Policy #EUCG PO-01
Compliance with Antitrust Laws

Membership in a trade association is legal, but as collection of competitors, members and association must comply with antitrust law

Trade associations such as EUCG, Inc. consist of members, some or all of whom may compete against one another. As such, they are subject to federal and state antitrust law. Membership in EUCG, Inc. is open to any organization affiliated with, or in the business of, production, transmission or distribution of energy.

EUCG and its members and contractors must be careful to conduct their business in compliance with antitrust and other laws. While competitors may legitimately meet and discuss matters concerning their industry, they may not agree between or among themselves – whether such agreement is explicit, tacit or merely implied, and even if the agreement involves only two individuals or entities – to monopolize, attempt to monopolize, restrain or suppress competition.

Any conduct which may or does result in explicit or tacit agreements to fix, raise, lower, or stabilize prices; limit production; allocate markets; engage in group boycotts; establish discriminatory standards; or otherwise unreasonably restrain free trade must be avoided altogether.

The Three Federal Antitrust Laws

There are three federal antitrust laws: the Sherman Act, the Clayton Act and the Federal Trade Commission Act. Also, most states have antitrust laws that are modeled on the federal antitrust laws.

The Sherman Act prohibits three things: 1) contracts or agreements in restraint of trade; 2) monopolization or attempted monopolization of trade; and 3) combinations, conspiracies or agreements between persons (whether natural persons or corporate entities) to monopolize or attempt to monopolize trade or commerce.

Penalties are severe for violation of the Sherman Act: violation is a felony and if convicted, a corporation may be fined $100,000,000 and an individual can be fined $1,000,000 plus be imprisoned up to 10 years (or both: fine and jail).

Analysis of Antitrust Claims: "per se" or "rule of reason"

Potential violations of the Sherman Act are judged under two different "rules". Rule 1 is "per se" violations, which means they are always and everywhere illegal: there is no defense. Examples of "per se" violations are arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids.

Rule 2 is the "Rule of Reason" analysis: Under the "rule of reason" analysis, courts look to see if there is a legitimate procompetitive justification for the practice under consideration and balance any anticompetitive effects the practice may have against whatever procompetitive effects there may be.

Data Exchange Programs Are Analyzed Under "Rule of Reason" Test

To be legal under the Sherman Act, data exchange and benchmarking programs must comply with certain standards, the most important of which are these:

1) Data submitted are *historical* (at least three months old); current or future data should never be used;

2) The data are *aggregated* so that individual contributors or transactions are not identifiable (however, in some situations, having unaggregated data does not render the program illegal (see below);

3) The data exchange program is administered by a *neutral, independent third party*; and

4) There are enough contributors (at least five, as a rule of thumb) to the information exchange program such that individual contributors or individual transactions are not identifiable. A "give to get" policy, such as EUCG has, is also legal and legitimate.

The legality of information exchange depends on whether it tends to suppress competition—and not on the format of the reported data. *Whether the shared information is aggregated is thus not a safe harbor from liability. The* DOJ takes the position that information exchanges that report only aggregated data can violate the antitrust laws, even where the information is not linked to specific competitors. *It is particularly dangerous to exchange* ***competitively sensitive information.*** While there is no all-inclusive list of what is or is not "competitively sensitive information", examples include company-specific information about future product offerings, price floors, discounting practices, expansion plans, and operations and performance; non-aggregated, customer-specific information, including current and future pricing plans, competitive plans, strategies,

and crucial data such as prices and costs; and, in the case of employees, compensation or other terms or conditions of employment.

The central issue in data exchange and benchmarking programs is this: ***do the information exchanges among competitors tend to harm competition?*** If so, they may be found to be illegal, even if they comply with all of the criteria listed above.

Application of Antitrust Laws Is Very Broad, Extends To Many Situations

The Sherman Act applies to all association activities: so whether EUCG is meeting formally, in person, or virtually; whether EUCG is meeting anywhere in the US or anywhere outside the US; whether a given activity takes place in the context of a formal presentation or in a discussion over drinks or dinner in a bar or restaurant; whether an illegal agreement (e.g., to boycott a supplier or fix the wages of employees or agree not to "poach" one another's employees) is explicit or "tacit" or implied; whether the participants are US or foreign; privately, publicly, municipally or government owned; and even if there is no meeting at all, but members – who know each other through their membership in EUCG – contact one another and agree to anticompetitive behavior: all of these scenarios are covered by the Sherman Act.

Moreover, not only members, but EUCG itself, and third-party contractors such as the administrators of EUCG's data exchange program; may be sued and found liable under the Sherman Antitrust Act.

For all of these reasons, it is EUCG's strict policy scrupulously to comply with the Sherman Antitrust Act (and other federal or state antitrust acts) at all times, in all places (within or outside of US) and in all circumstances. It is EUCG's policy to err on the side of caution in any doubtful or ambiguous situation. "If in doubt, leave it out."

EUCG™
Your Energy Information Source

Other activities – aside from data exchange and benchmarking,

DO NOT:

1. Fix or otherwise restrict the prices charged or paid for goods or services;
2. Allocate markets, sales territories or customers between members;
3. Initiate or encourage boycotts of specific products or services, or refusals to deal with designated customers or suppliers;
4. Encourage or agree to deal only with certain vendors, contractors or providers;
5. Limit production levels of members, otherwise restrict the availability of products or services, or share future outage dates;
6. Purposely hinder or disparage the competitive efforts of non-members;
7. Coerce or encourage members to refrain from competing;
8. Limit, impede or exclude anyone of the manufacture, production or sale of goods or services;
9. Promulgate or encourage unfair or misleading practices involving advertising or merchandising of products or services;
10. Make predictions about future behavior, including projected reliability or generation data;
11. Condition or tie the purchase of one product or service to the purchase of another product or service;
12. Discriminate against competitors when developing standards or specifications for products or services or when setting ethical standards;
13. Participate in informal "rump sessions" outside the formal sessions which disregard these guidelines.

If a conversation or activity such as those listed above begins, stop it immediately, leave the discussion and report it to EUCG's executive director or legal counsel. If there are any questions concerning the application of antitrust laws, the area should not be discussed without first reviewing with legal counsel.