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Ref. E05-CUB-11-02

In relevance to the project of "Guidelines for Good Practice on Regulatory Accounts Unbundling" ("Guidelines") elaborated by the European Regulators' Group for Electricity and Gas („ERGEG"), we would like to present the position of Polish Power Transmission and Distribution Association („PTPiREE") in the matter:

1. Presentation of PTPiREE

   PTPiREE is an association in terms of Polish Association Act. It unites Polish distribution companies and Polish Power Grid Company ("PSE SA") that is companies operating in the power transmission and distribution sub-sector, therein the leading Polish market participants. PTPiREE was founded in 1990. Since that time the society has been active for the benefit and on behalf of Polish power transmission and distribution sub-sector, inter alia, participating in works on the structure of Polish energy sector, as well as passing its comments about the drafts of laws, which regulating the energy market in Poland. Taking under consideration Polish accession to the European Union and incorporation of the Polish energy sector into the framework of the internal energy market, PTPiREE thinks fit to present its position in the matter of the Guidelines.

2. Opinion on the Guidelines in the context of Directive 2003/54/WE.

2.1. The Guidelines in spite of the lack of legal basis comprise provisions which in fact ensure them direct effect. Indeed, the Guidelines are not formally directly binding market participants (whereas they are addressed to national regulators), still their content indicates that they shall actually influence on the activities of energy companies. In particular, as it was provided on the page 6, non-application of rules indicated in the Guidelines contracting shared services by the utility should cause as a result lack of direct acceptance of costs of the services by the regulator, leading to the Guidelines assessment in terms of their effectiveness. Therefore, in case of non-application of the Guidelines by the utility the approval of its tariff can be made difficult. The following wording of the Guidelines encourages regulators to interfere inconsistently to some extent in utilities' activities with the competences of these organs arising from the national law.

Polish law accepts reasonable costs as a legal basis of a tariff calculation. An individual utility decides on the increase of indicated costs (that is particularly to enter into the contract generating the costs as well as to choose the consumer). If to bear certain costs is legitimate and their extent is reliably settled, the regulator should not then refuse an approval of the tariff elaborated on their basis. Polish law – in accordance with the European Community law – does not subject regulator's acceptance of certain costs at the tariff's settlement to the prior regulator's agreement to enter into the definite contract causing generation of the costs. Polish regulator does not have *ex ante* authority with reference to the definite contracts signed by the utility. Giving such real authority by the Guidelines for the regulator, by setting up a mechanism that could impede to approve the tariff settled on the basis of costs which origin had not been previously accepted by the regulator, is inconsistent with Directive 2003/54/WE. In the light of the explanatory memorandum for the Directive and according to Article 23 the tariffs' settlement is an instrument ensuring a non-discriminatory access to the network. There is no reason for which the tariff approval should be an instrument of regulator's interference in the utility's actual activity in the domain that neither the Directive nor the national law gives him authority.

2.2. Guidelines exceed in their regulation a framework of provisions of Directive 2003/54/WE. On the page 6 the Guidelines provide that enjoying shared services by

the operator legally unbundled should take place through tendering procedure or to a contract for shared services subjected to the regulator's final approval. The Directive mentioned above does not contain provisions of such a kind. However, it foresees different instruments sufficient to achieve the purpose defined in the analyzed article. In particular Article 10.2 provides that adequate measures must be undertaken by Member States to ensure professional interests of persons responsible for the transmission system operator's management to be taken with regard they could act independently. Furthermore, the Directive foresees the transmission system operator of a vertical integrated utility should have independently an effective right of decision making related to assets necessary for the network operating, maintenance or development. Article 15.2 above-mentioned Directive comprises a parallel regulation referring to distribution system operators. It should be also remarked that according to the company law (provided as well in European as in Polish regulations) the utility representatives should have in view a protection of its economic interests. An activity undertaken to the utility disadvantage is sanctioned - both economic (civil liability of the utility representatives) and penal sanctions. It means that there have already been invented the mechanisms which ensure the contracts signed by the operator of due system – also the contracts for shared services – to be based on the economic calculation. On the one hand persons in charge of management of the operator activity are independent but then again they have duty to act in the economic interest of the operator. There is no need to double these mechanisms by introduction of solutions giving the regulator competences to approve definite contracts signed by the operator.

