part of a strategy to improve the image of nuclear power among opinion leaders, and the advertisements were tested on groups with the characteristics of policy makers rather than typical consumers. In addition, numerous legislative proposals potentially affecting the interests of NEI's members were pending before Congress at the time the advertisements were run, and the timing of some of the advertisements coincided with expected votes on legislation important to the nuclear industry and with significant international meetings of policy makers. To this extent, the advertisements have characteristics normally associated with fully protected speech.

On the other hand, a large number of consumers now have, or will soon have, the option

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[2] On the same date, Public Citizen filed a petition with the FTC, requesting that the Commission find NEI's advertisements to be deceptive and that it prohibit further use of them. Public Citizen's petition, which is filed on behalf of Citizen Action Coalition of Indiana, Nuclear Information and Resource Service, Safe Energy Communication Council, and U.S. Public Interest Research Group, objects to the advertisements on broader grounds than those which NRDC presses in its submission.

[3] The publications in which the advertisements appeared include The Washington Post, The Washington Times, National Review, The New Republic, The Economist, CQ Weekly, National Journal, The Atlantic Monthly, The Hill, Congress Daily AM, Roll Call, The New York Times, Barron's, and the San Francisco Chronicle.

of selecting the source of their residential electricity supply. Many of these have undoubtedly encountered NEI's advertisements. The environmental claims made in these advertisements will be material to some proportion of these consumers, and may influence their purchasing decisions — that is, the belief that nuclear power is environmentally benign may induce them either to select a supplier that generates electricity from nuclear plants, or to forgo paying more for electricity that is produced by non-nuclear sources. By encouraging the consumption of nuclear-generated electricity, the advertisements thus further the economic interests of NEI's members. To this extent, the advertisements resemble commercial speech.

Given this question as to whether NEI's advertisements are commercial speech, we decline to exercise jurisdiction over this matter. Nevertheless, we are aware that the use of environmental benefit claims in the marketing of electricity to consumers is a significant practice that will likely gain increasing salience as the restructuring of the residential electricity market proceeds. Furthermore, it is clear that environmental benefit claims may, depending on the circumstances, constitute commercial speech, regardless of whether such circumstances exist in the present matter. For example, marketing messages of the sort contained in NEI's advertisements would probably be commercial speech if they were sent by direct mail to consumers who have a choice among electricity suppliers. Therefore, we think it may be useful to present FTC staff's views on the propriety of the claims contained in NEI's advertisements.

As to NEI's general environmental benefit claim — its statement that nuclear power is "environmentally clean," and that it supplies electricity "without polluting the environment" — we agree with NAD's conclusion. The FTC's Green Guides advise that "[u]nqualified general claims of environmental benefit . . . may convey a wide range of meanings to consumers," all of which require substantiation if the claims are not to be deceptive. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7(a). For example, the claim that a product is "Environmentally Friendly" may be interpreted by consumers to mean "that no significant harmful substances are currently released to the environment." *Id.*, Example 2. We believe that the same is true of NEI's claim that nuclear power is "environmentally clean." Because the discharge of hot water from cooling systems is known to harm the environment, and given the unresolved issues surrounding disposal of radioactive waste, we think that NEI has failed to substantiate its general environmental benefit claim.

We also agree with NAD that NEI has not substantiated its statement that the production of nuclear power does not pollute the water. Consumers are likely to interpret this as a claim that nuclear power generation does not harm aquatic environments. Since discharge of hot water from cooling systems is known to cause various harms to aquatic life, the claim is not substantiated. Although this discharge may be, as NEI points out, within levels permitted by federal law, that does not imply the absence of harm to the environment.

NAD also found deceptive NEI's statement that nuclear power generation "produces no greenhouse gas emissions." NAD recognized that the operation of nuclear plants does not release any combustion products. Its analysis, however, was based on the fact that the process of enriching uranium so that it can be used to fuel nuclear reactors requires large quantities of

electricity, and the generation of this electricity by plants burning fossil fuels releases greenhouse gases. The use of such a "life-cycle" analysis in interpreting environmental benefit claims is controversial. In its Green Guides, the FTC declined to take a position on the life-cycle approach, stating: "Such analyses are still in their infancy and thus the Commission lacks sufficient information on which to base guidance at this time." 16 C.F.R. § 260.7, note 2. Evaluating whether a life-cycle analysis would be appropriate for NEI's zero-emissions claim would require an extensive investigation. Because we are declining to exercise jurisdiction in this matter, we do not believe this is the appropriate forum in which to arrive at a position on the life-cycle approach, and therefore express no opinion on NEI's clean-air claim or NAD's analysis of it.

As you know, the FTC strongly supports the self-regulatory program that the Council of Better Business Bureaus, Inc. operates through its NAD. We commend NEI and NRDC for their participation in NAD's advertising review process, and hope that NEI will take to heart the evaluation of its advertising that has been rendered by its peers. The market for supplying electricity to residential customers is in the earliest stages of development, and the FTC will be monitoring marketing claims in order to prevent unfair and deceptive practices.

The closing of this investigation is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

Joan Z. Bernstein
Director

cc: Robert W. Bishop
Vice President & General Counsel
Nuclear Energy Institute