



**Antitrust Policy and Guidelines
for Members of the
Electric Power Supply Association**

I. Objective

It is the policy of the Electric Power Supply Association (“EPSA”) that all of its activities be conducted so as to avoid even the appearance of conduct prohibited by federal and state antitrust laws. Consistent with that policy, this guide outlines areas of the antitrust laws that should be of particular concern to EPSA and its members. This guide does not pretend to be an all-encompassing delineation of potential antitrust problems and the means to avoid them. Nor does it cover other laws and regulations related to competition, such as Federal Energy Regulatory Commission rules regarding disclosures of information. In some instances, EPSA policy contained in these guidelines is stricter than the applicable antitrust laws.

While the guidelines below provide a basic outline of antitrust matters, each member company bears responsibility for assuring that its actions and those of its employees comply with the antitrust laws. Antitrust laws are complex and subject to varying court interpretations. In instances of doubt, EPSA members should always seek the assistance of their legal counsel experienced in antitrust.

II. Basic Framework of Antitrust Laws

Antitrust laws are designed to promote vigorous and fair competition and to provide American consumers with the best combination of price and quality. Principal federal antitrust laws are the Sherman Act, Clayton Act, Robinson-Patman Act and Federal Trade Commission Act. Most states have their own antitrust laws, which frequently (although not always) parallel the federal laws.

Of principal concern to individuals and firms that take part in trade association activities are Section 1 of the Sherman Act and Section 5 of Federal Trade Commission Act. These laws make illegal certain agreements or conspiracies, particularly those among competitors, that are in restraint of trade.

The Supreme Court has interpreted these statutes as prohibiting only those agreements that have the effect of *unreasonably* restraining trade. Agreements could be illegal if, overall, the anticompetitive effects outweigh the pro-competitive benefits. For certain agreements, a “rule of reason” analysis that balances the relevant competitive factors is applied by the courts.

Other agreements, however, have been regarded as unreasonable by their very nature and are, therefore, considered illegal “*per se*.” Except in limited circumstances such as those involving legitimate joint venture activities, *per se* illegal agreements among competitors include 1) price fixing, 2) bid rigging, 3) market allocation (including dividing customers, territories, suppliers, or product lines and other lines of commerce), 4) output restrictions, and 5) certain tie-in sales where, due to market power of a seller, a customer is required to purchase an unwanted item in order to obtain a desired product or service.

Severe Penalties

The U.S. Department of Justice is authorized to prosecute Sherman Act violators as criminal felons, who can be severely fined and, in the case of individuals, imprisoned. In addition, the Justice Department, state attorneys general and private parties can bring civil suits and recover three times (treble) their actual damages, court costs and (in private suits) attorneys' fees from corporations and individuals who have violated the antitrust laws. The Federal Trade Commission has its own statutory authority to enforce antitrust laws through civil and administrative proceedings.

III. Antitrust Laws Particularly Applicable to Trade Associations

The legality of activities of trade associations under the antitrust laws is determined by the application of standards no different from those applied to other groups of persons or firms. Special problems do arise, however, from the fact that a trade association is, by definition, a combination of competitors, and the act of bringing competitors together creates the means by which collusive action can be taken in violation of the antitrust laws. Another antitrust problem arising from the nature of trade associations is that many of their most valuable and procompetitive programs directly impinge upon areas of particular antitrust concern. Among these areas are statistical reporting, economic studies, product standards, credentialing, certification, credit reporting and customer relations.

Illegal agreements can be oral or written, formal or informal, expressed or implied. Antitrust liability is frequently a result of circumstantial evidence of a course of business conduct from which a jury infers the existence of an illegal conspiracy. Courts and juries can infer agreements based on "loose talk," informal discussions, or exchanges between competitors of nonpublic competitively sensitive information, such as recent prices, costs, production levels or future company plans.

A. Basic Rules for Avoiding An Appearance of Unlawful Agreements Among Competitors

The essential principle that should guide the policies of EPSA to prevent antitrust violations is to avoid conduct that might give even the appearance of an illegal agreement.

