



Board of Appeal

Practice directions as amended on 01.10.2019

**to Parties to appeal proceedings before the Board of Appeal
of the European Union Agency for the Cooperation of
Energy Regulators**

The following Practice Directions cover the main elements of proceedings before the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (hereinafter the “Board of Appeal” or “Board” and the “Agency”) as defined in the Rules of Organisation and Procedure (the “Rules of Procedure”) of the Board of Appeal , available on the Agency’s website¹.

In order to ensure the smooth, reliable and cost effective running of proceedings, Parties should follow these directions carefully. These directions implement the Rules of Procedure and they are not intended as a substitute for the Rules of Procedure. Compliance with these directions will reduce the number of requests for regularisation and the risk of inadmissibility.

The latest version of these directions is available on the Agency’s website².

COMMUNICATION WITH THE BOARD

1. Communication through the Registry only

All submissions, as well as any other correspondence sent to the Board of Appeal, must be lodged at the Registry of the Board (hereinafter “the Registry”). Any direct communication to the Board of Appeal members will be disregarded and under no circumstances would it form part of the proceeding.

2. Other important communication requirements

The Board of Appeal encourages the use of electronic communication. Correspondents in appeal proceedings are asked to submit documents as electronic files (in PDF) and preferably by electronic means.

When a procedural document is submitted nevertheless to the Board as a paper document, it should always be accompanied by one paper copy and one further copy for each of the other parties to the proceedings, including the Agency. Copies lodged must be marked as “original” or “copy for opposing party” so that corresponding documents can be easily dispatched. In order to enable verification that the procedural documents (original, annexes and their copies) submitted

¹ Decision BoA no 1-2011 *laying down the* rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators,

http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

² http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

to the Board have been received in their entirety, the total number of submitted pages should be indicated on the first page of every submission.

In their first communication to the Board, parties are asked to:

- a) state whether they agree to service being effected on them or, where appropriate, their representative by telefax, e-mail or other technical means of communication (Article 25 of the Rules of Procedure);
- b) specify the e-mail address (or, exceptionally, fax number) that the Registry may use for that purpose.

Please note that for service by e-mail, communications from the Registry will be transmitted in PDF format.

3. Special requirements for communication with the Board via e-mail/telefax

1. The signed original of a procedural document may also be transmitted to the Registry:
 - a) As a main rule, by e-mail (e-mail address: BoA@acer.europa.eu)
 - b) Exceptionally, by telefax (telefax number: +386 (0) 82053 413) or
 - c) by post: Agency for the Cooperation of Energy Regulators

Registry of the Board of Appeal
Trg Republike 3
1000 Ljubljana
Slovenia

It is the sender's responsibility to ensure that procedural documents reach the Registry in their entirety within the time limit set. This requires particular attention when submissions are sent by electronic means of communication. Using e-mail, the parties are requested to refer to the nature of their submissions in the subject line of their e-mail. The appellant is requested to use the word 'appeal' at the occasion of its first correspondence. Insofar as the parties are notified on the number of the appeal case, they are invited to use this number in the subject line of their following e-mail correspondence to the Registry afterwards.

2. If submissions are sent to the Registry by e-mail or, exceptionally, by telefax, the following additional requirements shall be taken into account:
 - a) In order to ensure the integrity of the submissions, only a copy of the signed original will be accepted. Documents sent by e-mail shall be sent as scanned documents in PDF format.
 - b) Originals of the documents must be kept in file and available by the sender. On request by the Registry the original and one copy for each other party to the proceedings, including the Agency, must be sent by conventional mail or lodged directly at the Registry. They shall be sent without any corrections or amendments, even of a minor nature, being made thereto.

