

ANNOUNCEMENT OF APPEAL¹

Case:	A-002-2024
Appellant:	RWE Supply & Trading GmbH
Appeal received on:	6 September 2024
Subject matter:	Appeal against ACER's decision 09/2024 of 5 July 2024 on the second amendment to the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process.
Keywords:	Methodology for pricing balancing energy, price limits on balancing energy markets, lack of legal basis, ACER's competence and revision of proposals, objectives of the EB Regulation, duty to state reasons
Contested decision Number:	No. 09/2024
Language of the case:	English

¹ Announcement published in accordance with Article 9 of Decision BoA No 01-2023 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

Remedy sought by the Appellant (including procedural requests)

The Appellant request the Board of Appeal to stay the proceedings pursuant to Article 28(1)(a) of the Rules of Procedure until a legally binding decision is made on the action for annulment pending before the General Court under case number T-95/23.

The Appellant requests the Board of Appeal to:

- remit the case to the competent body of ACER
- annul the Contested Decision in its entirety or to declare the decision void *ipso iure*.

The Appellant request that the decision of the Board of Appeal indicates that the Appellant's pleas and arguments are well-founded, and along with this, especially indicate that:

- ACER must deny the TSOs' proposal to introduce price limits of $\pm 15,000$ €/MWh,
- ACER is prohibited from establishing price limits on balancing markets that do not fulfil the minimum requirements under Article 30(2) of the EB Regulation.

If and when the Board of Appeal remits the case to ACER without annulling the decision or declaring the decision void *ipso iure*, the Appellant requests the Board of Appeal to:

- suspend the application of the contested decision on the basis of Article 28(3) of the ACER Regulation in joint reading with Article 27 of the Rules of Procedure; or
- alternatively, order ACER to suspend the application of the contested decision on the basis of Article 21(3) of the Rules of Procedure.

Pleas in law and main arguments

The Appellant contests ACER's decision in its entirety, both regarding the continuation of the transitional price limits according to Article 6 of Annex I to the contested decision and regarding the introduction of new and permanent 'technical' price limits according to Articles 4 and 5 of Annex I to the contested decision.

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

1. ACER did not have the power to amend the existing technical price limits as the TSOs did not submit an approvable or revisable proposal.

The ACER Regulation and the EB Regulation allow ACER to approve or revise TSOs' proposals on methodologies for pricing balancing energy. However, ACER cannot introduce or amend these methodologies on its own initiative. If TSOs do not submit a proposal or submit one not provided for by the EB Regulation, ACER cannot revise it. The proposal must meet the requirements of Article 30(2) of the EB Regulation to be valid. TSOs rather proposed regulatory price limits instead of technical ones, which are not approvable or revisable under the EB Regulation. Thus, ACER's adopted price limits labeled as 'technical' are illegal.

2. The narrowing of the existing technical price limits as adopted by ACER infringes Article 10(1) of the Electricity Regulation.

The decision is unlawful as it is incompatible with Article 10(1) of the Electricity Regulation, which only allows for technical price limits on balancing markets as provided for in Article 30(2) of the EB Regulation. ACER's adopted price limits are rather regulatory, not technical, and are not needed for an efficient functioning of the market. Additionally, they are disproportional to the technical price

limits applicable on intraday markets.

3. The 'technical' price limits adopted by ACER do not comply with the purpose of the EB Regulation.

The decision is unlawful as it does not sufficiently take into account the purpose of the EB Regulation and criteria in Article 5(6) of the ACER Regulation and Article 5(1) of the EB Regulation. ACER must also ensure compliance with the purpose of these regulations, contribution to market integration, non-discrimination, effective competition and the proper functioning of the market. The new price limits interfere with free price formation, create market entry barriers, and contradict the objectives of the EB and ACER Regulations. They also undermine participation in demand response and violate Article 3(b) of the Electricity Regulation.

4. ACER upheld transitional price limits that infringe Article 10(1) of the Electricity Regulation.

ACER's decision to maintain transitional price limits with minor modifications is incompatible with Article 10(1) of the Electricity Regulation. These limits are based on ACER's assessment in its Decision No. 03/2022, and not on Article 30(2) EB Regulation, as ACER does not qualify them as technical price limits. Even if transitional price limits were compatible with Article 10(1), the ones maintained by ACER are unnecessary for their intended purpose, namely the integration of the balancing markets. The TSOs have not identified any circumstances that would constitute such a need.

5. ACER did not adequately reason its decision.

ACER has failed to provide a sufficiently reasoned decision. ACER did not indicate the legal basis of the transitional price limits that have been adopted and has not at all explained why transitional price limits that only differ from the adopted technical price limits in the non-applicability of the adjustment mechanism are necessary for securing the integration of the balancing market or for any other purpose.

Further information

More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website: [Procedural Documents | www.acer.europa.eu](https://www.acer.europa.eu/Procedural-Documents)