

AEEC Internal Newsletter

N° 7, June 2009

Foreword

Dear Members,
This is 7th edition of our newsletter and it consists of interesting contributions on some quite varying topics.

Our colleagues Marc Bernheim and Gaudenz Geiger report on the development of the Swiss energy market, Carmen Gimeno reports on the significant event of the first European Energy Law & Policy Master Class, which was co-organised by our member law firm Delás & Prat and which might be taken up again next year with the cooperation of AEEC. Ultimately, our colleague Christian Dessau from Berlin gives an overview on the new data obligations in the 3rd Energy Market Package. This report gives also some practical advice that can be of great significance for the legal consultancy.

There is still something I would like to point out at: between the poles of the financial crisis, on the one hand, and of the radical developments in the area of energy caused by the Third Package and the Green Package on the other, considerable opportunities arise for the legal consultancy which we should take up and develop. In this respect, our platform is more present and more valuable than ever.

I am looking forward to any suggestion and initiative from our circle and, at this point, I would like to draw your attention to our Summer Camp, the invitations to which will be sent out in the days to come.

I wish you all the best!

Christian Held, Chairman AEEC

Recent Developments in the Swiss Energy Market Laws

In 2004 the Federal Council released the draft of the new Federal Electricity Supply Act (including the revision of the Federal Energy Act) for consulta-



tion and subsequently submitted its Bill to Parliament. Parliament approved the new Federal Electricity Supply Act in its concluding vote on March 23, 2007. The Federal Electricity Supply Act (including the revision of the Federal Energy Act) was published in the Swiss Federal Gazette on April 3, 2007 and the referendum deadline expired unused on July 12, 2007.

The Federal Electricity Supply Act regulates the bases for a reliable and sustainable electricity supply. It calls for an opening of the market in two stages: in the first five years, end-consumers with an annual consumption of more than 100 MWh have free access to the market. After five years (2014), all end-consumers can freely

choose their electricity supplier, though it should be noted that the full liberalisation of the market is subject to an optional referendum. The high-tension transmission grid (220/380 kV) has to be operated by a national grid operator with Swiss majority ownership. For this purpose, transmission companies have established "swissgrid" as (Swiss) Transmission System Operator (TSO). Ownership of the high-tension transmission grid has to be trans-

AEEC Internal Newsletter

N°7, June 2009

ferred to the TSO within five years after the Act enters into force (2014).

With the revision of the Federal Energy Act, the Federal Electricity Supply Act also contains a package of regulations governing the promotion of renewable energy (in particular hydropower) and the introduction of measures to promote efficient electricity use. The most important measure concerns the remuneration of feeding in renewable energy at cost. The idea here is for electricity produced from new power plants that use renewable energy (hydropower plants up to 10 MW) to be compensated in the form of a remuneration rate to be specified on the basis of a reference facility. An annual sum of around 320 million Swiss francs is earmarked for the new promotion measures called for in the Federal Energy Act.

The Federal Electricity Supply Act entered into force on January 1, 2008, with the exception of the provisions concerning the right to grid access, i.e. the opening of the market for large-scale consumers with consumption levels higher than 100'000 kWh per annum, and those governing cost-covering remuneration for feeding electricity from renewable energy sources into the grid, which is regulated in the revision of the Federal Energy Act.

The provisions governing the liberalisation of the market for large-scale consumers and cost-covering remuneration for the feed of electricity from renewable energy sources into the grid entered into force on January 1, 2009. Production facilities that were put into operation after January 1, 2006 are entitled to benefit from the latter provisions. Registration for these producers is possible since May 2008. However, meanwhile the subsidi-

sation fund for green electricity has run dry. There have been so many registrations for compensatory feed-in remuneration (KEV) since May 2008 that the total cost ceiling for KEV has already been reached. Therefore, from February 1, 2009 all new registrations from electricity production plants using hydropower (up to 10 Megawatts), photovoltaic power, wind power, geothermal power, biomass and biomass waste will be put on a waiting list. Faced with the growing possibility of the system grinding to a halt, in November 2008 Federal Councillor Moritz Leuenberger charged the Swiss Federal Office of Energy with devising specific suggestions by mid 2009 to solve the problem. Further expansion of green electricity production in Switzerland on the basis of the current KEV incentive system is no longer possible. Only by amending the legislative framework can the economic potential of renewable power continue to be exploited. The main focus will be on either raising the KEV cost limits (full cap) or abolishing them completely. A further possibility would be to speed up the introduction of obligatory production quotas from renewable energies for the individual energy supply companies.

Dr. Marc Bernheim, Staiger, Schwald & Partner Ltd.,

Gaudenz Geiger, Staiger, Schwald & Partner Ltd.

The First European Energy Law & Policy Master Class

From 2nd to 4th March 2009, the first European Energy Law & Policy Master Class took place in Barcelona. It was an intensive three-day training course on the key issues of Europe's energy policy,



organised by Claeys & Casteels, Gas Natural and Delàs & Prat Advocats in association with the ESADE Law School of Barcelona.

The class was led by top European academics and lawyers, representatives of the industry, officials of the European Commission, like Mr. Christopher Jones (Director New and Renewable Sources of Energy DG-TREN) and the cabinet members of Energy Commissioner Mr. Piebalgs Mr. Ferran Taradellas and Peter Vis, the Chairman of ETSO and CEO of Elia, Mr. Dobbeni, and the Spanish Regulator Mrs. Costa.

The class was attended by 35 participants representing 14 European countries from large energy companies and national governments.

