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

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I. Objective

It is the policy of the Electric Power Supply Association ("EPSA") that its members conduct all activities so as to avoid *even the appearance* of conduct prohibited by federal and state antitrust laws. Antitrust enforcers recognize that trade associations like EPSA serve a legitimate purpose and provide a valuable forum for many procompetitive functions.

These guidelines are provided to allow EPSA and its members to meet those goals and carry out beneficial activities in a manner consistent with the antitrust laws. This guide is not an all-encompassing delineation of potential antitrust problems or the means to avoid such problems. Nor does it cover other laws and regulations related to competition or the energy industry, such as Federal Energy Regulatory Commission rules regarding disclosures of information. In some instances, the EPSA policy contained in these guidelines is stricter than the applicable antitrust laws.

While the guidelines below provide EPSA's policy for compliance with the antitrust laws, each member company bears responsibility for ensuring that its actions and those of its employees comply with the antitrust laws. Antitrust laws are complex and subject to varying court interpretations. Should EPSA members have questions or concerns about whether conduct is lawful under the antitrust laws, they should always seek the assistance of legal counsel.

II. Overview of Antitrust Laws

What Are the Antitrust Laws? Antitrust laws (also known as competition laws) are designed to promote vigorous and fair competition and to provide American consumers with the best combination of price and quality. Antitrust laws are intended to prevent unlawful monopolies or conduct that drives up prices, restricts availability, limits output, or inhibits quality or innovation.

When Do the Antitrust Laws Apply and Who Do They Apply To? Antitrust laws apply to every stage of the distribution and supply chain. They apply to EPSA, as well as its member companies, their employees, and other industry participants.

What Are the Primary Antitrust Laws? The principal federal antitrust laws are the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act. Most states also have their own antitrust and competition 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 involving competitors that unfairly limit competition or restrain trade.

The Supreme Court has interpreted these statutes as prohibiting only those agreements that have the effect of *unreasonably* restraining trade. Certain agreements are analyzed under a "rule of reason" analysis that balances the relevant competitive factors. If an agreement is analyzed using the "rule of reason," it could be found to be illegal if, overall, its anticompetitive effects

outweigh its procompetitive benefits. Among other potential penalties discussed below, any harms can result in triple (treble) damages for impacted parties.

Other agreements are deemed unreasonable by their very nature and are, thus, considered illegal "*per se*"—that is, such agreements are *always* unlawful under the antitrust laws.

> **Cartel Conduct:** Except in limited circumstances such as those involving legitimate joint venture activities, *per se* illegal agreements involving competitors ("cartel conduct") include: (i) price fixing, (ii) bid rigging, (iii) market allocation (including dividing customers, territories, suppliers, or product lines and other lines of commerce), (iv) output restrictions, and (v) wage-fixing and non-solicitation agreements. There is no legal defense to cartel conduct and no business justification or rationale can overcome the conduct. Prohibitions against cartel conduct may be enforced criminally, including through jail time for individuals involved.
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> **Certain Tie-In/Bundled Sales:** Depending on the court, certain tie-in sales in which, due to market power of a seller, a customer is required to purchase an unwanted item to obtain a desired product or service may also be *per se* illegal.

Who Can Enforce the Antitrust Laws? The U.S. Department of Justice, the Federal Trade Commission, and state attorneys general may initiate civil investigations, litigation, or other administrative actions to enforce the antitrust laws. The Department of Justice also has authority to enforce criminal antitrust violations. Additionally, private plaintiffs (*e.g.*, an aggrieved competitor, supplier, customer, or other individual) can initiate litigation in federal or state courts.

Severe Penalties

Antitrust law violations can result in serious sanctions, fines, or other negative harm to EPSA and its member companies, including:

- High fines imposed by government enforcers – for example, the Department of Justice may impose criminal fines in the hundreds of millions of dollars;
- Civil damages claims, including triple damages, costs, and attorneys' fees;
- Affirmative injunctions requiring the offender to undertake actions to "open" competition closed by the unlawful conduct or to engage in onerous compliance reporting procedures;
- Exclusion from public contracts;
- Voiding of illegal agreements;
- Loss of reputation and goodwill; or
- Costly, disruptive, and time-consuming investigations.