- c) The first page of each procedural document lodged following an electronic transmission must be marked "Previously sent by fax/e-mail on..." so that corresponding documents can be readily identified.
- d) In order to be successfully transmitted by e-mail, a message, including its attachments, must be limited in size to 10 MB. Any message over that size must be sent in several parts in order to ensure that it is received correctly by the Registry. In the case of such split transmissions, each individual transmission should include in the cover e-mail:
 - the name of the sender,
 - an indication of the contested decision or appeal number,
 - the total number of e-mails, their sequential number and the page numbers of the submitted sheets (e.g. e-mail no. 1 (of 5) containing pages 1-50 of the notice of appeal and pages 1-10 of Annex 1).

LODGEMENT OF A NOTICE OF APPEAL AND OTHER PLEADINGS

4. Time limits

1. An appeal shall be lodged with the Board in writing in the form of a notice of appeal containing the remedies sought, pleas in law and the main arguments.
2. The lodgement shall be made within two months of the notification of the decision to the person concerned, or in the absence thereof, of the day it becomes known to the latter (see Article 28 (2) of Regulation (EU) 2019/942). The time limit for lodging a notice of appeal cannot be extended.
3. For the purposes of calculating time limits, a document shall not be considered to have been lodged until it is received at the Registry (Article 13(2) of the Rules of Procedure). Rules for calculating time limits are defined in detail in Article 26 of the Rules of Procedure.

5. Proof of existence of a legal person

Where the appellant or an applicant for intervention is a legal person, proof of its existence in law shall be attached to the notice of appeal (Article 8(2) of the Rules of Procedure) or to the application for leave to intervene. An instrument constituting and regulating that legal person or a recent extract from the register of companies, firms or associations can serve for that purpose.

6. Language

1. The language of the notice of appeal shall be the language of the case. The language of the case shall be used in written and oral proceedings, unless the Board has authorised the use of another official language following the request of a party. This applies also to all supporting documents,

which shall be accompanied by a translation into the language of the case, where needed (Article 19(2), second and third paragraph of the Rules of Procedure).

2. When drafting pleadings, parties are advised to take into account the fact that in practice all documents submitted will be translated into English since this is the language used by the members of the Board and its staff for day-to-day internal communication and work produced jointly.
3. If the appellant is the addressee of the decision against which the appeal is brought and the appeal is not lodged in the language of that decision, the appellant should provide information and evidence that the language of the appeal has been used in earlier submissions giving rise to the decision (Article 19(1), second subparagraph of the Rules of Procedure).

7. Content and form of pleadings including the notice of appeal

1. Pleadings shall bear a signature and a date, as well as the other elements requested by Articles 8 (notice of appeal) or 10 (defence) of the Rules of Procedure. The following information should appear on the first page of any pleading submitted to the Board:
 - a) the title of the pleading (notice of appeal, defence, application for leave to intervene, statement in intervention, replies to questions, etc.);
 - b) the appeal number (A-...-...) where this has already been notified by the Registry, or, where this has not yet been notified, the number of the contested Agency decision;
 - c) the name and address of the party lodging the pleading;
 - d) if the party has appointed a representative, the name and business address of that representative;
 - e) the date of the pleading;
 - f) where appropriate, an indication of any confidentiality request.
2. It is recommended that the information listed above is provided as the first page of any pleading preferably by using the Cover Form which can be found on the Agency's website³.
 - a) Since all pleadings will be processed electronically by the Registry, parties should provide the Registry with a USB stick/DVD/CD containing all documents submitted to the Board, as far as they are not transmitted electronically.

