

Announcement of appeal¹

Case	A-002-2015
Appellant:	Austrian Power Grid (APG)
Appeal received on	23 November 2015
Subject matter	Request for annulment
Keywords	Admissibility, right to be heard, <i>ultra vires</i> , Article 47 CFR, fundamental freedoms
Contested decision	ACER Opinion No 09/2015 of 23 September 2015
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

- Declare that Appellant is impaired in her rights by Opinion 09/2015; and
- Suspend Opinion 09/2015 due to a violation of both procedural and substantive rules.

Pleas in law and main arguments

Austrian Power Grid AG (“APG”) is an Austrian Transmission System Operator (“TSO”) and addressee of the challenged Opinion at hand. APG is also directly and individually affected by the Opinion.

APG considers the Opinion as neither complying with procedural rules nor with substantial rules on primary and secondary EU-law. This based on the following grounds:

I. Formal grounds

- In issuing its Opinion, ACER infringed the Appellant rights to be heard (Art. 41 of the CFR). APG is directly and individually affected by ACER’s ruling on the capacity mechanism for the Austrian-German border and, therefore, it would have been necessary to inform the Appellant and give her the opportunity to be heard. As an attached study shows, APG would have been in a position to effectively dispute the conclusions drawn by ACER.
- ACER omitted to take into account the Bidding Zone Review as conducted in accordance with Art. 32 et seq. of the CACM-Regulation.

¹ Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

Board of Appeal

- By issuing the Opinion, ACER implicitly accepted a request of the Polish regulatory authority although such request was based on the wrong provision of the Regulation (EC) 713/2009 (Art. 7(4) instead of Art. 8).
- The procedure at hand was also not in compliance with Art. 47 CFR

II. Ultra Vires

- ACER infringed the system of distribution of competences as set out under EU-law. ACER is not competent to give concrete instructions to TSOs on the basis of Art. 7(4) Regulation 713/2009 as they did in the opinion at hand. Furthermore ACER intervened without any authorisation in the CCR-procedure as set out by the CACM-Regulation.

III. Material grounds

- ACER simulates a – de facto not existing – congestion at the Austrian-German border in order to intervene in the system of capacity allocation and bidding zone configuration. However, since there is no congestion within the meaning of Art. 2(2)(c) of Regulation 714/2009 no congestion management according to Art. 16 and the Guidelines may be applied.
- Impeding the free flow of electricity further also infringes the free movement of goods according to Art. 34, 35 TFEU.

Further information

The rules for the appeal procedure and other background information are available on the ‘Appeals’ section of the Agency’s website:

http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/Rules-of-procedure.aspx