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The Relationship Between Voluntary and Compliance Renewable Energy Markets

*By Flossie Davis and Lynn Fountain**

How to account for voluntary renewable and emission-free purchases in the context of mandatory renewable and emission-reduction requirements is an issue that energy suppliers and consumers have been grappling with for some time. The authors explain that whether this subject will become even more complicated with the adoption of a federal clean energy standard, or whether a federal clean energy standard will finally simplify this overlapping patchwork of products and programs, remains to be seen.

In the absence of comprehensive climate action at the federal level in the United States over the past decades, both consumers and states have stepped in to fill the void by taking action to reduce emissions associated with, among other things, their energy use. This has resulted in a patchwork of corporate pledges and initiatives, of voluntary renewable energy and emission reduction products and programs, and of state emission-reduction targets, cap-and-trade programs, and renewable energy portfolio standards (“RPS”).

As more companies move toward “net zero” and “100% renewable” corporate goals, as states set increasingly aggressive greenhouse gas (“GHG”) reduction targets and/or RPS requirements, and as the federal government shows signs—through its own recently revealed clean energy standard—of getting into the fray, the question of how voluntary commitments and claims interact with mandatory requirements is becoming increasingly important.

The area of voluntary renewable and emission free energy in particular has recently received greater attention and has experienced some evolution. However, further guidance is warranted, and will likely need to be revisited, if and when a federal clean energy standard is implemented.

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CORPORATE/VOLUNTARY INITIATIVES

The market for voluntary renewable and emission-free energy, which has existed for many years, has become more robust and sophisticated in recent years. To a significant degree this growth has been fueled by sustainability initiatives of large corporations, many of which are guided by participation in environmental leadership initiatives and GHG accounting programs.

Between 2019–2021, 108 large global companies pledged to achieve net zero emissions, which includes Scope 2 emissions¹ associated with electricity use, by 2040.² Over 300 companies³ have joined RE100, committing to 100 percent renewable electricity use by 2050.⁴ Over 700 companies have joined the EPA Green Power Partnership, committing to source a certain percentage of their electricity use from renewable resources.

In December 2020 alone, Amazon signed 650 megawatt (“MW”) of corporate power purchase agreements (“PPAs”) for the output of renewable projects to be developed throughout the country.⁵ In 2019, approximately one in 20 U.S. retail electricity customers purchased voluntary renewable energy products, totaling approximately 164 million megawatt hour (“MWh”) of renewable electricity and representing 32 percent of the non-hydro renewable energy generation in the country.⁶

Voluntary emission-free and renewable energy purchases can be as simple as matching load with renewable or emission-free energy certificates (“RECs” and “EFECs”), which represent the environmental attributes associated with one megawatt-hour of generation from a renewable and/or emission-free source, or as complex as corporate PPAs supporting the development of a specific facility.

¹ For GHG emission accounting purposes, “Scope 2” emissions are emissions related to electricity use. “Scope 1” emissions are direct emissions from owned or controlled sources, and “Scope 3” emissions include all other indirect emissions in a company’s value chain.

² The Climate Pledge, *Signatories*, (2021); available at <https://www.theclimatepledge.com/us/en/Signatories.html>.

³ The RE 100, *RE100 Members*, (2021); available at <https://www.there100.org/re100-members>.

⁴ The RE 100, *What Are the Requirements to Become an RE100 Member?*, (2021); available at <https://www.there100.org/technical-guidance#:~:text=RE100%20companies%20must%20select%20a,60%25%20by%202030>.

⁵ Amazon, *Amazon Becomes World’s Largest Corporate Purchaser of Renewable Energy, Advancing its Climate Pledge Commitment to be Net-Zero Carbon by 2040*, (2020); available at <https://press.aboutamazon.com/news-releases/news-release-details/amazon-becomes-worlds-largest-corporate-purchaser-renewable>.

⁶ NREL, *Status and Trends in the Voluntary Market (2019 data)*, available at <https://www.epa.gov/sites/production/files/2021-01/documents/gpp-webinar-01282021-oshaughnessy.pdf>.

Customers may purchase a bundled product that includes both electricity and environmental attributes from their energy supplier, whether that be a competitive supplier or their local utility, or purchase blocks or load-following amounts of RECs or EFECs separately from their underlying electricity supply.

In some cases, purchased products are certified or audited by a third party, which confirms that the purchased environmental attributes originated from qualifying resources, have been retired in association with the customer's purchase, and have not been double counted (i.e., claimed by more than one entity). In North America, the most widely used certification program is Green-e Energy, administered by the Center for Resource Solutions.⁷

Based on those voluntary purchases, customers may make certain marketing claims about their purchase of emission-free and/or renewable energy. Although the specifics of those claims vary depending on the product, typically customers seek to tout the reduction in GHG emissions associated with their energy use.