2.3. Wording of the Guidelines in the scope of shared services raises serious doubts about their compliance with the principle of subsidiarity stated in Article 5 of the European Community Treaty and related to it the principle of proportionality. The principle of subsidiarity stands to make an analysis if given purpose can be achieved more efficiently on the Community level, and secondly whether the intended activity does not surpass what is essential to achieve that purpose. Obtaining two positive answers permit only to accept a specific regulation (see the European Court of Justice's judgments in cases C-137/85, C-339/92, C-210/00, C-491/01). It should be emphasized here that the principles of subsidiarity and proportionality are directly brought by Directive 2003/54/WE. In particular, under clause 31 of the Directive's explanatory memorandum it is indicated that in compliance with the principle of

subsidiarity the Directive does not surpass beyond what is necessary to achieve its purpose. The rule of proportionality establishes a kind of a limit of the regulation accepted in the Directive. All sorts of further regulations can constitute a breach of the Directive. It should be emphasized in this context that the Directive has neither excluded the possibility of existence of vertical integrated utilities nor possibility of enjoying shared services by the operators being parts of such utilities. This is not an accidental solution. It was remarked in the literature dedicated to Directive 2003/54/WE that enjoying shared services can bring to the vertically integrated undertaking considerable savings and in consequence the reasonable approach is essential here (C. W. Johnes, EU Energy Law, v. I, Leuven 2004, p. 77). Such an approach was elaborated in compliance with Directive 2003/54/WE by the European Commission. In conformity with its interpretation (DG TREN note of January 16, 2004) shared services should be contracted under the market conditions. According to PTPiREE this formula is sufficient to achieve aims in the form of operators' independence and the elimination of an illicit subsidy; therefore, there is no need to introduce fix and bureaucratic mechanisms related to the regulator's approval of the contracts for shared services. Since the Directive referring to the principle of proportionality did not introduce regulations ordering to enter into the contracts for shared services by the system operators either in the tender procedure or by the regulator's approval, then the introduction of such regulations should be consider as the breach of that principle. In present case it should be acknowledged that national regulations and activities of national regulators undertaken on their basis make effective measures sufficient enough to reach a due level of operators' independence and an exclusion of an illicit subsidy. Activities foreseen in the Guidelines, in particular a requirement of acceptance of contracts in the subject of shared services by the regulator, are related to considerable impediment in concluding such contracts and significant bureaucracy of the contracting procedure. Such burdensome measures are not necessary to achieve the purpose that is the operators' independence and the elimination of an illicit subsidy. The reasons for which the ERGEG recognized that the established aims cannot be effectively achieved through the national regulator's activities with the use of national legal measures (which had implemented Directive 2003/54/WE), have not been either explained in the Guidelines.

3. A duty of application of public procurement provisions rests with the utilities. These provisions include detailed regulations which shall be applicable inter alia to contracting shared services (compare with Article 23 of Directive 2004/17/WE). In the principle these provisions settle that utilities are obliged to apply public procurement provisions in concluding contracts for shared services. At the same time the Community legislator foresaw situations when such contracts can be concluded with a related specialized enterprise without application of procurement procedures. Neither of above scenarios of activities (organizing tendering procedure/cooperation with specialized enterprise unbundled in the structure of a capital group) can be reconciled with necessity of making additional agreements with the regulator. Since the Community legislator has foreseen detailed regulations within the scope of services procurement, and taking under consideration importance of connections among groups, to acknowledge that in certain situations it is reasonable to exempt the utility from the obligation of the application of tendering procedures to conclude contracts, the introduction of further restrictions within this scope cannot be recognized for reasonable. Such activities would be contradictory to the legislator's will expressed in the provisions of Directive 2004/17/WE.

4. To conclude, PTPiREE submit a proposal to make amendments to a text of the Guidelines through cancellation of interference in the issue of shared services contracted by network operators remaining in the structure of utilities vertically integrated. The draft Guidelines in the present shape arise doubts over the conformity of the Guidelines with authority of ERGEG and meeting the requirements of the principle of subsidiarity stated in Article 5 of the European Community Treaty. The Guidelines cause also objections about their conformity with Community legal regulations referring to the award of public works contracts which foresee the category of the inter-group procurement.