Culpable employees and the management of companies involved in antitrust law violations may also face severe consequences, including:

- Imprisonment of up to 10 years for engaging in cartel conduct such as price-fixing, bid-rigging, market allocation, wage-fixing, or non-solicitation agreements;
- Personal fines of up to $1 million; or
- Debarment from participating in certain business lines or business activities.

III. Antitrust Laws Particularly Applicable to Trade Associations

Trade associations and their activities are subject to the same standard of legality that applies to other firms or groups. But special problems do arise, given the fact that a trade association is, by definition, a combination of competitors. The act of bringing competitors together—whether in person or virtually—creates an environment ripe for collusive conduct that can violate the antitrust laws. Additionally, many of trade associations' most valuable and procompetitive activities and program`s involve aspects that create antitrust risk and require legal counseling when undertaken. Among these are information exchanges, statistical reporting, economic studies, product standards, credentialing, certification, credit reporting, and customer relations.

How Do the Antitrust Laws Define an Agreement? An agreement is broadly defined. Illegal agreements can be oral or written, formal or informal, expressed or implied. A meeting of the minds or a "gentleman's agreement" between the companies involved is sufficient to constitute an agreement under the antitrust laws. Further, the existence of an illegal conspiracy is frequently inferred from circumstantial evidence of a pattern of business conduct. For example, agreements may be inferred if there is evidence of:

- Contacts directly or indirectly with competitors (including "loose talk" or informal discussions);
- The exchange of non-public, competitively sensitive information, such as recent prices, costs, production levels, wage information, or future strategic plans;
- Contacts through distributors or other conduits (*e.g.*, trade associations) that pass information between competitors;
- Contacts through speeches, earnings calls, or the media; or
- References to "the industry" taking certain actions.

Importantly, there is no requirement that the agreement succeed or that the parties take steps to carry out the agreement for a violation to occur.

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

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

EPSA staff, officers, directors, and members should be particularly on guard as to conduct involving pricing; bidding; territorial, output, or employment restrictions; information exchanges; statistical data projects; joint ventures and other competitor collaborations; association membership; and industry standardization and certification. EPSA members should be aware not only of matters discussed in open meetings, but also of topics considered in committees and actions taken by one or more members in the name of EPSA.

Pricing and Bid-Rigging

Price-fixing and bid-rigging are the most common antitrust violations. Price-fixing is any agreement between competitors to eliminate or reduce price completion. Examples include:

- Using a common formula or methodology to set prices;
- Adopting a common starting price for negotiations;
- Standardizing credit terms;
- Calling a truce on price competition; or
- Refusing to accept discounts or rebates.

Bid-rigging is any agreement between competitors to submit noncompetitive, rigged bids. Examples include:

- Rotating winning bids;
- Submitting a "sham" or courtesy bid with false price or other terms submitted for the appearance of competition only and that a member company knows will not be competitive with other bids;
- Refraining from bidding; or
- Agreeing to key competitive components of a bid.

To avoid the risk of liability, EPSA members should not collectively (including between two or more EPSA members) discuss their prices, discounts, bids, bidding strategy, or other terms of sale. Nor should EPSA members discuss their costs, profit margins or other items that might affect prices.

Territorial Restrictions

Territorial or market restrictions are any scheme by which competitors agree to divide markets among themselves. Territorial or market allocation may involve dividing:

- Geographic areas or sales territory;
- Customers;
- Products or services; or
- Sources of supply;

EPSA members should not discuss allocating markets, geographic areas, customers, products, services, or sources of supply.

