ACER
Agency for the Cooperation of Energy Regulators

Board of Appeal

Announcement of appeal[1]

Case	A-001-2017
Appellant:	Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (Rudolfsplatz 13a, 1010 Vienna, Austria) **/"E-Control"/**
Appeal received on	17 January 2017
Subject matter	Appeal against the Decision of the Agency for the Cooperation of Energy Regulators (Trg republike 3, 1000 Ljubljana Slovenia) **/"ACER"/** No 06/2016 of November 17th 2016 on the Electricity Transmission System Operators Proposal for the Determination of Capacity Calculation Regions
Keywords	determination of capacity calculation regions, configuration of bidding zones, lack of competence
Contested decision	ACER Decision No 06/2016 of 17 November 2016
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

- annul the Decision of the Agency for the Cooperation of Energy Regulators No 06/2016 of November 17 2016 on the Electricity Transmission System Operators Proposal for the Determination of Capacity Calculation Regions;

or, in the event that the Board of Appeal does not annul the complete decision,

to annul the Decision of the Agency for the Cooperation of Energy Regulators No 06/2016 of November 17th 2016 on the Electricity Transmission System Operators Proposal for the Determination of Capacity Calculation Regions in so far as a bidding zone border between Germany and Austria is introduced by annulling Article 2 of the contested decision and Article 1(c), Article 5(1)(s) and Article 5(3) of the Definition of the Capacity Calculation Regions (CCRs) in accordance with Article 15(1) of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a Guideline on Capacity Allocation and Congestion Management (CACM Regulation) and

[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.

to request information from the German transmission system operators TenneT TSO GmbH, Amprion GmbH, 50 Hertz Transmission GmbH and Transnet BW GmbH whether physical congestion exists inside the German transmission network and which redispatch measures are taken pursuant to Article 19(3)(c) and (d) of the Rules of Procedure.

- Suspend the application of the Decision.

Pleas in law and main arguments

The Appellant's claims and arguments can be summarized as follows:

1. Violation of procedural rules and fundamental procedural guarantees

Established procedural requirements were disregarded in the procedure leading to the adoption of the contested decision. These violations of procedural rules and fundamental procedural guarantees include in particular: (i) lack of ACER's competence to change the proposal of the transmission system operators; (ii) lack of competence by ACER because it disregarded E-Control's amendment request; (iii) lack of adequate procedure to secure fundamental rights in the proceeding; (iv) lack of impartiality by ACER; (v) infringement of the right to be heard; and (vi) absence of a proper justification.

2. Lack of competence for the determination of bidding zones

The contested decision includes a bidding zone border between Austria and Germany splitting up the joint bidding zone. The procedure laid down in Article 15 of Regulation (EU) 2015/1222 and Article 9(11) of Regulation (EU) 2015/1222 does not provide ACER with the competence to decide on bidding zone borders. ACER not only chose the wrong procedure but by doing so also acted ultra vires and interfered with the competence of Member States.

3. No proof of structural congestion on the German-Austrian border

ACER does not analyze, whether the criteria of structural congestion are met and also does not apply the criteria established by Regulation (EU) 2015/1222. The contested decision and its annexes fail to show that structural congestion exists on the German- Austrian border and a capacity allocation mechanism was required.

4. Violation of the principle of proportionality

The contested decision or its annexes do not show that a capacity allocation mechanism on the German-Austrian border was a proportionate response to supposed problems of network stability and that other mitigating measures were not suitable to solve these issues.

5. Violation of the competition rules of the Treaty

By ordering the transmission system operators and national regulatory authorities to artificially split the integrated electricity market between Austria and Germany the contested decision violates fundamental principles of the Internal Energy Market.

This also constitutes an infringement of the EU competition rules laid down in Articles 101 and 102 TFEU.

6. Infringement of Articles 34 and 35 TFEU

A regulatory measure that hinders trade between Member States by artificial barriers of trade as contained in the contested decision will also interfere with the fundamental principle of freedom of goods in the meaning of Articles 34 and 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