³http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

- b) Parties should take into account the following requirements which are necessary for document scanning and character recognition: the text should be easily legible and appear on one side of the page only (i.e. 'recto', not 'recto verso');
 - c) each paragraph of the pleading should be numbered consecutively;
 - d) documents should not be bound together or joined, for example, with glue or staples;
 - e) in order to ensure that a scanned version is legible, the text should be drafted with sufficient line spacing and margins. The recommended minimum font size is 12pt in the body of the text and 10pt in the footnotes.
3. In order to ensure that all pages of the documents (including any annexes and page dividers) are duly scanned, the pleading and annexes should be numbered consecutively (e.g. Page 1 of 11) and the numbers should preferably appear in the top right-hand corner of each page.
 4. The information to be included in the notice of appeal and the documents required to be annexed to it are listed in Articles 8(1) and 8(2) of the Rules of Procedure. A "Checklist" supporting the filing of an appeal can be found on the Agency's website⁴.
 5. The notice of appeal shall clearly identify which of the facts and which of the conclusions in the Agency's contested decision are disputed by the appellant. In particular, the appellant shall specify whether the decision is contested in its entirety or only partially. In the latter case, the contested part shall be specified.
 6. Parties are advised to take into account that no new plea in law may be introduced after the first exchange of written pleadings, unless the Board decides, by the request on at least one of the parties, that it is based on new matters of law or of fact that have come to light in the course of the proceedings (Article 17(2) of the Rules of Procedure).
 7. The notice of appeal and other pleadings shall contain not only the pleas in law on which the appellant relies in support of the appeal, but also a succinct presentation of each of the arguments supporting those grounds. Thus, the notice of appeal should contain a written development of each of the factual, legal or other grounds relied on.
 8. Any evidence (documents or other type of evidence) relied on should be indicated, listed and annexed to the pleadings. The parties shall:
 - a) Identify in the table of Annexes which documents contain evidence;

⁴ See Section V of the Templates, to be found on the Agency's webpage:

http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

- b) indicate the exact location of the passage(s) within the evidence intended to support the facts or claims. For this purpose the parties may highlight or mark the relevant passage(s) of the evidence offered.

8. Annexes

1. Only documents mentioned in the actual text of a written pleading and which are necessary to prove or illustrate its contents should be submitted as annexes. Extracts from voluminous documents are acceptable, provided that the extract is not taken out of context.
2. Annexes shall be drawn up in the language of the case or be accompanied by a translation into that language. In the case of lengthy documents, translations may be confined to relevant extracts. However, the Board may at any time require a more extensive or complete translation (Article 19(2), third subparagraph, of the Rules of Procedure).
3. The following formal requirements are to be complied with:
 - a) Annexes shall be easily legible. An annex will not be accepted if the print quality is inadequate;
 - b) Annexes shall be numbered and included in the Table of Annexes with a reference to the pleading to which they are attached. If the annex is voluminous, the party must indicate the parts considered relevant.
4. Lengthy annexes (exceeding 50 pages) must be provided in electronic form or on an electronic storage device, in order to be taken into account.

9. Representative

Where a party has appointed a representative to represent him/her before the Board, that representative shall provide an authority to act (Article 12 of the Rules of Procedure). Any change in representation must be notified to the Registry in writing without delay.

10. Summary and publication of the notice of appeal

1. An announcement of each notice of appeal lodged will be published by the Registry on the Agency's website⁵ (Article 9 of the Rules of Procedure).
2. In order to facilitate the preparation of the announcement, the appellant should attach to the notice of appeal a summary of the dispute. That summary should not exceed three pages and shall include:
 - a) the name of the appellant;

⁵ https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Announcements-of-appeals.aspx

- b) the related disputed decision;
 - c) the particulars of the remedy sought by the appellant; and
 - d) a summary of the principal grounds relied on.
3. The announcement must be detailed enough that the potential interveners be able to decide on the basis of that source of information whether to submit a request for leave to intervene.
 4. Parties are invited to use the appeal announcement template which can be found on the Agency's website.⁶
 5. The appellant must not include confidential information in the summary, since the announcement of the notice of appeal will be prepared on the basis of the appellant's summary. This is the concerned appellant's sole responsibility to take the intended confidentiality into consideration.
 6. The announcement, prepared by the Registry, will be published without delay after any confidentiality request related to the content of the announcement has been decided upon.

