INDEPENDENT POWER PRODUCERS SOCIETY OF ALBERTA

COMPETITION LAW COMPLIANCE GUIDE

INTRODUCTION

The Independent Power Producers Society Of Alberta (IPPSA) is committed to complying with the letter and spirit of Canada's *Competition Act* (the "Act"). All IPPSA employees, officers and directors, and members and representatives of IPPSA member companies, must act in accordance with this Compliance Guide as a condition of their employment or relationship with IPPSA. All relevant individuals are required to become familiar with the Guide and to adhere strictly to its letter and spirit.

This Guide is not intended to be a comprehensive review of competition law. It focuses on competitor collaboration issues, as this is the area of greatest concern for an industry association such as IPPSA. Each member company bears its own responsibility for ensuring its compliance with the full scope of the Act, including competitor collaboration issues.

It is important that IPPSA **and member companies** behave so as to avoid even the **appearance** of inappropriate collaboration. It is not sufficient to merely avoid actual breach of the Act, as even the **appearance** of wrongdoing can have serious negative consequences. Therefore, all IPPSA activities must be carried out in compliance with this Guide.

TRADE ASSOCIATIONS

Trade associations, such as IPPSA, are common and are legitimate forms of cooperation among competitors. However, since industry associations by their very nature encourage contact and interaction between actual or potential competitors, their activities are inherently of interest to competition law enforcement authorities and carry an inherent risk of actual or potential breach of the criminal prohibition against competitor collaboration. There have been prosecutions of trade associations in the past for inappropriate competitor collaboration. It is therefore essential to understand and adhere to the appropriate scope of IPPSA activity and scrupulously avoid even the **appearance** of straying outside the permitted scope of association activity.

The sphere of legitimate trade association activity is generally limited to lobbying government policy makers, government relations, public education, joint promotion/marketing of the industry, and development and promotion of legitimate industry standards. IPPSA must not become involved in business or commercial decisions, nor should these be discussed at IPPSA events (or at any other occasion

with competitors). IPPSA members should never discuss market or commercial activity or decisions, or intended commercial activity or decisions, nor should there be any discussion or sharing of commercially sensitive information (which is defined below). It is essential that IPPSA activities remain clearly within the permitted scope noted above and stay clearly away from inappropriate competitor collaboration, which is explained below.

COMPETITOR COLLABORATION

Competition law covers numerous criminal and non-criminal matters, but given the nature of IPPSA as a trade association, the primary concern and focus of this Guide is the prohibition against collaboration among competitors, or "anti-competitive agreements". There will also be reference to bid-rigging and joint abuse of dominance.

Anti-competitive agreements among actual or potential competitors are the most serious competition criminal offence in Canada, the U.S.A. and elsewhere. Charges can be laid not only against IPPSA, but also against officers or board members or employees involved. Consequences can include:

- fines against IPPSA and member companies of up to $25 million;
- fines of up to $25 million and/or jail up to 14 years for individuals;
- use of investigative powers, such as wire taps and search warrants;
- disruption of business and distraction from business effort for both IPPSA and member companies in order to deal with charges and litigation;
- civil claims for damages;
- reputational damage for IPPSA, member companies and individuals.

Even if no charges are laid, or if charges are successfully defended, an investigation or prosecution by the authorities can involve considerable expense, business disruption and embarrassment. All of these ill effects can impact, not only IPPSA, but also its members and individuals. Therefore, it is important to avoid even the **appearance** of wrongdoing.

Prohibited Anti-Competitive Agreements and Bid-Rigging

It is a **criminal** offence for competitors (which includes potential competitors) to conspire, agree or arrange to:

- fix, maintain, increase or control the price of a product;
- allocate sales, territories, customers or markets;

- fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

Any such activity is strictly prohibited under the Act, even if there is no negative impact on competition, even if the competitors believe that prices will be lower or markets will be more competitive, and even if there is no market impact. It used to be an offence only if competition was "unduly" negatively affected, but that is no longer the law, and agreements and arrangements of a nature described above are strictly illegal regardless of market impact.

There is also a separate criminal offence of bid rigging. There shall be no discussion with competitors of bid content or whether a company intends to bid, or not bid, or withdraw a bid.