Staff, officers, directors, and members of EPSA should be particularly on guard as to conduct or agreements affecting areas of particular antitrust concern, especially pricing, territorial and output restrictions, information exchanges and statistical programs, association membership, and industry standardization and certification. EPSA should be aware not only of matters discussed in open meetings, but also of topics considered in committees and of actions taken by one or more members in the name of EPSA.

Pricing

Price-fixing is the most common antitrust violation. To avoid the risk of liability, EPSA members as elaborated below should not collectively discuss their prices, discounts, bids or bidding decisions or other terms of sale. Nor should EPSA members discuss their costs, profit margins or related items that might affect prices.

Territorial and Output Restrictions

EPSA members should not discuss allocating markets, territories or customers, or limiting production or scheduling of outages.

Exchanges of Confidential Information

Generally, the following information relating to individual companies should not be exchanged or discussed among competitors: 1) information on current or future prices, price trends, or terms and conditions of sale; 2) information on whether or not a company plans to bid, or potential bidding terms; 3) information on a company's current or future production or marketing plans, including plans to introduce new or cut back existing supply or to modify the geographic markets in which the company competes; 4) information on how a company uses market information, *e.g.*, the way a company sets prices; and 5) information on a company's costs and expenses.

Statistical Data

Collecting and disseminating aggregate statistical data involving members' historical prices and costs is permissible but should be established and conducted under the careful supervision of legal counsel. Broadly speaking, the further removed the data are from current nonpublic prices and costs and the less company-specific they are, the less likely it is that they will raise antitrust concerns. As a general rule, particular market-sensitive data supplied by individual member companies should never be discussed or disseminated without advice of counsel. Projections of future prices should never be the subject of such programs.

Membership

Because a trade association by its very nature provides certain commercial and other benefits to its members, the denial of membership to qualified competitors could violate antitrust laws. Membership should be open to all companies that satisfy basic membership requirements, and any decision to deny membership or expel a member company should be reviewed with counsel. All member companies should have an equal opportunity to participate in EPSA activities and benefits.

EPSA services of competitive benefit should also be made available to nonmembers. EPSA may charge nonmembers higher fees for such services than are charged EPSA members whose dues help to support the services.

Normally, a member should not be expelled unless it has not paid its association dues or there is an adequate reason and a two-thirds vote of the Board of Directors. Counsel should be consulted before consideration is given to expelling a member for reasons other than non-payment of dues.

Industry Self-Regulation

Nongovernment industry rules proposed or established by EPSA should be reviewed by counsel to ensure that they do not unreasonably restrict competition. For example, a standard that is unreasonably biased in favor of one set of competitors at the expense of others might raise significant antitrust problems. Care should therefore be used both in creating and applying reasonable codes, standards and certification criteria. Especially to be avoided is any rule or standard that would be construed as an agreement not to deal with individual competitors, suppliers, or customers.

Government Relations

There is a constitutional right to petition legislatures and government agencies for action and, if properly undertaken, such activity is not subject to the antitrust laws. The right to petition, however, does not provide unlimited antitrust protection. If the activity in question is not really designed to achieve government action, but rather amounts to actions undertaken by competitors to injure competition, it could be viewed as a sham.

Records

You should prepare every record with the thought that it might someday have to be produced to plaintiffs' lawyers who will interpret your language in the worst possible way. Such "records" include all of the various communications used day-to-day – documents and drafts, e-mail, videotapes, audio recordings (such as voice mail) and the like.

Contact legal counsel if you have any concerns that EPSA activities could lead to:

- **Unlawful agreements relating to prices or business terms,**
- **Improper exchanges of confidential information or statistical data,**
- **Improper membership exclusion,**
- **Anti-competitive industry standards,**
- **Sham efforts to influence government, or**
- **Problematic documents/records.**

B. Agreements Between Suppliers and Customers Could Sometimes Raise Concerns Under the Antitrust Laws

EPSA members might both be competitors and have a supplier/customer relationship with other members. In addition to agreements among competitors, agreements with customers can be subject to antitrust scrutiny. Some potential examples include:

Exclusive Dealing

Exclusive dealing arrangements arise in various forms. Some might compel a customer to purchase all of its requirements for a product or service from a single supplier. Others might coerce a supplier into refusing to sell to a customer's competitors. Antitrust authorities assess the market power of the parties and the business purpose and impact of the agreement on competition to determine its lawfulness.

