



**UNIFORM CODE OF
CONDUCT**

FOR

**REGULATED AND UNREGULATED
SUPPLIERS OF ENERGY AND
RELATED SERVICES AND
TECHNOLOGIES**



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I

Introduction

The National Energy Marketers Association (NEM) is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of natural gas and electricity. NEM also represents producers, generators, transporters, and marketers of energy-related information, services and technology throughout the United States.

NEM is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of natural gas and electricity markets. NEM and its members appear before state Public Utility Commissions, the Federal Energy Regulatory Commission and legislative bodies throughout the nation. NEM members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas and electricity;
- Rates, tariffs and operating procedures that lower the cost of energy;
- Standards of conduct that protect consumers;
- Rules to permit competition based on price and quality of service; and
- Policies that encourage new technologies, including the integration of energy, telecommunications and Internet services.

II

Background

Decades-old regulations governing the supply, generation, transmission, storage, distribution, marketing, and delivery of energy are being rethought and rewritten, nation-wide. After years of experience in numerous industries, lawmakers, policymakers, and regulators throughout the country are recognizing that true price competition and meaningful customer choice provide greater public benefits than traditional utility-style regulation.

This document sets forth NEM's recommendations for a set of principles to ensure competitive neutrality among utilities, affiliates and non-affiliated energy providers. These guidelines include recommendations for a Uniform Code of Conduct to govern commercial transactions between regulated and unregulated energy service providers and recommendations for specific functions, products and services that should be competitively priced by unregulated companies.

Recommendations for national guidelines for unbundling the natural gas and electric transmission and distribution functions will be set forth in separate documents.

All Classes of Customers Should Have Meaningful Choices Among Competitive Suppliers at the Earliest Possible Date

The right to switch suppliers is the ultimate consumer protection. Choice must exist in order to serve the public interest and it should not be complicated or expensive. A true measure of a competitive market is the number of customers that have choice. A true measure of the quality of choice is the number of customers that, in fact, exercise choice. NEM urges that all customers be given meaningful choice at the earliest possible date.

Competitively Priced Energy Products and Services Should be Offered Separately from Regulated Utility Services

Competitively priced energy and related services can serve the public interest, save consumers, governments and taxpayers billion of dollars and can continue significant efficiency, innovation and productivity gains, nationwide. However, to bring the benefits of competition to the American public, historically regulated utility services should be offered separately ("unbundled") from products and services that may be offered by competitive suppliers and subjected to the rigors of the marketplace.

It is generally acknowledged that utilities should continue to provide certain services and perform certain functions that are true "natural monopoly" functions. For now, "natural monopoly" functions and services include the long-distance transmission and local distribution of both natural gas and electricity. Specifically, regulations should continue to ensure the maintenance, scheduling and reliable operation of the pipes and wires needed to deliver natural gas and electricity through interstate commerce into a local franchise territory and to end users. However, there are numerous services and functions which can be offered separately from regulated utility services and priced competitively by non-regulated energy suppliers.

It is imperative to establish rules that fairly allocate, value and competitively price utility services that are needed to support robust, competitive markets in energy and related services. Additionally, a competitively neutral code of conduct is crucial to govern commerce between the regulated and unregulated providers of energy services. Competitive advantages must be determined by the marketplace.

To the extent that the following functions, products and services are currently offered by utilities, the National Energy Marketers Association urges legislators and regulators to pass and implement rules to require that they be separately priced and offered on a non-discriminatory basis. Unregulated energy service providers should be authorized to offer these same services on a competitive basis. At a minimum, these functions, products and services are:

Natural Gas Services That Can be Opened to Competition

- Supply of natural gas,
- Customer billing and metering,
- Natural gas storage services,
- Natural gas balancing services,
- Natural gas peaking services, and
- Providing upstream natural gas transportation capacity consistent with existing law.

Electric Services That Can be Opened to Competition

- Electric generation,
- Customer billing and metering,
- Energy imbalance services,
- Demand side management and efficiency services, and
- Ancillary services such as operating reserve: spinning reserve service, operating reserve: supplemental reserve service, reactive supply and voltage control from generating sources, regulation and frequency response services, load following, backup supply services, real power loss services, restoration services, and system black start capability.

III

Principles That Should Govern Transactions Between Regulated and Unregulated Energy Service Providers

A. Codes of conduct should incorporate state privacy and consumer protection laws.

In the marketplace, there are numerous laws and regulations that are designed to protect consumers from invasion of privacy, fraud and all manner of improper commercial practices. These laws provide reasonable protection. Wherever and whenever applicable, these laws should act as valuable complements to NEM's recommended standards for industry con-

duct and its recommended guidelines for commerce between regulated and unregulated energy providers.