Similarly, customers can use these purchases to reduce Scope 2 emissions for GHG emissions accounting purposes using market-based accounting protocols, which recognize a company's energy procurement decisions.⁸

STATE AND PROPOSED FEDERAL INITIATIVES

While many corporations are increasing their commitments to purchase renewable energy and/or reduce emissions associated with their energy use, states continue to increase their own renewable energy and emission-reduction requirements.

Currently, 30 states, the District of Columbia, and the territories of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have mandatory RPS programs, requiring a portion of energy sold in the state to be supplied from renewable energy. Another seven states and Guam have a voluntary RPS in place. Each of these states defines "renewable" or "alternative"

⁷ See, generally, About Green-e, available at <https://www.green-e.org/>.

⁸ A "location-based" Scope 2 emission allocation method in GHG accounting "reflects the average emissions intensity of grids on which energy consumption occurs, using mostly grid-average emission factor data." A "market-based" method "reflects emissions from electricity that companies have purposefully chosen, based on contractual instruments" for energy and/or RECs or EFECs. See, World Resources Institute ("WRI"), *GHG Protocol Scope 2 Guidance, Executive Summary; An Amendment to the GHG Protocol Corporate Standard* (2015) at 4; available at https://ghgprotocol.org/sites/default/files/Scope2_ExecSum_Final.pdf ("Scope 2 Guidance"). WRI guidance recommends side-by-side reporting of the two accounting views, as well as the total MWh used, for complete disclosure and transparency into the company's efforts to that action on climate change.

energy in a different way, with qualifying resources ranging from the more typical solar, wind, small-scale hydroelectric and biomass to less typical waste coal, clean coal, and nuclear.

In recent years, some states have significantly increased their requirements; California, Colorado, Hawaii, Maine, Nevada, New Mexico, New York, Virginia, Washington, the District of Columbia, and Puerto Rico have all adopted goals of achieving 100 percent renewable and/or emission-free energy within the coming decades.⁹

On March 31, 2021, the Biden administration announced its infrastructure plan, which includes a federal energy efficiency and clean energy standard that would, among other things, require energy companies to source more energy from renewable and other clean energy sources.¹⁰

At the same time, many states have revealed GHG emission reduction targets and, in some cases, have taken action toward reducing the emissions associated with electricity generation within their states through participation in GHG emission cap-and-trade programs. Currently, 24 states and the District of Columbia have set GHG emission reduction targets through executive action, legislative action, or both.¹¹

Twelve states participate in GHG emission cap-and-trade programs applicable to electricity generation within their states and a thirteenth state, Pennsylvania, is currently in the process of joining one.

Now, at the federal level, President Biden's infrastructure plan also includes a pledge to decarbonize the nation's electricity sector by 2035.¹²

⁹ National Conference of State Legislatures, *American Rescue Plan Act of 2021*, (2021); available at <https://www.ncsl.org/ncsl-dc/publications-and-resources/american-rescue-plan-act-of-2021.aspx>.

¹⁰ See, The White House, *Fact Sheet: The American Jobs Plan*, (2021); available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

¹¹ See, Center for Climate and Energy Solutions, *U.S. State Greenhouse Gas Emissions Targets*, (2021); available at <https://www.c2es.org/document/greenhouse-gas-emissions-targets/>.

¹² See, The White House, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, (2021); available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

THE INTERPLAY OF VOLUNTARY EFFORTS AND COMPLIANCE REQUIREMENTS

With corporate and government clean energy and emission reduction goals approaching 100 percent, the question arises of what marketing and GHG emission accounting claims customers can make about legally mandated renewable or emission-free energy included in their supply.

In the context of renewable energy claims, the question is whether a supplier can claim to be selling, and whether a customer can claim to be using, renewable energy that includes a portion of the state mandated RPS. In the context of claims associated with emission-free energy, there is an additional question of how GHG emissions claims and accounting are affected when a facility's location is already subject to a GHG cap-and-trade program.

Further complicating these issues is the acknowledged role the voluntary market plays in allowing states to achieve their renewable energy and emission-reduction goals. In its recent decision establishing standards for voluntary renewable offers within the state, the Connecticut Public Utilities Authority acknowledged this by noting its intent to “ensure [voluntary renewable] products . . . further the state’s clean energy goals.”¹³

Some states have made an even more direct connection between the voluntary and compliance markets.

For example, Maryland allows electricity suppliers to exempt certain customers who procure their own renewable energy and meet certain other requirements from their load for RPS compliance purposes, effectively “crediting” the supplier, and by extension the customer, for the customer’s voluntary renewable purchases.¹⁴

The Virginia Clean Economy Act includes a number of provisions that allow larger customers to avoid the utilities’ RPS, offshore wind and energy efficiency charges by procuring qualifying renewable products and/or installing qualifying energy efficiency projects.¹⁵

In addition, in the 2021 Illinois legislative session, a similar bill was introduced that would provide customers with a credit for their RPS fees for self-procured renewable energy purchases.¹⁶ Each of these approaches high-

¹³ Docket No. 16-12-29 *PURA Development of Voluntary Renewable Options Program* (October 21, 2020) at 2 (decision currently under appeal) (“Connecticut VRO Order”).