Output Restrictions

Firms participating in the energy or utilities industries are also susceptible to illegal agreements regarding output restrictions. Output restrictions are any scheme by which competitors agree to restrict or limit output. This can take several forms including:

- Limiting production capacity, such as through restricting expansion of production facilities, restricting production facility hours, restricting technology used in production, or closing or selling a plant;
- Setting quotas for inputs or electrical output; or
- Discontinuing supply or services.

EPSA members should not discuss, for example, limiting production, scheduling of outages, restricting operational hours, limiting use of technology or other operational innovations, production quotas, plans to close or sell a plant or other electrical facility, or plans to discontinue any service.

Wage-Fixing and Agreements Not to Hire

Antitrust enforcers are increasingly scrutinizing illegal agreements related to employment practices and may prosecute such violations criminally. These agreements typically take two forms: (i) no-poach or non-solicitation agreements and (ii) wage-fixing.

No-poach or non-solicitation agreements are agreements between competing firms not to hire, solicit, recruit, or pursue each other's employees. Essentially, the firms are agreeing not to compete for those employees' labor.

Wage-fixing involves an agreement between competing firms to fix wage or salary levels, whether within a set range or at a specific amount. This may involve constraining:

- Wages or salaries;
- Benefits; or
- Employment terms.

EPSA members should not discuss hiring or recruiting practices, wages, salaries, benefits, or employment terms with other EPSA members.

Exchanges of Confidential Information

It is important to understand the boundaries for sharing information with competitors to avoid violating antitrust laws. Information exchanges can occur informally and inadvertently during unplanned encounters with competitors, such as at business dinners, social events or informal

gatherings at EPSA meetings, or through personal relationships with other EPSA members and industry participants.

Generally, the following information relating to individual member companies *should not be exchanged or discussed*:

- Prices;
- Price changes or methodology;
- Discounts or rebates;
- Costs or expenses;
- Profit margins;
- Customer lists or customer strategy;
- Sales terms or conditions;
- Bidding plans, strategy, or terms;
- Delivery terms;
- Marketing plans;
- Plans to modify the geographic areas supplied (including entering or leaving any geographic market);
- Strategic plans;
- Output;
- Productivity;
- Growth or contraction plans;
- Prices of third-party goods such as inputs or licensing fees;
- Procurement volume;
- Production capacity;
- Plans to discontinue or cut back an existing supply or service;
- Innovation or new product plans;
- Wage rates; or
- Benefits or other terms of employment.

EPSA members must be vigilant to prevent the unlawful exchange of information with competitors. When in doubt, always seek the advice of legal counsel.

Statistical Data

In some circumstances, EPSA may facilitate the exchange of information among competitors to foster competition through increased market transparency. EPSA members must take special care to ensure sensitive information is not shared with competitors. Thus, it is critical that EPSA members consult legal counsel *before* sharing or receiving any information as part of a statistical data request.

Individual member companies' particular *market-sensitive data should never be discussed or disseminated* without advice of counsel. Projections of *future prices or production capacity should never be discussed or disseminated*. As a general rule, EPSA members should not share information with competitors that is:

- Non-public;
- Current or forward-looking;
- Competitively-sensitive; and
- Disaggregated and specific to the member company.

Generally, collecting and disseminating *aggregate* statistical data involving members' *historical* (at least 3 months, but ideally more than 1 year old) prices and costs is permissible but should be conducted under the careful *supervision of legal counsel*. Broadly speaking, the further removed the data are from current or future nonpublic prices and costs and the less company-specific they are, the less likely it is that they will raise antitrust concerns.

EPSA members must take care to ensure that a sufficient number of members participate in any data exchange so that no single member's data contributes a significant weight of any data point collected, and that the data is sufficiently aggregated such that no disclosing member can discern the data of any other disclosing member. Any aggregate data collection should only occur through EPSA staff or an authorized third-party consultant. Again, EPSA members must consult legal counsel before embarking on or participating in any statistical data exchange to develop guardrails for the program.

Joint Ventures and Cooperation with Competitors

Certain arrangements between EPSA members are economically beneficial because they allow companies to cooperate to develop new products or technologies which they could not develop independently, or to jointly purchase inputs.

