

**IOWA TELECOMMUNICATIONS ASSOCIATION  
ANTITRUST COMPLIANCE PROGRAM  
April 2009**

**INTRODUCTION**

Federal antitrust laws prohibit “combinations or conspiracies in restraint of trade.”

A trade association that includes members who compete against each other is by definition a “combination.” Therefore, ITA and its members **MUST** strictly comply with antitrust laws to avoid any actions that can be considered “in restraint of trade” or anti-competitive.

Historically, our industry has been less affected by antitrust issues since we were highly regulated. As we move to a competitive environment, the rules of competition, including antitrust laws become of great importance.

We need to beware the words of the famous Adam Smith, the eighteenth century economist and strong advocate of the free enterprise system, who was quoted by one court in an antitrust case involving trade associations:

**“People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.”**

The ITA Antitrust Compliance Program is intended to assure that member companies avoid antitrust issues. We have drawn this Program narrowly to define avoidance of antitrust issues. In some cases, this Program is stricter than applicable law—we want to make sure that members avoid even the appearance of violating antitrust laws.

Whether conduct beyond that discussed in this Program violates antitrust law is a subject for discussion between the members and their counsel.

## STATEMENT OF PURPOSE

The ITA Board of Directors has established this Antitrust Compliance Program to alert ITA members to those types of activities which are most likely to raise antitrust concerns and to provide guidance for avoiding antitrust liability.

ITA insists on full compliance with both the letter and the spirit of antitrust laws. All meetings and events sponsored by ITA will be conducted in a manner consistent with the guidelines and policies discussed in this Program.

It is the policy of ITA, in the course of its activities and functions, to avoid the disclosure and/or discussion of topics that could be concluded to be anticompetitive in violation of federal or state antitrust laws. It is also the policy of ITA to avoid even the appearance of facilitating anticompetitive conduct. In furtherance of these two policies, this Antitrust Compliance Program has been drafted to be more restrictive than federal and state antitrust laws.

Telecommunications carriers, associate members and others join the ITA to pursue common business interests and purposes. Various members of the ITA provide services both as incumbent local exchange carriers and as competitors for local, interexchange, cellular, data, and other services. Other members of ITA provide services as competitors for local, interexchange, cellular, data, and other services. In addition, some members of ITA are both competitors and suppliers to each other of facilities and services and use such facilities and services to provide services to consumers.

The ITA provides services for the benefit of members, including lobbying, education, and information-sharing and advancing the interests of members. ITA and each of its directors and members should make sure that no antitrust laws are violated when performing these services. Even seemingly casual or inadvertent discussions at meetings or social gatherings (whether or not sponsored by ITA) can have antitrust consequences if misconstrued by government investigators. Federal and state antitrust laws are fully applicable to trade associations such as ITA.

Each ITA member should individually seek his or her own counsel with any questions as to that individual's permissible scope of activities or conversations.

## SUMMARY OF ANTITRUST LAWS

Antitrust laws seek to ensure open markets and free competition by preventing “combinations” of competitors who act in restraint of trade.

Because trade associations, by their very nature, involve a “combination” of competitors, the first element of an antitrust violation is already present. Any joint activities by the association or its members that unreasonably restrain trade will be in violation of civil and criminal antitrust laws.

The most important antitrust statutes are:

1. ***The Sherman Act.*** Section 1 of the *Sherman Act* prohibits “contracts, combinations, or conspiracies . . . in restraint of trade.” The *Sherman Act* prohibits any understanding or agreement affecting the price of a product or the price of a service, regardless of the purpose of the understanding. Even price agreements that potentially benefit consumers are prohibited. *The Sherman Act* is both a civil and a criminal statute.

Consequently, a member who attends a meeting at which competitors engage in illegal discussions which relate to prices or market allocation may be held criminally responsible, even if he or she says nothing at the meeting. The member’s attendance at the meeting may be sufficient to imply acquiescence in the discussion, imposing liability and penalties as severe as for those who actively participated in price-fixing or market allocation.

The maximum fine for a person convicted of a violation of the *Sherman Act* is the greater of \$350,000, twice the monetary loss suffered by the victims, or twice the monetary gain of the wrongdoer. Plus, an individual who is convicted may be imprisoned for a term of between 90 days and three years. A corporation convicted of such a criminal offense may be fined as much as \$10 million, twice the monetary loss of the victims, or twice the monetary gain of the wrongdoer.

2. Section 5 of the ***Federal Trade Commission Act*** forbids “unfair methods of competition in or affecting commerce” and “unfair or deceptive acts or practices in or affecting commerce.” The FTC’s authority to determine what constitutes an unfair method of competition or unfair or deceptive act is extremely broad.

A violation of the *Federal Trade Commission Act* can result in the issuance of a cease and desist order, thereby placing extensive

governmental restraints on the activities of the association and its members. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

3. The ***Robinson-Patman Act*** makes it unlawful for any person engaged in commerce to knowingly induce or receive prohibited price discrimination.
4. The ***Iowa Competition Law*** (Chapter 553) prohibits restraint on trade and monopolies: “A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.”