¹⁴ COMAR 20.61.01.06.D(2).

¹⁵ VA Code Ann. § 10.1-1308 *et. seq.*

¹⁶ H.R. 1747, 102nd Gen. Assemb., Reg. Sess.(Ill. 2021).

lights the complicated interplay between voluntary and mandated renewable and emission-free energy markets.

In the case of marketing claims, one of the key legal questions is whether the claim is truthful, and not misleading or deceptive.¹⁷ A company's claim that it is purchasing 25 percent renewable energy may be truthful, but if that 25 percent is legally mandated, the claim could still be considered deceptive.

When it issued its Revised Green Guides nearly a decade ago, the Federal Trade Commission ("FTC") examined, but declined to address, this issue.¹⁸ Though it "share[d] the concern" expressed by commenters that consumers might expect their renewable energy purchases to "support renewable energy generation beyond legal requirements," the FTC had not tested the issue nor solicited comments on it, and ultimately determined that the record did "not provide a basis for general guidance on claims in this area."¹⁹ It noted, however, that it would continue to monitor the issue.

In some cases, whether a renewable energy product is permitted to include compliance RECs as part of the renewable portion of the product may depend on the state where the product is sold and whether the product is certified by a third party.

For example, Green-e Energy certified REC products are not permitted to include RECs that have been used for compliance purposes. There are limited exceptions for renewable electricity products that meet 100 percent of a customer's load and for the Green-e corporate PPA product, both of which have specific requirements that many voluntary products do not meet.²⁰ This means that for a large portion of the voluntary Green-e Energy certified products any claimed RECs are over and above those required for compliance purposes.

In addition, in Connecticut, a supplier is not permitted to include the RPS requirements in the portion of electricity marketed as "renewable."²¹ This could result in a customer's supply being made up of, effectively speaking, more than

¹⁷ See, Section 5(a) of the FTC Act, 15 U.S.C § 45(A), *et seq.*

¹⁸ See, FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2012) ("Revised Green Guides").

¹⁹ FTC The Green Guides, Statement of Basis and Purpose, at 226-226; *available at* <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf>.

²⁰ Green-e Renewable Energy Standard for Canada and the United States, Version 3.5, Updated December 15, 2020, at 20-25, *available at* <https://www.green-e.org/docs/energy/Green-e%20Standard%20US.pdf> ("Green-e Standard").

²¹ Note that the Connecticut VRO Order actually prohibits suppliers from calling most

100 percent renewable energy, taking into account RECs procured to match the customer's load along with RECs procured for compliance purposes.²²

The program in which a company participates may also provide standards for reporting RPS requirements as part of the company's renewable energy use. For Green Power Partnership participants, the EPA "recognizes only voluntary green power use above mandatory requirements"²³ In contrast, RE100 allows a company to report renewable electricity supplied to them as part of compliance requirements, so long as the renewable energy is supported by RECs retired on behalf of the customer.²⁴ The company needs to confirm that its energy supplier does not comply with the applicable requirements by paying an alternative compliance fee or similar rather than retiring RECs, a task that can be challenging in practice, with suppliers managing multiple state compliance requirements for potentially millions of customers.

Recent guidance issued by the Center for Resource Solutions Clean Energy Accounting Project (March 2021 CEAP Report), in coordination with other industry groups, provides standards for how customers and suppliers can claim "Standard Delivery Renewable Energy," which is defined to include renewable energy supplied to, but not actively procured by, the consumer.²⁵ This would include renewable energy that suppliers are required to procure for RPS compliance purposes.

The March 2021 CEAP Report concludes that "Standard Delivery Renewable Energy may be credibly reported by a customer as consumed renewable energy and by a provider as delivered renewable energy when the attributes of the renewable energy are retained or retired on behalf of the customer (or a group including the customer), and other established requirements for credible renewable electricity usage claims are met."²⁶

energy + REC products "renewable energy" products, which is one of the issues currently under appeal.

²² Connecticut Public Utilities Regulatory Authority, *PURA Establishment of Rules for Electric Suppliers and Electric Distribution Companies Concerning Operations and Marketing in the Electric Retail Markets*, Final Order, Docket No. 13-07-18 (Nov. 5, 2014).

²³ EPA's Green Power Partnership Requirements at 2, May 2019, *available at* https://www.epa.gov/sites/production/files/2016-01/documents/gpp_partnership_reqs.pdf.