Implicit Anti-Competitive Agreements - Dangerous Information Exchange

A prohibited criminal agreement does not have to be express, clearly spelled out, or in writing. It can involve an implicit understanding. It can be assumed or inferred from exchanges of information and/or parallel conduct. Agreements might be inferred from suspicious circumstances. For example, if there is frequent contact between competitors at social events or other meetings and/or exchanges of information (verbal or written), and then there are subsequent similar price changes or terms of sale, it may be inferred that there was an agreement or understanding. Similarly, if there are contacts or exchanges of customer information, and subsequently parties do not compete for certain customers or in certain geographic areas, it may be inferred that there had been an agreement to allocate customers or markets.

Therefore, key areas of concern are any contacts or communications with competitors, and especially the exchange of any commercially sensitive information (see below). Even if no anti-competition agreement is intended, contacts with competitors or exchanges of information can create the **appearance** of wrongdoing. That could trigger an investigation or even charges.

Commercially Sensitive Information

This Guide refers to "commercially sensitive information" and the need to avoid sharing or discussing such information at IPPSA meetings or activities or at any time with actual or potential competitors. Some examples of "commercially sensitive information" are:

- prices, price changes, future prices, price lists or offers
- terms of sale, credit terms, terms of purchase, discounts, allowances or rebates
- profit margins, costs or other information related to costing or pricing
- allocation or restriction of territory, clients, products or markets

- sales, production, inventory levels or capacity (current or projected)
- channels or methods of distribution
- quantity or quality of production
- content of bids, and intent to bid or not to bid
- selection or termination of customers
- marketing, sales or strategic plans
- entering or exiting geographical or product markets
- commercial decisions or activities in the marketplace.

Unless approved by legal counsel, discussions or exchanges of any commercially sensitive information at IPPSA meetings or activities, or at any time, is prohibited and will be a breach of this Guide.

Competitor Contacts - Do's and Don'ts

- Do not discuss commercially sensitive information with competitors or potential competitors, or allow them to talk to you about commercially sensitive matters. It is not an excuse to have discussions, but then say there is no agreement.

- If a competitor seeks to discuss commercially sensitive topics or seeks or provides commercially sensitive information, say you can not discuss that and break off the discussion and leave if possible. Advise legal counsel as soon as possible.

- Even silence can be construed as approval, so if you receive commercially sensitive information, or if it is raised in discussion with competitors, immediately break off the discussion and advise legal counsel.

- Do not accept documents or information, including e-mails, from competitors containing commercially sensitive information or topics. If you receive such an e-mail or document, immediately bring it to the attention of legal counsel for appropriate response.

- If you obtain competitor information from a public source and retain it, make a note on it as to its source. Do not accept information from competitors, even if it is otherwise publicly available. The fact that it came from a competitor might indicate or infer ongoing discussions or agreement. Therefore, only publicly available information should be used, but only when not obtained from a competitor, and its source must be documented.

- It is best to avoid contact with competitors, except in specific monitored settings, because even meeting can give rise to suspicion.

PERMISSIBLE AGREEMENTS/ACTIVITY

The discussion concerning competitor collaboration addressed the danger of prohibited collaboration or exchanges but, as noted earlier, trade associations, such as IPPSA, have a legitimate sphere of operation. Generally speaking, agreements with respect to the following topics are permissible, provided they are not designed for the purpose of creating artificial barriers to entry into the market, giving some members a competitive advantage over others, or excluding competitors from the market. If there is the least doubt, legal counsel should be consulted. There are limits to be observed but, generally, areas of permissible collaboration are:

- membership decisions;
- industry self-regulation;
- government relations - policy lobbying;
- exchange of statistics (with appropriate safeguards);
- defining product standards;
- definition of terminology;
- cooperation in research and development;
- measures to protect the environment;
- measures to protect the public.

Membership

Membership provides commercial and other benefits to trade association members, and therefore denial of membership to qualified competitors may violate competition laws. Membership should be open to all companies satisfying membership requirements. Decisions to deny membership, or to expel an existing member, should be reviewed with legal counsel. It is important to avoid using membership entry or exit decisions for commercial, competitive purposes.

Industry Self-Regulation - Defining Standards

Non-government rules, such as product standards, industry terminology or other industry rules that are proposed or established by IPPSA, should be reviewed to ensure they do not unreasonably restrict competition. It is important to avoid standards that are biased in favour of one set of competitors. Therefore, it is important to create and apply reasonable codes, standards, certification criteria, and other industry measures, to ensure they are aimed at legitimate, level playing field objectives and not for commercial advantage or disadvantage. It is particularly important to avoid any rule or standard that

could be construed as a direction or agreement not to deal with certain competitors, suppliers or customers. Standards must be related to specific legitimate objectives and no more detailed or restrictive than necessary.