11. Regularisation of the notice of appeal and other pleadings

1. If a notice of appeal does not comply with the requirements set out in Article 8(1) (a) to (e) of the Rules of Procedure, the Registrar shall prescribe a reasonable period to put the notice of appeal in order. The Registrar may prescribe such a period only once (Article 8(4) of the Rules of Procedure).
2. If the appellant fails to put the notice of appeal in order, the Registrar shall refer the matter to the Chairperson of the Board for a decision on the admissibility of the appeal (Article 8(5), second subparagraph of the Rules of Procedure).
3. The Registrar may also request that a notice of appeal or other pleadings be put in order where it is not in conformity with these practice directions.

12. Confidentiality requests

1. A request for the confidential treatment of any information contained in a document filed in connection with proceedings before the Board under Articles 8(1) (g) and 10(2)(d) of the Rules of Procedure shall be made in writing at the time the document is lodged, under a separate heading of the submission in question or by a separate application lodged together with the principal document(s).

⁶ See Section of the Templates, to be found on the Agency's webpage:

http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

2. The request shall indicate the relevant words, figures or passages for which confidentiality is claimed, together with the reasons for that request. Sufficiently detailed reasons are required for every confidentiality request.
3. Whether particular information is to be regarded as confidential is a matter for the Board to decide on, having regard to all the circumstances of the individual case.
4. Since the Board cannot rely on any matters which have not been the subject of disclosure between the principal parties to the proceedings, confidential treatment cannot be accorded to an appellant vis-à-vis the Agency or vice versa.

13. “Non-confidential” and “marked confidential” versions of documents

1. After a confidentiality request has been accepted in its entirety or partially, a sufficient number of copies of “non-confidential” and “marked confidential” versions of the relevant document should be submitted to the Registry so that they can be supplied to all parties to the proceedings. The Registry will inform the parties of the number of copies to be submitted to the Registry.
2. The party requesting confidential treatment should prepare the required number of non-confidential versions bearing a marking in the relevant places in the documents where there has been an excision for confidentiality reasons. The layout of the page should not be altered, so that it is possible to assess the amount of excised text, as well as to enable the pagination and paragraph numbering to remain unaltered.

Where possible, an indication of the nature of the information which has been excised should be provided. If that cannot be provided, the generic marking “[confidential details omitted]” may be used. These versions must be clearly marked as “non-confidential”.

3. A separate set of documents shall be prepared where the confidential information is left between square brackets (“marked confidential” versions). Such a document will enable efficient conduct of the procedure for the Board. Furthermore, the opposite party will need to know what information is regarded as confidential by the other party, in order to avoid making any explicit disclosure when referring to this information in written submissions to which the public may have access. These copies must be clearly marked as “confidential”.
4. The preparation of the “non-confidential” and “marked confidential” versions of the documents in question must be conducted by the party concerned (or by its representative if the party has appointed one) and at its own risk. Under no circumstances will the Board or the staff of the Registry be responsible for any verification of the contents of different confidential and non-confidential versions lodged by a party before the Board.
5. Every pleading submitted to the Board after a confidentiality decision shall be prepared in accordance with the abovementioned rules.
6. Parties should consider when requesting confidential treatment for their submissions, that, in the event of consolidation of cases, the confidentiality is not applied to the parties of the consolidated case.

14. Consolidation of cases

1. In the event of consolidation of cases under Article 20(3) (h) of the Rules of Procedure, the consolidation does not affect any procedural deadlines.
2. Parties shall address any further submissions with reference to the consolidated case number, applying the numbering of the appellants described in the decision on consolidation.

ORAL PROCEDURE

15. Request for a hearing

If a party considers that an oral hearing is necessary, it shall submit a reasoned request not later than three working days from the date of notification of the defence paper of the Agency or within the longer time limit allowed by the Chairperson (Article 18(1), second subparagraph, of the Rules of Procedure). The parties shall also indicate if they request the hearing of an expert or witness. This request must be reasoned. Where the abovementioned time limit has expired without any request for a hearing being received, the Board may nonetheless consider that a hearing is necessary. In that case, the parties shall be notified accordingly.