Under certain conditions, EPSA members that compete against each other may lawfully cooperate in some areas including:

- Research and development;
- Licensing;
- Sourcing;
- Production;

- Technical norms and standards; and
- Petitioning the government.

Whether the conditions for a lawful cooperation or joint venture between EPSA members are met can only be assessed on a case-by-case basis. In some cases, counsel may need to seek regulatory approval or observe a regulatory waiting period before engaging in the cooperation agreement. EPSA members should consult legal counsel before undertaking any such joint activities with one or more other member firms.

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. EPSA 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 EPSA's legal counsel. 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.

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 non-members. EPSA may charge non-members higher fees for such services than are charged EPSA members whose dues help to support the services.

Industry Self-Regulation

Non-government 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. Thus, EPSA members should take care both in creating and applying reasonable codes, standards, and certification criteria. EPSA members should especially avoid any rule or standard that could be construed as an agreement not to deal with (or to "boycott") 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. EPSA members may collectively petition the government. The right to petition, however, does not provide unlimited antitrust protection. If the activity in question is a "sham" that is not really designed to achieve government action, but rather amounts to action undertaken by competitors to limit competition, it could violate the antitrust laws.

EPSA members should consult antitrust counsel before individually or collectively petitioning the government to take any action which could be viewed as restricting competition.

B. Working with Suppliers and Customers

EPSA members might both be competitors and have a supplier/customer relationship with other members. Generally, any EPSA member's unilateral decisions regarding suppliers or customers are lawful; however, agreements with customers and suppliers can be subject to antitrust scrutiny. Some potential examples include exclusive dealing and reciprocity:

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 involved, as well as the business purpose and impact of the agreement on competition to determine its lawfulness.

EPSA members should consult legal counsel if they have any concerns about exclusive purchasing or supply agreements.

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 involved, as well as the business purpose and impact of the agreement on competition to determine its lawfulness.

EPSA members should consult legal counsel regarding any reciprocal dealing agreements.

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

EPSA members 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. When any enterprise enjoys a very strong market position for a particular product in a geographic market, it should be concerned about monopolization. Monopolization also comes into play in mergers and acquisitions that could create a strong market position. What constitutes a strong market position varies by industry and the competitive landscape and has been interpreted differently by courts.

Government enforcers more carefully scrutinize the business dealings of companies with a large share of sales for a particular product or service. Thus, a company with a large share of sales

needs to be more mindful of its pricing, marketing, and sales decisions, including business dealings with distributors. Companies with a strong share of sales may not engage in anticompetitive conduct – either singly or jointly with other firms – that protects or threatens to create monopoly power. Such behavior may include:

- Exploiting customers through unfair pricing or unfair business practices;
- Unfairly hindering competitors;
- Excluding competitors;
- Applying dissimilar conditions to similar transactions with different parties;
- Refusing to supply customers without a legitimate reason;
- Providing bundled discounts;
- Entering into exclusive dealing arrangements;
- Conditioning ("tying") the sale of one product or service on the sale of another product or service; or
- Conditioning contracts on the acceptance of supplementary obligations or ancillary agreements, which by their nature have no connection with such contracts.

In the U.S., it is not unlawful for a monopolist or near monopolist to impose as high a price as the market will bear, to charge low, non-predatory prices, or generally to refuse to deal with a rival absent usual circumstances.

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. If you have any concerns about whether EPSA's business dealings implicate monopolization or whether your firm enjoys a strong market position, consult legal counsel.

Price Discrimination

The Robinson-Patman Act prohibits certain discrimination in the price of "commodities" sold to competing customers at the same point in time. Generally, sales of the same product to competing distributors or customers must be at the same price unless a lower price is necessary to meet a competing offer and the lower price will not put the disfavored distributor at a competitive disadvantage (*e.g.*, the lower price is for a brief period or a de minimis amount).

