

Statement by RWE Energy AG on the ERGEG Public Consultation on the „Guidelines for Good Practice on Regulatory Accounts Unbundling“

A) General comments

- a) In presenting its public consultation paper, ERGEG is asking for comments by interested parties. RWE Energy welcomes the opportunity to respond and comment on the ERGEG consultation paper. Due to the fact that RWE is a major player in the European energy business on all levels of the value chain we highly appreciate the creation of a Single European Energy Market which cannot be achieved without a properly functioning unbundling regime.
- b) Effective unbundling is a key requirement for functioning competitive electricity market, as it avoids discriminatory network operation and cross-subsidies between regulated and non-regulated parts of the value chain. To reach this objective, the Electricity Directive 2003/54/EC and the Gas Directive 2003/55/EC have set in place a consistent and balanced unbundling regime, ensuring the non-discriminatory behaviour of network operators while allowing companies to keep their network assets and to maintain synergies to the ultimate benefit of the customer.
- c) RWE supports initiatives to speed up the full implementation of the 2003 electricity and gas directives. This clearly includes the rules on unbundling of accounts.
- d) As the directives establish a comprehensive unbundling regime, RWE does however not see the basis for the ERGEG paper's statement according to which ownership unbundling is undoubtedly the preferred option while the current unbundling regime would only be a „second best“ solution. RWE would appreciate if ERGEG argued on the basis of the existing legal framework. This is of particular importance when it comes to the issue of unbundling of accounts, the founding pillar of the current EU unbundling regime.
- e) RWE is surprised about ERGEG's large definition of the notion of „unbundling of accounts“. It appears that a number of the guidelines proposed in the paper transgress the concept of accounts unbundling laid down in Article 19 of the electricity directive and Article 17 of the Gas directive. They would rather fall into the scope of functional unbundling or even go beyond the unbundling issue as such.

B) Answers to the specific questions raised in the public consultation paper

Question 1 General: The current rules on accounts unbundling, laid down in the 2003 electricity and gas directives, are just starting to show results in practice. Before challenging these rules, a more detailed analysis of existing shortcomings seems necessary. Whether or not ERGEG has performed such an analysis is not apparent from the consultation paper.

Question G1: §2, 2 of the German Energy Law asks network operators to publish all major transactions with affiliated companies in the annex to their annual accounts. While this provision is helpful in view of providing transparency, the link to the EU public procurement regime or to financing costs is not evident for RWE. Also in Germany there are detailed provisions on procurement issues – there shouldn't be an unnecessary link between procurement provisions and unbundling issues, which will in practise lead to complex interpretation problems.

Question G2: In order to achieve the objective of transparency and non-discrimination, making available the pieces of information referred to in the public consultation paper to the regulator only is sufficient. The additional pieces of information mentioned in question G2 (credits, loans, guarantees etc.) do not constitute an economic incentive for unequal treatment of affiliated and non-affiliated companies. Therefore it will create an unnecessary administrative burden and related costs without creating any pay-back in terms of more non-discrimination.

Question G5: RWE believes that the requirement to submit to the approval of the regulator the contracts related to shared services when they are not concluded after a tendering procedure goes beyond what is necessary for an effective control by Regulators of potential cross-subsidies. Ex-post control of contracts' clauses and the possibility for Regulators to ask for a modification of these clauses should be the best and – in legal terms and for all parties and bodies involved – most proportional way to avoid cumbersome contract approval procedures. In any event, regulated companies have sufficient incentives to choose for the most competitive service offer, independently of additional regulatory provisions about how such an offer shall be identified.

Question 6: RWE agrees with the statement that the choice between network ownership or network leasing should not have any impact on capital costs.