Reference to the Uniform Commercial Code (UCC), state privacy laws and local laws against unfair trade practices imbues the marketplace with meaningful and enforceable guidelines to implement the final unbundling of the natural gas industry and the regulatory and corporate restructuring of the electricity industry. Incorporating these laws and the years of court cases interpreting these laws protects all purchasers of energy without imposing new and costly regulations, licensing requirements, paperwork and administrative burdens. In addition, the National Energy Marketers Association strongly endorses standards of conduct and self-policing rules to protect customers against unwanted sales tactics.

B. As regulated utilities fully unbundle functions, products and services, they should be relieved of the associated "obligation to serve."

Historically, regulated utilities have offered a "bundle" of energy related services. However after years of experience, it has become clear that alternative suppliers can offer many of the services traditionally offered by regulated utilities on a competitive basis. These services include the responsibility to be the energy supplier of last resort. When regulated utilities fully unbundle energy supply and service functions, the provider-of-last-resort functions can be provided by qualified suppliers and the obligation to serve can be modified into an obligation to deliver.

C. Choice must exist to serve the public interest and it should not be complicated or expensive.

All consumers should have a right to choose and regulators should encourage choice. Excessive non-cost based fees, filing requirements, formal contracts with signatures, complicated forms and processes, and multiple monthly bills inhibit competition and the ability of customers to choose alternative energy suppliers. The National Energy Marketers Association urges the establishment of alternative methods to protect customers from slamming and other improper business practices. NEM supports rules, rates, tariffs and operating procedures that provide the maximum ease, flexibility and a minimum of paperwork, licensing and administrative burdens for customers who choose to switch energy suppliers. Indeed, the customer's ability to quickly and painlessly choose an alternate supplier is the ultimate consumer protection and provides the maximum assurance of quality control.

D. All regulated utility services must be offered on a non-discriminatory and comparable basis. No functions, products or services shall be subsidized by regulated rates.

It is vital to protect a competitive market from the leverage of a utility's control over regulated transmission and distribution facilities.

Historically, regulated utilities were given few, if any, incentives to provide truly competitive energy services. Regulations based on performance may sufficiently ameliorate this problem. The nature of cost-of-service ratemaking generally and after-the-fact commodity-cost adjustments, in particular, are not suited to markets that can otherwise be competitive. Competitors take market and price risks that may not be compensated by the marketplace. Historically, regulators mitigate or eliminate risks for regulated utilities by guaranteeing returns on all "prudently incurred" costs and investments. In competitive markets, there are no such guarantees.

Given the many decades when regulated utilities were the only provider of energy services, it is important that consumers understand both the existence and implications of the new choices available to them. For these reasons, many states are formulating affiliate guidelines and codes of conduct to govern the relationship between regulated and unregulated energy providers. Set forth below are principles that are incorporated into NEM's recommended Uniform Code of Conduct to govern commerce between utilities and affiliated and non-affiliated energy providers.

- 1. Subsidies of non-regulated activities by regulated entities should be prohibited.** No costs or overhead related to competitive, non-regulated activities should be included in the rates of regulated utility services.
- 2. Regulated utility services must not be preferentially tied to products or services provided by non-regulated market participants (affiliated or non-affiliated).** A regulated utility should not represent to any customer that it might receive preferential treatment concerning regulated services if it deals with a specific unregulated market participant (affiliated or non-affiliated).
- 3. All tariff provisions must be applied in an equal, non-discriminatory manner to all market participants (affiliated and non-affiliated).** Tariff and rate designs should ensure that every term and condition of service offered by a regulated utility is offered at comparable prices and on comparable terms and conditions to all competing companies. Offers of rebates, discounts, waivers of contracts, fees or tariff provisions by regulated utilities must be applied in an equal, non-discriminatory manner to all market participants. Where application of a tariff is discretionary, any exercise of such discretion must be documented.
- 4. Information should be available and disseminated on a non-discriminatory, competitively neutral basis.** NEM urges all jurisdictions to require that cus-

tomers energy usage and billing data be provided to all competitors at a reasonable fee, in a timely manner and without preference. Specific customer information requested by one non-regulated party must be confidential to all other parties unless similarly requested by such parties. Utilities should keep written records of such information requests and stand ready to demonstrate that information requested by one competitor was not shared improperly with other competing suppliers.