Government Relations

One of the core functions of an industry association, such as IPPSA, is to make representations to regulators and government with respect to government policies affecting the industry. It is essential that any such discussions or activity be focussed on affecting government policy only and not involve discussion or coordinated activity with respect to commercial matters in the marketplace.

Statistical Data

Statistical data raises particular challenges for industry associations, such as IPPSA, because collection and dissemination of such data is in some respects related to the legitimate role, but at the same time, can raise at least the appearance of wrongdoing. Statistics and data, unless otherwise publicly available, should be anonymized and presented in aggregated and historical form. It should be established and conducted under supervision of legal counsel. Generally, the further the data is from current non-public prices and costs, and the less company-specific the information is, the less likely that collecting or sharing the information will raise competition law concern. If public information is being used, its source as publicly available should be identified. However, even if the price or cost information is publicly available, it should generally not be discussed at IPPSA meetings. The concern may arise that although the price or cost information is publicly available, the discussion of such information at an IPPSA meeting may give rise to the appearance of competitor collaboration. Projections of future prices or costs should never be the subject of data collection or discussion by IPPSA or at IPPSA meetings. If any company-specific information is provided to IPPSA, it must only be provided to staff who are not associated with any member, and the IPPSA staff shall not share any company-specific information with any member.

ABUSE OF DOMINANT POSITION

This is not a criminal matter, but it can result in litigation before the Competition Tribunal, which can order administrative monetary penalties of up to $10 million for a first event. Generally, abuse of dominant position should not be a concern for trade associations such as IPPSA, because they are not operating in the commercial market. Abuse of dominant position arises where a dominant company uses anti-competitive tactics, such as predatory pricing, monopolizing scarce supply or delivery resources, using fighting brands, tied selling or other conduct aimed at excluding or disciplining competitors. Although abuse of dominant position is usually restricted to conduct of a single company, there is a concept of joint abuse of dominance whereby two or more companies jointly coordinate activity to abuse their dominance against other competitors. Examples of possible abuse of dominance include:

- imposing excessive or discriminatory terms on customers or suppliers;
- offering predatory prices with a view to excluding competitors;
- limiting production or technical development;
- refusing to supply parallel trader
- acquiring scarce resources or methods of delivery and refusing to supply competitors or customers with products they need and cannot buy elsewhere;
- tied selling.

These topics should not be discussed as between members in the course of IPPSA meetings or activities.

MEETINGS

IPPSA meetings must have an agenda which at a minimum should specify the purpose of the meeting and the topics to be discussed. If any employee or member proposes a topic that might raise a potential *Competition Act* concern, or if such a topic appears on the agenda, legal counsel should be consulted. Also, agendas should be sent out in advance to permit such review.

All minutes, documents and notes relating to meetings should indicate and reference the specific purpose of the meeting and topic. All agendas, minutes and notes should be retained.

Do not discuss any topics or information not on the agenda if they could conceivably raise *Competition Act* concerns.

If it is necessary to discuss a topic which may raise *Competition Act* concerns or involve discussion of commercially sensitive information, counsel should be consulted in advance and counsel should be present at the meeting if the discussion is going to proceed.

Without prior approval of counsel, there should be no discussion of commercially sensitive information or topics or sharing of such information before, during or after IPPSA meetings.

Meetings should begin with a reminder of the IPPSA Competition Law Compliance Guide, and attendees should be reminded that commercially sensitive information or topics cannot be discussed. Meetings should be restricted to discussing topics within the appropriate sphere of IPPSA activity as outlined above. Discussions and agreements should be kept on an industry-wide level, as opposed to company specific, and should not involve discussion of commercial market matters.

If commercially sensitive matters do arise in the course of a meeting, the discussion should be promptly terminated and counsel should be consulted to determine whether the topic can be pursued at another date. If anyone seeks to discuss commercially sensitive information or topics at any IPPSA meeting, activity or social event, others in attendance should immediately terminate the discussion and if anyone raises commercially sensitive information or topics with you, you should report it to senior management or legal counsel as soon as possible.

COMMUNICATIONS

Members should avoid communication outside the umbrella of the IPPSA. If the communication between members concerns IPPSA matters, such communications should go through IPPSA and not directly between members.

External communications to members, government or regulatory entities or other parties, may make policy argument and communicate IPPSA's position on various issues. However, such communications should not advocate specific commercial actions in the marketplace.

In the event of investigation or legal action, all communications at IPPSA or at members could be subject to search or a disclosure obligation. This could include e-mails, minutes, agendas, memos, calendars, notes, expense reports or any documentation.