Recent developments in the European energy policy as the Third Internal Energy Package, the new renewable energy, the ETS Directives and the Second Strategic Energy Review as well as the new proposals on energy security and competition issues were discussed in detail during the course. The three-day course gave the delegates a unique opportunity to learn and discuss these key issues with Europe's leading energy experts and decision makers.

Delas & Prat Advocats is proud of having contributed to the organisation of this successful European Energy Law & Policy Master Class.

By Carmen Gimeno, Delàs & Prat Advocates

New Data Obligations in the 3rd Energy Market Package

The public consultation on the European Commission's 3rd Energy Market Package mainly focuses on the issue of *ownership unbundling*. The package includes a series of further subject matters. Unremarkable but still important are the extended data obligations hidden in the reorganization.

The data obligations are generally divided into two groups: the physical data and the transaction data. While the provisions on physical data (power plant and generation capacities, network capacities, cross-border capacities etc.) can be found in the electricity and gas regulations, the transaction data obligations are contained in the directives. At the time of the preparation of this article, the drafts resulting from the second reading in the European Parliament and the thereto relating compromise talks were already known. On this basis, which should be identical with the final version to come into effect, the future requirements can be fully comprehended.

Physical Data

Responsible for the collection and publication of the physical data are the *Transmission System Operators* (TSO). They are required to provide the relevant data concerning electricity and gas, which will enable a smooth, transparent and efficient network access for all market participants. The details are specified under Article 15 of the Electricity Regulation and respectively under Article 18 of the Gas Regulation. Important in both cases is though that the market players have to provide the TSOs with the data they need for publication. This means in other words that all market players will be subject to legal constraints. This fact, however, does not seem to be that widespread yet.

Both regulations contain further detailed provisions that are binding for specific types of data. For instance, the electricity regulation requires that also data on power plant capacity is collected. However, this only concerns companies operating a power plant with a minimum capacity of 250 MW. What is more, this data needs not be published. It must just be collected and retained for five years. The obligation to retain data applies (in addition to the gas TSOs) also to storage facility operators.

The purpose of the data retention obligation is to enable the competent national regulatory authori-

ties, the competition authorities and the European Commission the access to this data at a later point in time. In doing so, suspected cases of market abuse or the like can be traced. This is a compromise between a real market transparency and the wish to keep one's own business secrets especially for the generation sector, which is understandable as the knowledge of all (up-to-date) generation data could be used against the respective generator.

Transaction Data

The same consideration dominated the political process on the subject of transaction data. After the original thought of a complete publication, eventually, it was agreed that the transaction data should be retained by the companies in order to be made available to the national authority in charge and the Commission. The relevant provisions are laid down under Article 39 of the Electricity Directive and under Article 43 of the Gas Directive.

This retention obligation applies initially to every utility. It also includes physical supply agreements as well as financial energy derivatives. Furthermore, the data must be quite comprehensive. The Directive speaks about:

"... details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives."

A combined task force of CESR (Committee of European Securities Regulators) and ERGEG (European Regulators Group for Electricity and

Gas) was assigned the closer specification of these general requirements.

The directives also stipulate that the regulatory authority may at its own discretion publish in anonymised or aggregate form the data submitted by the market participants. However, the inevitable question is posed whether this permission to publish anonymised data – unlike a publication obligation – contradicts with the mere obligation to retain data. A publication would only make sense if the data would be retrieved at regular intervals. This, however, would cause unreasonably high expenses which should definitely be avoided.

CESR and ERGEG have already been dealing with this and other subject matters in a first stage. According to a technical advice, which in the meantime has also been submitted to the Commission, it is basically okay to inquire this data regularly from the companies even if it was only for the reason of obtaining the relevant knowledge about the market development. At the same time, though, the task force does realize that this would cause a huge effort and expenses. Therefore, it proposes that the anonymised data is surrogated by publication of trade data by the big trading platforms, fulfilling so the need for transparency.

The necessary data format will also have to be determined. The task force appears to be practice oriented also in this case. It is assumed that an electronic data format will be chosen the details of which will not have to be specified. However, the crucial point in this context is that the data can be transmitted to the requesting authority at short notice and that it can be quickly analyzed.

Summary

The 3rd Energy Market Package provides – almost to the exclusion of the public – for new broadened data obligations for all energy companies. It is to be expected that the TSOs and the energy suppli-

AEEC Internal Newsletter

N°7, June 2009

ers (as well as all the other market participants) will have to deal in the future with new requirements relating to physical data or transaction data.

If the 3rd Energy Market Package will really be passed by the end of this legislative period, at least the obligations with regard to physical data will become binding directly thereafter. This means that the TSOs should very quickly approach the other market participants in order to specify the details for the required data, such as formats and time. The term of implementation for the transaction data is accordingly longer. The first to be called upon here are the national legislators, who have the usual 18-month term to implement the provisions of the Electricity and Gas Directives. However, one should already now take the opportunity to prepare for that moment.

Even though new internal burdens will emerge due to these measures, the provisions might be helpful for reconsidering and optimizing the own data processes. Complying with these data obligations will become an important part of the company's internal compliance.

By Dr. Christian Dessau, Becker Büttner Held

Coming up next:

- **6th AEEC Summer Camp, September 3rd - 5th, 2009, Meisenheim/Germany**
- **Brussels Conference, November 23rd - 24th, 2009**

AEEC - Associated European Energy Consultants e.V.
Rajmonda Alla
+49-30-611284064
info@aeec-online.com