

MINUTES

3rd Board of Appeal meeting

Tuesday, 10 June 2014, 17.00 – 19.00

Agency for the Cooperation of Energy Regulators

Trg republike 3, 1000 Ljubljana

Present:

Chair (outgoing)	Pippo RANCI ORTIGOSA
Vice-Chair (outgoing)	Herbert UNGERER
Member	Jacques DE JONG
Member	Wolfgang URBANTSCHITSCH
Member	Callum McCARTHY (via audio conference)
Alternate	Nadia HORSTMANN (via audio conference)
Registrar	Alessandra FRATINI (via video conference)
Deputy Registrar	Mariacristina BOTTINO (via video conference)
Agency Staff	Paul MARTINET, Stefano BRACCO, Chiara PETRUZZO

1. Welcome and Draft Agenda

Welcome address from the Chairman with logistical introduction and approval of the Agenda.

The Chairman communicated that he was invited to attend the Administrative Board meeting on 19 March and present the work of the Board of Appeal (the “BoA”) and the mock trial in particular. The Administrative Board conveyed a general appreciation for the mock trial and showed interest for the conclusions reached by the BoA in the case.

2. Presentation on the Agency’s extranet

While waiting for the audio conference connection, the meeting started with the technical presentation of the Agency’s extranet. Stefano Bracco (Agency) showed how to access and use the Agency’s extranet and confirmed that the brochure of the Agency’s extranet will be sent to all Members and Alternates by email. Suggestions for improving the extranet’s functioning are welcome and will be dealt with, to the extent that they fit with the Agency’s budget.

3. Adoption of the minutes of the 2nd BoA meeting; Right of intervention of 3rd parties and the notice on GIPL

a) Minutes of the 2nd BoA Meeting

The Chairman invited the BoA to adopt the minutes of the 2nd meeting that were circulated before the meeting.

b) Right of intervention of 3rd parties and the notice of GIPL

Paul Martinet (Agency) recalled that at the previous meeting the BoA did not reach a final view on the right of intervention of 3rd parties and the Agency was asked to verify whether there was any legal obligation to explicitly take that right into account.

Chiara Petruzzo (Agency) was invited to provide a concise overview of the outcome of the researches carried out by the Agency in that respect. She highlighted that the European Court of Justice has been quite activist in protecting procedural rights in relation to individualized decisions and has interpreted the right of intervention broadly. The right to be heard has been acknowledged as a general principle of EU law, irrespective of whether it is provided for in the Treaties, a Regulation, a Directive or a Decision, and then formally stated in Article 41 of the Charter of Fundamental Rights. The general trend of the EU case law is to allow for a hearing of 3rd parties even where no sanction is imposed, provided that there is some adverse impact or significant effect on the applicant’s interests.

The Chairman highlighted that the matter is of actual interest, given that the Agency is expected to take an individual decision concerning the cross-border cost allocation and the

inclusion into tariffs of the GIPL project (see item 4 below) and, in the eventuality of an appeal, that could trigger a request for intervention.¹

Since the BoA's procedural rules do not afford a "stop-the-clock" provision similar to the one applicable in the EU merger proceedings, the BoA agreed that only two solutions can be envisaged: 1) to provide for a right to intervene; 2) to exclude such a right and expose the (first) BoA's decision to a possible annulment by the General Court of the EU on procedural grounds.

The BoA decided to allow the right of intervention of 3rd parties within a short time-limit. As submitted by the Registrar, a fair balance was to be found between the right to be heard of 3rd parties and the efficient administration of justice: the BoA agreed that, due account taken of the 3 month time-limit, seven working days was a reasonable time-limit for 3rd party's intervention.

Therefore, the Chair proposed a new Article 11 of the Rules of Procedure (right of intervention). In addition, and further to the discussions held during the 2nd meeting in December 2013, the Chair proposed a new Article 26 (suspension of the application of the contested decision) and the following additional amendments to the Rules of Procedure:

Citation/recitals: minor editorial modifications in line with the Union's Interinstitutional Style Guide

In Article 22 the reference to "Article 20(2)" is replaced by the reference to "Article 21(2)".