Reciprocity

In reciprocal dealing arrangements, a customer makes purchases from a supplier only on the condition that the supplier will buy products or services from the customer. Antitrust authorities similarly assess the market power of the parties and the business purpose and impact of the agreement on competition to determine its lawfulness.

Certain Supplier/Customer Agreements Could Be Illegal, Depending on the Circumstances

Given potential risks, EPSA operations and activities must not be used to reach or further agreements among member companies in any of the following areas without prior review of counsel:

- **Exclusive dealing arrangements, and**
- **Reciprocal sales and purchase agreements.**

To avoid even the appearance of impropriety, the subjects indicated should not be discussed or addressed in the course of EPSA-related activities without prior review of counsel.

C. Some Conduct Without an Agreement Might Violate the Antitrust Laws

You should also be aware that certain antitrust law violations could occur without an agreement. The most common such violations are briefly discussed here.

Monopolization

The law of monopolization (including attempts to monopolize) is extremely complicated. It covers single-firm, unilateral conduct as well as agreements to monopolize. Basically, when any enterprise enjoys a very strong market position for a particular product in a geographic market, it should be concerned about questions of monopolization. The law of monopolization also comes into play in mergers and acquisitions that could create such a market position. No member should take actions through EPSA that might be viewed as evidence of an intent to acquire or maintain monopoly power in a particular market.

Price Discrimination

The Robinson-Patman Act prohibits certain discrimination in the price of “commodities” sold to competing customers at the same point in time. Courts are divided as to whether electricity is a commodity (as distinguished from a “service”) that is covered by the Act. Prohibitions under the Act have a number of complex exceptions. Again, prices and pricing plans should not be discussed among EPSA members.

Unfair Competition

The Federal Trade Commission Act, in addition to prohibiting conduct that is illegal under the Sherman and Clayton Acts, bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Enforced by the Federal Trade Commission, the Act covers antitrust violations like those discussed above, as well as certain conduct that falls short of such violations, such as deceptive or misleading trade practices.

Contact legal counsel for advice on any situations potentially involving:

- **Attempts to eliminate competition,**
- **Price discrimination, or**
- **Potentially unfair business practices.**

IV. Antitrust Guidelines

In all EPSA activities, you must avoid any discussions or conduct that might violate the antitrust laws or even raise an appearance of impropriety. The following simple **DOs** and **DON'Ts** will help you to do so:

- **DO** schedule and attend meetings only when there are proper items of substance to be discussed that justify attendance.
 - ◆ When recommending a meeting or preparing a meeting notice be specific, avoiding broad topics such as “market issues,” that might look suspicious from an antitrust standpoint.
- **DO** assure that no matter of doubtful legality is brought up for discussion.
- **DO** consult counsel about any documents that appear to touch on sensitive antitrust subjects such as pricing, market allocations, refusals to deal with any company, and the like.
- **DO** use EPSA as a vehicle for promoting the industry as a whole.
- **DON'T** have discussions with competitors about:
 - ◆ current or future prices for products, assets, or services;
 - ◆ bids, or whether or not your company intends to bid or provide a quote;
 - ◆ company costs, discounts, terms of sale, profit margins or related terms that might affect prices;
 - ◆ the resale prices your customers should charge;
 - ◆ allocating markets, customers, territories, products or assets with your competitors;
 - ◆ limiting production and scheduling of outages;
 - ◆ boycotting or refusing to deal with a supplier or customer; or
 - ◆ any other confidential, competitively sensitive information concerning your own company's or a competitor's business plans.
- **DON'T** stay at a meeting, or any other gathering, if those kinds of discussions are taking place.
- **DON'T** discuss any other sensitive antitrust subjects (such as price discrimination, reciprocal dealing, or exclusive dealing agreements) without first consulting counsel.
- **DON'T** establish programs or guidelines for the purpose of harming certain competitors.
- **DON'T** create any documents or other records that might be misinterpreted to suggest that EPSA condones or is involved in anticompetitive behavior.