

MINUTES

4th Board of Appeal meeting

Tuesday, 1 December 2015, 12.30 – 16.30

Agency for the Cooperation of Energy Regulators

Trg republike 3, 1000 Ljubljana

Present:

Chair	Herbert UNGERER
Vice-Chair	Jacques DE JONG
Member	Mariano BACIGALUPO SAGGESE
Member	Pippo RANCI ORTIGOSA
Member	Wolfgang URBANTSCHITSCH
Member	Ignacio PEREZ – ARRIAGA (via video conference)
Alternate	Nadia HORSTMAN
Alternate	Peter KADERJAK
Registrar	Alessandra FRATINI (via video conference)
Deputy Registrar	Mariacristina BOTTINO (via video conference)

Guests: ACER	Alberto POTOTSCHNIG (points 1 – 2), Paul MARTINET (points 1 – 5), Stefano BRACCO (points 1 – 3)
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1. Welcome and Draft Agenda

Welcome address from the Chairman with introduction on organization matters and approval of the Agenda.

2. Current reform of EU energy policy and repercussions on ACER and BoA

Mr. Pototschnig (Director of the Agency) provided a brief presentation of the future role of ACER within the Energy Union, highlighting the possible implications for the Board of Appeal (“BoA”). See power point presentation attached to the minutes. Mr. Pototschnig expanded on items of specific interest to the members.

3. Report by the Registrar on the functioning of the Board and the work carried out during the period / Establishment of the Board’s electronic platform

The Registrar provided a succinct overview of the legal and administrative services carried out in support of the BoA going through the Report prepared and circulated among the members and alternates of the BoA before the meeting. The BoA unanimously approved the Report.

Mr. Bracco (Agency) delivered a short technical presentation of the new section of the BoA Extranet dedicated to BoA activities and documents regarding appeals brought before the BoA. He confirmed that access to the new appeals section of the Extranet would be restricted to the members and alternates of the BoA who are not conflicted in the appeal proceedings pending before the BoA. The Chairman suggested that Mr. Bracco is the only person allowed to give access to the “privileged section” of the Extranet on request respectively by the Chairman and the Registrar.

Mr. Martinet (Agency) recommended the uploading on the new BoA website of the documents of previous BoA activities.

The BoA also debated the opportunity to publish the pictures of the members and alternates of the BoA on the ACER’s website, as it is the case with the other Boards of the Agency. It was agreed that pictures would be uploaded only if and when those are available for all members.

Mr. Bracco (Agency) left the meeting.

4. Amendment of the Rules of Procedure / Conflict of Interest amendment

The BoA discussed a number of proposals for amendment of the Rules of Procedure (“RoP”) tabled by the Chairman in order to update and improve the efficiency of the appeal procedure, based on the initial experience.

Amendment 1

Article 4, par 2 of the RoP - add second indent: *“The declarations may be prolonged on an annual basis, on statement by members and alternates that there is no change of circumstances of relevance to their declaration”*. The amendment aims at simplifying the procedure and avoiding unnecessary paperwork.

Mr. Martinet suggested the members and alternates submit new declarations. The Chairman noted that an explicit confirmation that there are no changes in respect to previous declarations could suitably serve the purpose. It was agreed that for renewal the Registrar will take contact with each member and alternate and provide the previous declarations with requests for explicit confirmation and/or re-submission in case of changes. A corresponding amendment should be inserted in the RoP.

Amendment 2

Article 4 of the RoP - add par 5: *“In implementing these provisions, due account will be taken of Decision AB No 02/2015 of the Administrative Board of the Agency of 31 January 2015 laying down a policy for the prevention and management of conflicts of interest, and in particular Art. 4(2) thereof”*. The amendment aims at aligning the RoP with the Agency’s Col policy.

Amendment 3

Article 20, par 2 of the RoP – add: *“The latter is without prejudice to the provisions under Art 26 on suspension of the application of the contested decision by the Board of Appeal”*. While not absolutely necessary, the proposed addition will clarify that the BoA and not only the Agency may suspend the contested decision.

Amendment 4

Article 25, par 6 of the RoP – replace by *“Periods shall include Saturdays and Sundays, save where the periods are expressed in working. Days. If a period includes official holidays of the Agency, the number of those days will be added to the period calculated under 2. – 5.”*.

Amendment 5

Article 25, par 7, RoP – amend: *“if a period calculated according to 2. – 6. would otherwise ...”*.

Amendments 4 and 5 aim at avoiding extreme time constraints over, for example, Christmas and Easter periods (“stop the clock” procedure). While the proposed change mirrors a

practice used in other Commission's procedures, it was agreed that further checks would be required as to whether it can be approved without a prior amendment of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (the "ACER Regulation").

The Registrar also suggested amending Article 28 of the RoP in order to provide a specific provision on allocating costs, to make it clear that all the parties and interveners bear their own costs.

The BoA then discussed the possible amendment of the time limit of one calendar month after service of the Notice of Appeal for the Agency to lodge its defence. That time limit is relevant for the closing of the written procedure and, in turn, for the two-month limit for the BoA's decision. It was agreed that the issue will be further discussed internally.

The BoA asked the Chairman to make a written proposal regarding the amendments discussed. It was agreed that the draft amended RoP, and draft amended practice directions to parties where necessary, would be submitted to the members for approval by written procedure. Once approved, they will enter into force in 2016.

As regards possible changes of the ACER Regulation in the current reform process of concern to the BoA, the following were discussed:

- Updating the ACER Regulation with regard to the reference to the BoA in subsequent regulations (e.g., the two Agency decisions under Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure, adopted subsequent to the ACER Regulation);
- Making the timeline for the operation of the BoA more realistic by adding the possibility of extension of the two month period for BoA's decisions: the Chairman suggested to extend the timeline to three months in case of need for in-depth investigations;
- Providing a more permanent legal basis for resources for the BoA.