A new Article 11 is added as follows:

*Article 11
Intervention*

1. *Any person establishing an interest in the result of the case submitted to the Board of appeal may intervene in the proceedings before the Board of Appeal.*
2. *An application stating the circumstances establishing the right to intervene shall be submitted within seven working days from the day of the publication of the announcement referred to in Article 9 (2).*
3. *The intervention shall be limited to supporting or opposing the remedy sought by one of the parties.*
4. *The application to intervene shall contain:*
 - a) *the name and address of the intervener;*
 - b) *where the intervener has appointed a representative, the name and the business address of the representative;*
 - c) *an address for service, if different from those under points (a) and (b);*
 - d) *a statement of the remedy sought by the intervener in support of or opposing, in whole or in part, the remedy sought by one of the parties;*
 - e) *the pleas in law and the arguments of fact and law relied on;*

¹ The decision will be based on Article 12(6) of Regulation 347/2013 which is part of the Commission's 2013 infrastructure package. More specifically, Article 12(6) of Regulation foresees that the Agency can take an individual decision in cases where the national regulatory authorities do not succeed in reaching a coordinated decision within a period of six months.

- f) *where appropriate, the nature of any evidence offered in support;*
- g) *where appropriate, an indication as to what information in the application to intervene is to be regarded as confidential;*
- h) *an indication whether the intervener agrees that service is to be effected on him or, where appropriate, on his representative by telefax, e-mail or other technical means of communication.*
- 5. *The notice of appeal shall also bear the signature of the intervener or his representative. Where the appellant is a legal person, the instrument or instruments constituting and regulating that legal person or a recent extract from the register of companies, firms or associations or any other proof of its existence in law shall also be attached.*
- 6. *The Board of Appeal shall decide whether or not to allow the applicant to intervene.*
- 7. *Intervenors shall bear their own costs.*
- 8. *The Registrar shall circulate the request of intervention to the parties of the proceeding without delay.*

A new Article 26 is added as follows:

“Article 26

Suspension of the application of the contested decision

- 1. *Upon application of a party to the proceeding or on its own motion, the Board of Appeal may suspend the application of the contested decision.*
- 2. *The application to suspend the application of the contested decision shall be admissible only if the applicant has challenged that decision in an action before the Board.*
- 3. *The application shall state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the suspension applied for.*
- 4. *The application shall be served on the opposite party, and the Chairman shall prescribe a short time-limit within which that party may submit written observations.*
- 5. *The decision on the application shall take the form of a reasoned order, not subject to appeal. The order shall be served on the parties forthwith.”*

The existing Article 11 and the subsequent articles are renumbered, taking into account the newly inserted Articles 11 and 26.

A consolidated version of the Rules of Procedure is attached to these Minutes and shall be published on the Agency’s website.

The above amendments to the Rules of Procedure will be sent for approval to all Members and Alternates, who will be asked to reply by email in seven days. If approval is reached, a consolidated version of the Rules of Procedure will be uploaded on the Agency’s website.

4. Update on recent developments (Registrar; GIPL)

The Chairman introduced the new Deputy Registrar and informed the other Members and Alternates of the BoA of the new specific contract signed with the Registrar. Following a request of the BoA, Paul Martinet confirmed the possibility, in terms of both timing and

budget, of concluding a new contract with the Registrar in the event of an appeal being brought against the decision of the Agency on the GIPL project.

Paul Martinet referred to the “Notice on the investment request on the GIPL Project of Common Interest” (the Gas Interconnector Poland-Lithuania), published on 9 June 2014.

The notice on the GIPL invites 3rd parties to send observations to the case coordinator in the Agency. Finally, Paul Martinet informed the BoA that a decision on the case is currently expected for the end of July.

5. Designation of the Chairperson and of the Vice-Chairperson

Following a secret ballot, pursuant to Article 1(2) of the Rules of Procedure, the BoA designated Herbert Ungerer as Chairman and Jacques De Jong as Vice Chairman for the next two-and-a-half-year period.

6. Exchange of considerations on the experience of the first two-and-a-half years and possible suggestions

The outgoing Chairman invited the Members and Alternates to share comments on the experience of the BoA and possible proposals. The Members conveyed a positive appreciation of the work carried out, in particular in connection with the mock trial, and expressed their gratitude to both the Agency’s staff and the Registrar.

The Chairman then invited the Members to consider in due course whether to continue their mandate, with a view to identifying possible Alternates and ensuring continuity of the activities of the BoA.

From an operational point of view, the Chairman suggested to keep using email to share issues that deserve attention and hold meetings only where necessary. Finally, the Chairman took the opportunity to thank the Registrar and the staff of the Agency.

For the Board of Appeal:

Chairman Dr. Herbert Ungerer