²⁴ RE100 Reporting Guidance 2021 at 6, March 26, 2021, *available at* <https://www.there100.org/sites/re100/files/2021-04/RE100%20Reporting%20Guidance%202021.pdf>.

²⁵ Clean Energy Accounting Project, *Accounting for Standard Delivery Renewable Energy*, (2021), at 1, *available at* <http://resource-solutions.org/wp-content/uploads/2021/03/Accounting-for-Standard-Delivery-Renewable-Energy.pdf> ("March 2021 CEAP Report").

²⁶ *Id.*, at 3.

The criteria for credible usage claims include the following requirements:

- That the electricity be delivered;
- That generation information be accurate;
- That the claimed generation include all ownable attributes (including GHG emission benefits);
- That the attributes be exclusively owned by or retired on behalf of the consumer or group of consumers;
- That the attributes are not double-claimed; and
- That the generation occurs in the same market and relative timeframe as consumption.

For purposes of this last criterion, the U.S. and Canada are considered a single market, and the suggested parameter for “same relative timeframe” are the year of consumption, six months prior and three months after.²⁷ This guidance provides a framework for making marketing and GHG emission accounting claims related to legally mandated renewable energy that could become even more useful as we see movement toward a federal clean energy standard.

The issue of how the existence of a GHG emissions cap-and-trade program affects the marketing and GHG emission accounting claims made about voluntary renewable and emission-free energy is a more nuanced one that is often not directly addressed in guidance. For example, the issue is not addressed by the Revised Green Guides, nor is it directly addressed under state law.

The Green-e Energy certification standards, however, bar certification of any REC generated by a facility subject to a GHG emission cap-and-trade program, unless the REC is sold into a state that provides for the retirement of a commensurate number of GHG allowances in connection with voluntary renewable sales.²⁸ This is because, technically speaking, generation by an emission-free resource in a state subject to a GHG emission cap simply allows another resource to emit more, unless allowances are retired in connection with the generation.

Currently, the Regional Greenhouse Gas Initiative (i.e., RGGI) states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont provide for this type of retirement in connection with voluntary renewable sales within the state as long as the REC source meets the

²⁷ *Id.*, at 6.

²⁸ Green-e Standard at 20–25.

states' requirements.²⁹ California's cap-and-trade program has a similar provision. RECs originating from a state subject to a GHG emissions cap-and-trade program and sold into a state that does not provide for such allowance retirement, however, cannot be Green-e Energy certified. This can create the odd result of incentivizing a Maryland customer, for example, to source a certified REC from Texas rather than a REC that cannot be certified from Maryland.

For customers who are willing to accept uncertified RECs, there is no apparent bar to making marketing claims about emissions associated with their own generation based on renewable energy purchases, even when those purchases are from a resource subject to a GHG emission cap-and-trade program.

However, such claims would be subject to the same requirements applicable to all marketing claims that they not be false or misleading. The means that a customer purchasing renewable or emission-free energy from a state subject to a GHG emissions cap could not imply that the purchase resulted in reduced emissions in that state or region. The customer presumably could claim, however, that the purchase resulted in reduced emissions related to the customer's own energy use. In addition, to further avoid being misleading, the existence of the cap-and-trade program could be disclosed in connection with any such claims.

In the area of GHG emission accounting, market-based accounting allows a customer to report Scope 2 emissions based on procured electricity—including purchases of RECs and EFECs.³⁰ If those RECs or EFECs are sourced from a facility subject to a GHG emissions cap, the company is required to indicate whether allowances associated with the voluntary purchase have been retired. This provides a balance between allowing customers to accurately account for emissions associated with electricity they specifically procure even if that electricity is purchased from a region subject to an emissions cap, while also allowing those customers who are able and decide to have GHG emission allowances retired on behalf of those purchases reflect that in their GHG emission accounting reports.

²⁹ See, e.g., Conn. State Agencies Regs. § 22a-174-31(e)(7)(A); Code of Maine Regs. § 06-096-156 (2)(G)(4); 310 C.M.R. 7.70(5)(b), (c); N.H. Admin. Rules, Env-A 4606.09; NYCRR § 242-5.3(c); 250 R.I.C.R. 120-05-46.8(K); and Vermont Public Utility Commission, *Order Implementing the Regional Greenhouse Gas Initiative Auction Procedures for the State of Vermont*, Case No. 18-4145-INV (Jan. 10, 2019).

³⁰ See, generally, Scope 2 Guidance.

CONCLUSION

The issue of how to account for voluntary renewable and emission-free purchases in the context of mandatory renewable and emission-reduction requirements is one that energy suppliers and consumers have been grappling with for some time. The complexity of this issue has only increased in lock-step with the increase in mandatory requirements.

It remains to be seen whether this issue will become even more complicated with the adoption of a federal clean energy standard, or whether a federal clean energy standard will finally simplify this overlapping patchwork of products and programs.