Always prepare documents as if they might someday be read by an investigator, prosecutor or plaintiff's lawyer. In order to avoid the **appearance** of anti-competitive behaviour, IPPSA employees, members and their employees, should avoid any language which could be misconstrued as suggesting a lessening of competition, sharing of commercially sensitive information or any anti-competitive activity or intent. For instance, references to "controlling" supply, demand or markets, immediately raises concerns, as do references to "eliminating" competitors or "driving them out of the market" or "controlling/cornering the market". Do not sensationalize or exaggerate and do not use legal terms or raise legal issues or offer legal conclusions (example "that would be illegal"). Do not inadvertently suggest or infer that IPPSA or its members have discussed or shared commercially sensitive information or discussed inappropriate topics or reached inappropriate agreements.

MONITORING AND REPORTING

All members of the IPPSA Board, executive, staff, member company representatives participating in IPPSA activities, and all members, collectively share the responsibility for ensuring that this Guide is enforced at all times. The Guide cannot refer to every conceivable situation or issue that may arise, and therefore members and staff are responsible for adhering to both the letter and spirit of this document. If there is ever any doubt or concern, all are to err on the side of caution and seek advice.

Actual or potential breaches of the policy cannot be tolerated or ignored. They must be reported as soon as possible to senior executives and legal counsel. Delays in reporting any perceived breaches may compromise IPPSA's ability to effectively deal with the situation and protect the legal rights of IPPSA, its board, staff and member companies. Any inappropriate discussion or written communication, or suggestion of same, should be reported.

DO'S AND DON'TS

- Don't ever seek or accept, exchange or discuss, commercially sensitive information (review the list above again).

- IPPSA meetings should only be held when there are proper items to be discussed that are within the legitimate scope of IPPSA mandate.

- There should be an agenda that clearly identifies topics for the meeting, and topics should be clearly identified as being within the appropriate mandate of IPPSA, avoiding such vague topics as "market issues", which may raise suspicion.

- Consult legal counsel if agenda items might raise commercially sensitive information or topics. Minutes and notes of meetings must reference the purpose and legitimate topics, and notes, agendas and minutes should be retained.

- There should be no discussion beyond agenda topics.

- If potentially sensitive topics are suggested for a meeting, legal counsel should be consulted in advance and legal counsel should be present if the meeting might touch upon commercially sensitive information or topics.

- Be vigilant at all IPPSA meetings, activities or social gatherings. Any meeting participant who becomes concerned that a discussion is turning to commercially sensitive areas should halt the discussion pending clarification. If necessary, adjourn the meeting or that portion of it, pending legal advice.

- If anyone seeks, shares or discusses commercially sensitive information or topics at any IPPSA activity or social gathering, break off the discussion and point out that it cannot continue and leave the setting if necessary.

- Do not portray informal gatherings as being sponsored as sanctioned by IPPSA if that is not the case.

- Do not communicate with competitors about industry association matters directly. Instead, communicate through IPPSA only.

- Do not tolerate or foster "off the record" or "cocktail" conversations or "gentleman's agreements" as between members. All IPPSA sanctioned agreements and discussions should be transparent and clearly documented.

- Ensure statistics and data are appropriately anonymized and aggregated or historical, or consult legal counsel before sharing statistics and data.

- Do not establish programs or guidelines with the purpose of harming certain competitors, or which may involve boycott of competitors, suppliers or customers.

- Do not discriminate against competitors when developing product or intellectual property standards, specifications, environmental requirements or other programs.

- Do not engage in collective action by way of refusal to deal, boycott or embargo, which could affect competition.

- Do not inappropriately refuse or revoke membership for anti-competitive purposes.

- Report any perceived or potential breach of this Guide, or anything that might appear to raise competition concerns to senior executives or legal counsel.

- Do not create records including overly aggressive or vague language suggesting unintended anti-competitive objectives or results.

- Do not use ambiguous language that could be misinterpreted to suggest IPPSA is condoning or involved in anti-competitive behaviour.

Proposed Compliance Statement

As for drafting a compliance statement, it is difficult to develop one that suits all purposes, such as IPPSA emails, as well as board meeting agendas. It would be particularly cumbersome to set out the actual obligations or limitations for each occasion or purpose. Generally, the following high-level statement may be used:

"Members are reminded of the IPPSA Competition Law Compliance Guide. All communications and activities shall be conducted in compliance with the Guide, including restrictions on the exchange of information and topics of discussion."