In addition to governmental prosecution, a company or an association can be the target of civil lawsuits by competitors or consumers seeking damages or injunctions. Civil suits may result in an award of three times the damages suffered by the plaintiff plus attorneys fees.

## PROHIBITED CONDUCT UNDER ANTITRUST LAWS

As a practical matter, ITA and its members should focus their attention on the following types of prohibited conduct under the antitrust laws:

- Price-Fixing
- Agreements to Allocate Customers or Divide Territories
- Boycotts
- Bidding Techniques

ITA and its board of directors also need to govern their actions carefully when dealing with the following issues:

- Membership Restrictions
- Denial of Services to Nonmembers
- Exchanging Information

These issues will now be discussed in more detail.

### **A. Topics of Discussion to Avoid at Association Meetings When Not Related to Action Requested of the Iowa Utilities Board or Other State Agency or the Legislature**

#### 1. Competitive Rates

The most likely violation of antitrust statutes involves the Sherman Act's ban on price-fixing. Price fixing is a *per se* violation of the antitrust laws -- that means it is "automatically illegal." In other words, the accused can make no excuses to attempt to show that their actions were reasonable under the circumstances.

As the telecommunications industry progresses toward open-market competition, price fixing becomes much more of a concern.

Courts have long recognized that establishing uniform schedules for fees or services is "price fixing." Competitors are allowed to share some information about fees under certain circumstances if there is a legitimate business reason for the exchange of information. Competitors must never discuss future prices or any future pricing policies, including bids, discounts, credit or service charges, promotions, or terms or conditions of sale. Past and current prices are sometimes a matter of public record, for example as a result of public advertising or as a result of the filing of tariffs, and in these instances a discussion of public fees is not likely to violate antitrust laws. However, care should always be taken in any discussion of past or present pricing. The more prudent approach is to avoid discussion of past and present prices unless the information is clearly public information.

No verbal or written agreements are needed to support a charge of price-fixing or bid-rigging. Antitrust violations in the price-fixing or bid-rigging areas can be inferred simply from similar price or bid behavior by association members. Once price-fixing or bid-rigging is established, you cannot escape liability by claiming that the prices were reasonable or would have benefited the consumer.

Any written communications from an association, and any discussions before, at, or after any meeting that relate to prices or fees are too risky to be tolerated. The exchange of this information provides an element that might be construed to be part of an agreement, combination or conspiracy “in restraint of trade” which could expose participants to litigation and possible civil and criminal liability.

## 2. Competitive Territories

Antitrust laws expressly prohibit any understanding or agreement among competitors that involve dividing territories or allocating customers. Even an informal agreement whereby one member agrees to stay out of another’s territory can constitute a criminal violation of the antitrust laws. Members must not discuss their willingness to offer service (or refrain from offering service) in any markets, exchanges or territories, or to any potential customers. Non-compete agreements may be valid but require advice of counsel.

## 3. Boycotts Against any Customer, Supplier or Vendor

Members cannot use trade associations as a tool to suppress competition by refusing to deal with nonmembers, or refusing to deal with those who deal with nonmembers. Accordingly, an association and its members must not enter into any agreements to refuse to deal with certain competitors, customers or suppliers. This includes advertising sources such as newspapers. A member can individually decide to cease doing business with a supplier, competitor or customer, or make legitimate complaints about that company, but a member cannot seek concerted effort by other association members to boycott or cease doing business with that company.

## 4. Bidding Techniques or Agreements

Because ITA offers a number of opportunities for suppliers and purchasers of services to gather, members must avoid any discussions relating to bidding techniques, bid-rigging, or refusing to deal with a particular business entity because of its pricing or bidding practices. Members must avoid any discussions that might impede competition amongst suppliers and vendors of services, and avoid any discussions that might restrict the ability of any individual suppliers and purchasers to enter into any mutually agreeable arrangements.

## **B. Association-Related Issues**

### **1. Membership Restrictions**

The *Sherman Act* was specifically intended to prohibit independent businesses from becoming associates in a common plan to reduce their competitors' opportunity to buy or sell products making up that trade association.

Associations must establish reasonable and objective procedures and criteria to make membership decisions and apply them in a non-discriminatory manner.

Based on the assumption that members of ITA derive "an essential economic benefit" from their ITA membership, we need to be aware that the denial of membership to an applicant might constitute a restraint of trade if that denial limits the ability of the applicant to compete effectively with members of the association. We also need to keep these principles in mind when terminating an existing member.