16. Language used in oral proceedings

1. A request to use an official language of the European Union other than the language of the case (Article 19 of the Rules of Procedure) shall be submitted within one calendar week after service of the notice of appeal to the parties to the procedure (Article 19(1), third subparagraph, of the Rules of Procedure). The request shall be reasoned.
2. The Chairperson acting on behalf of the Board will decide on the issue after consulting the parties to the proceedings.

17. Summons

1. The Registrar will notify the parties, and any other person invited to attend the hearing, in writing. The summons to a hearing shall contain the time, date and place of the oral hearing. An announcement of the hearing will also be published on the Agency's website (Article 18(4) of the Rules of Procedure)⁷.

18. Request for a closed hearing

⁷ https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Schedule-of-the-hearings.aspx

The party requesting that the case is not heard in public (Article 18(4) of the Rules of Procedure) shall submit a reasoned request to that effect within three days of notification of the date of the hearing.

19. Place of the hearing

Hearings shall take place where the seat of the Agency is located (i.e. Ljubljana, Slovenia) or, taking into account procedural economy, at another appropriate place. The Board may decide that the hearing shall be held by video-conference or by using other communication technology, provided that the technical means are available to all the parties and third persons to the proceedings (Article 18(7) of the Rules of Procedure).

20. Attendance at the hearing

1. The date of the hearing can be changed only in exceptional circumstances. A request to reschedule the date of the hearing must be duly reasoned, accompanied by appropriate supporting documents, and submitted to the Board within three days of the date of the notification of the date of the hearing.
2. When a hearing requires the use of interpreting services, the parties will be given due notice before it takes place. Due to constraints related to the organisation of interpreting services, requests to postpone the date of a hearing are granted only in very exceptional circumstances.
3. If a party intends not to be present or represented at the hearing, it is requested to notify the Board within three days of the notification of the date of a hearing. In those circumstances, the hearing will take place in its absence. Absence will not imply silent agreement with any of the arguments brought forward during the hearing. This will also apply should the Board find that a party is absent from the hearing without due notification after it has been duly summoned to the hearing.
4. The hearing will take place under the direction of the Chairperson of the Board and be heard in public, except for any part of the proceedings where the Board is considering confidential information or where the Board has accepted a request for a closed hearing.

21. Opening and direction of the hearing

The Chairperson opens, directs and adjourns the hearings. The Chairperson may prescribe measures in order to ensure procedural fairness and efficiency of the hearings.

In particular, the Chairperson may

- establish time limits for the oral presentations,
- define the order of the presentations, statements, questions or other procedural acts with regard to Article 18(5) of Rules of Procedure,
- delineate the parties' rights and obligations,

- pause, suspend or adjourn the hearing if it is necessary,
- warn the parties, if appropriate, to respect the rules of the procedure.

22. Summary minutes of the hearing

1. The Registrar of the Board of Appeal may register, use and store a full audio/and or video record of the hearing. The full record serves only backup purposes and makes the compilation of the summary minutes of the hearing more accurate. The record does not form part of the case file and will be deleted at latest on the 90th day following the last day of the hearing (Article 18(6), third subparagraph of the Rules of Procedure).
2. The Registrar sends the draft summary minutes of the hearing to the parties at its earliest convenience. The parties have the opportunity to make comments and requests regarding the content of the draft summary minutes insofar as it concerns their own statements. The experts and witnesses may request an abstract of the minutes concerning their oral presentation. The summary minutes are considered to be final upon the seventh day from their service. The final summary minutes deemed to be an official case document and forms part of the case file.

23. Publication of final decisions

1. Final decisions of the Board will be published on the Agency's website as soon as the main parties to the proceedings have been notified, unless the Chairperson of the Board of Appeal decides otherwise on reasoned request of a party (Article 24(5) of the Rules of Procedure).
2. This publication may be delayed by supervening technical issues or unresolved issues of confidentiality.
3. The Agency's website⁸ contains a section in which the full text of all final decisions of the Board can be found, subject to appropriate excisions for reasons of confidentiality.

⁸ https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Decisions.aspx