Courts are divided as to whether electricity is a commodity (as distinguished from a "service") that is covered by the Robinson-Patman Act. Prohibitions under the Robinson-Patman Act also have a number of complex exceptions. Thus, EPSA members should consult legal counsel with any concerns about pricing and should not discuss pricing or pricing plans with other EPSA members.

Unfair Competition

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Federal Trade Commission 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. The Federal Trade Commission is increasingly scrutinizing conduct that may constitute unfair competition and has brought civil and administrative enforcement actions against such conduct.

D. Best Practices for Records and Written Documentation

EPSA members should take special care when creating records or documents relating to EPSA's activities. "Document" is interpreted broadly (whether final or in draft form, or official or informal records) and includes meeting minutes, presentations, notes, emails, text messages, chat messages, phone calls, voicemails, and other audio or video recordings.

You should prepare every record with the thought that it might someday be produced and reviewed by government attorneys or plaintiffs' lawyers who will interpret your language in the worst possible way.

It is important to document the source of any competitive information (*e.g.*, a customer or public source) and the business justifications for actions EPSA undertakes. Do not write or talk as though you have inside knowledge of any EPSA member's pricing, bidding, or other competitive strategy.

If you have any concerns about whether any document or record created by or on behalf of EPSA is problematic, please consult legal counsel.

IV. Duty to Report and Risk of Non-Compliance

Duty to Report

EPSA members have a duty to report any actual or suspected violation of antitrust law related to EPSA activities to EPSA legal counsel at the earliest opportunity.

Preservation of Documents

U.S. criminal laws prohibit the destruction, deletion, alteration, or concealment of documents in connection with or in contemplation of a government investigation. Even where no investigation is pending, destroying documents to prevent their discovery in a potential future investigation is a crime that could result in imprisonment of up to 20 years. Government enforcers view obstruction of justice as the best evidence of guilt for a violation of antitrust laws.

Thus, if you suspect a potential violation of antitrust laws occurred, it is important to preserve all related documents, data, information, and other evidence.

Leniency Programs

The Department of Justice has a leniency program to aid in the detection of unlawful cartel conduct. Under the leniency program, an entity admits its involvement in the cartel and provides government enforcers with information that allows it to prosecute the other cartel members in exchange for immunity from fines. Obtaining leniency requires rapid contact with the appropriate government enforcers. Accordingly, it is essential that EPSA members bring any actual or suspected violation of antitrust laws related to EPSA's activities to the attention of legal counsel at the earliest opportunity.

Failure to Adhere

EPSA is committed to complying with the antitrust laws and takes any violation of the antitrust laws seriously. Any failure to adhere to these guidelines may result in termination of an entity's EPSA membership.

Antitrust Guidelines

These simple **DOs** and **DON'Ts** will help you carry out EPSA's activities in a manner that mitigates antitrust risk:

- **DO** use EPSA as a vehicle for promoting competition and the industry as a whole.
- **DO** document the procompetitive benefits of EPSA's activities (lower prices, enhanced efficiency, increased production, new services, or new technology or other innovation, etc.).
- **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. Avoid broad topics, such as "market issues," that are ambiguous and might look suspicious from an antitrust standpoint.
- **DO** consult counsel about any documents that appear to touch on sensitive antitrust subjects such as pricing, bidding, customers, geographic areas of operation, production or output, employment restrictions, refusals to deal with any company, and the like.
- **DO** immediately notify legal counsel of any actual or suspected violation of antitrust laws.
- **DON'T** have discussions with competitors about:
    - current or future prices for products, assets, or services;
    - bidding terms or strategy (including, whether your company intends to bid);
    - 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;
    - hiring practices, wages, benefits, or other terms of employment;
    - 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 if those kinds of discussions are taking place. Ask others to stop the discussion and leave the room.
- **DON'T** exchange non-public competitive information without first consulting counsel.
- **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.

If you have any questions or concerns regarding whether conduct is lawful under the antitrust laws, please consult legal counsel.