### **2. Denial of Services to Nonmembers**

An association cannot deny services to nonmembers if those services confer important competitive or economic advantages which would impair the ability of non-members to compete with members. Stated differently, an association may have to make available to non-members any service that is unique, essential or provides a competitive benefit not otherwise available, if the non-member requests it. An association may charge a non-member a reasonably higher fee for association services than it charges members. The price must not be so high so as to preclude the non-member from using the service. Subject to these restrictions, an association need not advertise or promote its services to nonmembers.

### **3. Exchanging Information**

Associations may gather and disseminate information regarding an industry, and members may legally act on that information. Indeed, one of the chief functions of an association can be to compile information concerning the industry to allow members to become more knowledgeable and more competitive. There is a limit on what types of information can be collected and distributed, though.

Generally, an association must use care if it decides to collect or distribute data that reveals past or current pricing information of competitors or current marketing or manufacturing plans. "Price surveys" of past or current prices or charges are allowed if the data is gathered by a third party, such as the association, are more than three months old, and are gathered from more than five anonymous members, none of whom represent more than 25% of the

market. Any survey that collects current data on revenues on an item-by-item, product-by-product, or service-by-service basis could create antitrust issues and must be reviewed by counsel prior to circulation.

4. Lobbying and Policy-Setting—an Important Exception to the Antitrust Laws

One area that is typically exempt from antitrust laws includes lobbying and policy setting before governmental entities. Lobbying and advocacy efforts are protected by the First Amendment to the U.S. Constitution and by the Iowa Constitution. The US Supreme Court has recognized (under the Noerr-Pennington Doctrine) it is lawful for a trade association to lobby public bodies for specific legislation or action, even if the result would be anticompetitive. Exceptions apply where the lobbying efforts merely are a sham to cover up what is actually an attempt to interfere with competition.

Therefore, ITA and its representatives are allowed to participate in formal or informal advocacy, legislative, or regulatory proceedings that relate to the sensitive issues discussed above. This applies to issues relating to competition, prices, and territories before the Iowa Utilities Board, the Federal Communications Commission, the Iowa Legislature, U.S. Congress, a judicial court of law, and any other governmental entity.

## **ITA's RESPONSIBILITIES FOR ANTITRUST COMPLIANCE**

ITA has adopted the following guidelines to help ensure compliance with this Program:

1. ITA will provide all members a copy of the ITA Antitrust Compliance Program.
2. ITA will update members concerning antitrust problems periodically and formalize the association's antitrust compliance program.
3. ITA will approve, in advance, all new association programs or changes in existing programs that may have potential antitrust implications.
4. All association meetings will be regularly scheduled and accompanied by an agenda. Under normal circumstances, meetings shall be limited to the subjects shown on the agenda.
5. ITA will have legal counsel present at all meetings of the board of directors and at any other meeting at which antitrust sensitive issues might be raised. ITA will have legal counsel review all action by the association or its board of directors which has the effect of rejecting a membership application.
6. If at any time during the course of a meeting ITA staff or counsel believes that a sensitive topic under the antitrust laws is being discussed or is about to be discussed, discussion on that topic will be halted.
7. ITA will have legal counsel approve the minutes of all meetings. .
8. ITA will enforce the following policies regarding Membership:
  - a. ITA will not exclude competitors from membership in the association, if the applicant meets membership requirements of the association.
  - b. ITA will not restrict members from dealing with nonmembers.
  - c. ITA will not prevent nonmembers from obtaining access to information which, if denied would limit the ability of the applicant to compete effectively with members of the association.

## **ITA MEMBER RESPONSIBILITIES FOR ANTITRUST COMPLIANCE**

Any individual attending any ITA meeting has an independent responsibility to comply with this ITA Antitrust Compliance Program. When attending formal or informal meetings with other managers or industry representatives, members must observe the following specific antitrust guidelines:

1. Avoid any topics of discussion listed under **Topics of Discussion to Avoid at Association Meetings**, discussed earlier in this Program.
2. Avoid all discussions which could result in other persons present following a similar course of conduct which would not have been taken in the absence of a prior agreement.
3. Keep in mind that a “restraint of trade” can be found even if there is no “express agreement” reduced to writing. A “meeting of the minds” coupled with subsequent acts in furtherance of a common goal may be sufficient to cause antitrust liability.
4. Do not try to induce your suppliers to take actions to disadvantage a particular competitor or group of competitors.
5. Attendees at a meeting should voice any concerns they have if at any time during the course of a meeting they believe that a sensitive topic under the antitrust laws is being discussed or is about to be discussed.
6. Be advised that the discussion of prohibited activities listed in this Antitrust Compliance Program outside of formal ITA meetings could still subject the member to antitrust exposure. Therefore, members must not engage in anticompetitive discussions during coffee breaks, meals, social outings or any other gathering relating to ITA meetings or events.

**All ITA staff, board members, and members must understand and comply with the ITA Antitrust Compliance Program. Violation of this Program can result in antitrust liability for the association and for the companies and individuals involved. If you have any questions or concerns on how this Program applies to your specific circumstances, please contact your own legal counsel.**

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