- 5. Communications by a regulated utility within an exclusive franchise territory should be competitively neutral.** A regulated utility should not speak or appear to speak on behalf of any non-regulated entity (affiliated or non-affiliated). A regulated utility should not supply leads or assign customers to non-regulated market participants unless it is in a competitively neutral fashion.
 - Regulated utilities should not provide advice on picking alternate suppliers, or provide qualitative information on suppliers.** The state public service commission should maintain a list of qualified providers. Customers should be advised of the availability of such lists from their utility or Public Service Commission.
 - Marketing activities of non-regulated entities must not be subsidized by regulated rates.**
- 6. If regulators permit regulated utilities to engage in unregulated activities (either through affiliated or non-affiliated entities) a number of safeguards must be implemented to protect against the disclosure of proprietary or competitive information.** Firewalls and the separation of functions, information, operations and personnel must be effective and enforceable. Enforceable standards of conduct must ensure that proprietary and confidential competitor information is scrupulously safeguarded. Ironclad operational firewalls must be erected, and a complete separation of functions and operations must occur. Under no circumstances may the supplies of natural gas or electricity of an unregulated entity be subsidized by regulated rates.
- 7. Under no circumstances may a regulated entity sell, release or otherwise transfer assets, services or commodities that have been included in regulated rates at less than market value.**
- 8. Under no circumstances, may a regulated company directly or indirectly subsidize the costs associated with employees, officers or in-house services that are shared with affiliated, non-regulated entities.**

Uniform Code of Conduct for Regulated and Unregulated Suppliers of Energy and Related Services and Technologies

1. Cross subsidies between a utility and its marketing affiliates are prohibited. A utility's operating employees and those of its unregulated affiliates shall function independently of each other.ⁱ
2. Under no circumstances may a regulated entity sell, release or otherwise transfer assets, services or commodities, that have been included in regulated rates, at less than market value.
3. A utility shall not preferentially disclose, condition, withhold or tie any agreement for the release, use or transfer of interstate pipeline or electric transmission capacity or related assets or services to, or on behalf of, any non-regulated market participants (affiliated or nonaffiliated).
4. Under no circumstances may the supplies of natural gas or electricity of an unregulated entity be subsidized by regulated rates.
5. Offers of rebates, discounts, waivers of contracts or fees in connection with tariff provisions of regulated utilities should be made by utilities in an equal, non-discriminatory manner to all market participants (affiliated and non-affiliated). Any discount, rebate or fee waiver of utility service offered by a utility directly or indirectly to its unregulated affiliate or to a customer of its unregulated affiliate, including but not limited to transportation, transmission, generation, dispatch, redispatch, wheeling, balancing, meters, meter installation, storage, or standby or interruptible services or any other tariffed service offered to shippers, shall be simultaneously offered on a non-discriminatory basis to all non-affiliated marketers, suppliers and customers. All such offerings should be made available upon request.
6. In the event market information acquired through the provision of tariffed service related to on-system retail markets is made available by a utility to on system suppliers, it will at the same time be made available to all competing suppliers, under the same terms and conditions. Such information should be available on-line.
7. A utility shall not speak on behalf of its unregulated affiliate or give the appearance that it is speaking on behalf of its unregulated affiliate.
8. A utility and its unregulated affiliate shall not trade upon, promote or suggest to any customer, supplier or third-party that they may receive preferential treatment as a result of the affiliation. Utilities may not provide negative information about affiliated or non-affiliated competitors.
9. Marketing activities of non-regulated entities must not be subsidized by regulated rates.
10. Books and records of the utility shall be available, for good cause shown that these Guidelines have been violated, for review and audit by a Commission on a confidential basis.
11. Each utility will establish enforceable complaint procedures to detect alleged abuse of the relationship with its unregulated affiliates and such procedures must be made available to anyone alleging violations of these Guidelines. Resort to these procedures should be voluntary on the part of complainants and shall not preclude the filing of complaints directly with the jurisdictional regulatory commission.
12. A utility may contract with its unregulated affiliates only if the services to be provided under the terms of that contract are consistent with the public interest.ⁱⁱ
13. Procedures for implementing compliance with these rules must be neutral and swift, and the penalties for non-compliance should adequately discourage repeated violations.
14. Nothing in these Guidelines shall be construed to modify, impair, or supersede federal, state or local laws, rules or regulations.

ⁱ Personnel of a utility's unregulated affiliate shall not be involved in the utility's regulated management decisions concerning the day-to-day operation of its transmission, generation and/or distribution systems (including but not limited to, decisions relating to available capacity, nomination, dispatch, redispatch, curtailment and declaration of system emergencies or critical periods).

ⁱⁱ A utility must apply all rates and tariff provisions on a nondiscriminatory basis to all marketers, shippers, and customers including all customers served under the same or comparable tariff services or non-tariff offerings. Further, a utility may not, through a tariff provision or otherwise, give its unregulated affiliate or customers of such affiliate preferences (or "last-looks" and rights-to-match) over non-affiliated suppliers or customers with respect to transmission or distribution services, including but not limited to service priorities, scheduling, capacity reservations, processing of requests for service, balancing, metering, storage, standby service or curtailment policies.

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