5. Information points

Renewal of the BoA

The Chairman reminded the BoA of the forthcoming end of its current term (22 September 2016) and raised the issue of the interpretation of the relevant provision of the ACER Regulation (Art. 18: "*The term of office of the members of the Board of Appeal shall be five years. That term shall be renewable*"). Following discussion, it was agreed that, further to approval under the written procedure, the Chairman would write to the Commission and to the Chairman of the Administrative Board in order to raise the issue of the renewal of the BoA and the terms of its members where members wish to renew.

"Project Appeal" by Max Planck Institute Luxembourg: comparative study of the BoA

The Chairman informed the BoA about the questionnaire received by the Max Planck Institute Luxembourg on the Boards of Appeal of the EU Agencies.¹ It was decided that, for the time being and given its short experience, the BoA will not participate in the questionnaire survey but follow the project and participate in the scheduled meetings.

Mr. Martinet (Agency) left the meeting.

6. Appeals A-001-2015, E-Control/ACER and A-002-2015, APG/ACER: presentation, composition of panel and first discussion

The Chairman communicated that the BoA had received: (i) two notices of appeal against ACER Opinion 9/2015,² respectively submitted by E-Control and Austrian Power Grid; (ii) by the time of the meeting, one application for leave to intervene and statement of intervention; and (iii) fifteen statements in support of the intervention. The Registrar also reported that one further statement had been submitted in support of an application for intervention in case A-002-2015 which had not been filed yet.

The Chairman provided a short summary of the contested Opinion and of the two appeals. He invited the members and alternates of the BoA to consider their possible conflict of interest regarding the appeal proceedings under Article 2 of the RoP, in order to establish the composition of the BoA panel that would hear the appeals.

Mr. Urbantschitsch took the floor. Before issuing his declaration under Articles 2 and 4 of the RoP, he shared some general remarks on the role of the BoA and the importance to guarantee the rights of third parties, especially the non-NRAs. According to Mr. Urbantschitsch, the BoA should give guidelines to the Agency in order to guarantee these rights (access to the file, transparency, reasonable time for parties to bring their arguments). After these general remarks, Mr. Urbantschitsch declared that, as head of E-Control's legal department, he had a personal interest in both appeal proceedings (the appeal by APG being interlinked to E-Control's one) and declared a conflict of interest with regard to these cases. He asked to be replaced as a member of the panel.

Mr. Perez - Arriaga informed the Board that on 20 November 2015, three days before the appeal, he was interviewed by a journalist, after his participation to a conference organised by ENTSO-E in Brussels. The short summary of the interview, which deals exactly with the

¹ The project aims at identifying best practices and issues in the activity of the Boards that deserve further reflections by academics and practitioners. This exercise should facilitate a comprehensive understanding of the Boards' role, and prompt some reform proposals in case the practical experience reveals there is room for improving the current regulatory framework.

² Opinion No 09/2015 of 23 September 2015 on the compliance of National Regulatory Authorities' (NRAs) decisions approving the methods of allocation of cross-border transmission capacity in the Central-East Europe (CEE) region, adopted by the Agency for the cooperation of Energy Regulators having regard to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.08.2009, p. 1) and, in particular, Articles 7(4) and 17(3) thereof.

subject matter of the pending appeals but given without knowledge of the appeals, has been made available online. He noted that the RoP do not prevent members from having a personal opinion on subject matters or from expressing that opinion publicly; nevertheless, he invited the colleagues to express their view on his position.

Following their declarations, the Chairman invited Mr. Urbantschitsch and Mr. Perez - Arriaga to leave the room, in order to allow the Board to deliberate on their potential conflict of interest without their participation, in line with the RoP. He then asked Ms. Horstmann whether she considered to have any personal interest in the cases. Since she has no role in the decision ruling chamber of the German NRA and no access to the file, the members and alternates of the BoA agreed that she could be part of the BoA, as an alternate, without voting rights.

The Chairman thus invited the members and alternates of the BoA to accept the declaration on conflict of interest of Mr. Urbantschitsch and exclude him from the BoA panel hearing the appeals, while he proposed to clear Mr. Perez – Arriaga’s position. Since the members and alternates of the BoA agreed, the Chairman invited Mr. Urbantschitsch and Mr. Perez - Arriaga to re-join the meeting. He formally communicated to Mr. Urbantschitsch that he could not be part of the BoA panel hearing the appeals and he would be barred from the access to the section of BoA’s Extranet on the BoA hearing the appeals. The Chairman informed Mr. Perez – Arriaga that the BoA has concluded that he was not conflicted.

In line with the RoPs the BoA concluded that Mr. Kaderjak as next available alternate would replace Mr. Urbantschitsch as member of the BoA panel hearing the appeals, while Mr. Urbantschitsch was invited to leave the meeting. The BoA designated Mr. Mariano Bacigalupo Saggese as Rapporteur for both pending proceedings. The BoA established thus its composition for hearing the appeals as follows: Herbert Ungerer (Chairman), Mariano Bacigalupo Saggese (Rapporteur), Jacques de Jong, Peter Kaderjak, Pippo Ranci Ortigosa, Ignacio Pérez-Arriaga.

Subsequently, the restricted BoA panel discussed the appeals based on a preliminary report provided for by the Registrar. According to Article 21 of the RoP the deliberations remain secret.

The meeting was closed at 16h30.

*For the Board of Appeal:
Herbert Ungerer
Chairman*