

Press Release

BEITEN BURKHARDT Successfully Represents wesernetz Bremen GmbH in Complaint Procedure Because of Customer Facility

Berlin, 22 June 2018 – The international law firm BEITEN BURKHARDT has successfully represented wesernetz Bremen GmbH in a complaint procedure before the Higher Regional Court of Dusseldorf. The decision is of fundamental significance. Through this decision the criteria for the interpretation of the concept of "customer facility" have been further developed and, thus, important questions of the players in the energy market concerning the definition, if not delimitation of non-regulated customer facilities against regulated energy supply networks answered.

The complaints procedure was preceded by abuse of dominance investigations of GEWOBA Energie GmbH against wesernetz GmbH before the Federal Network Agency (BNetzA) in which the classification of energy facilities as customer facilities or as energy supply networks had been the subject of controversy. At two different sites in Bremen GEWOBA had constructed and operated two CHP plants, each with a power-generating capacity of 140 kW. To forward and distribute the generated electricity to the house connections GEWOBA installed its own low voltage lines as well as transformers of its own to transform electricity from low voltage into medium voltage. The power units installed were, in turn, connected to the medium voltage network of wesernetz GmbH. The plan provides for the power units of GEWOBA to supply at one single site a total of 457 apartments in 22 different buildings (annual consumption approx. 1005 MWh). At the other site a total of 515 apartments in 30 buildings shall be supplied (annual consumption approx. 1133 MWh).

In the complaints procedure BNetzA had decided that the power units of GEWOBA are not be classified as customer facilities in terms of section 3 no. 24a German Energy Industry Act. Gewoba had filed a complaint against the decision rendered by BNetzA on 3 April 2017 before the Higher Regional Court of Dusseldorf. By order of 13 June 2018 (VI-3 Kart 48/17 V) the 3rd Cartel Panel of the Higher Regional Court of Dusseldorf has dismissed the complaint filed by Gewoba, thus confirming the legal opinion of wesernetz GmbH and BNetzA.



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The decision brings more clarity to various issues in dispute. The decision makes it absolutely clear that the need for regulation of power units is to be denied in exceptional cases only. Essential premise for the interpretation of the factual prerequisites, fulfilment of which is required for the existence of a customer facility, is the application of a broad network concept and, related to it, to take into consideration the relationship of rule and exception between a regulated network and a non-regulated customer facility. To answer the question of insignificance for competition it is of relevance whether the facilities in view of their competitive influence are to be seen as part of a natural monopoly, and therefore a need for regulation is to be affirmed. This requires an evaluative synopsis of those criteria bearing indications on the economic weight and thus on the similarity of the facility to a typical regulated distribution network. The competitive influence is, in particular, subject to the number of end consumers connected to the facility, the amount of energy supplied as well as the geographical expansion whereas an absolute standard has to be applied. Only if the limits to a customer facility are kept as narrow as possible, will it be possible to prevent distortions of competition at the expense of consumers or other market participants.

The decision has not become final yet. Other than in parallel proceedings before the Higher Regional Court of Frankfurt am Main, the Higher Regional Court of Dusseldorf has admitted legal appeal to the Federal Court of Justice.

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Information on BEITEN BURKHARDT

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- Through our long-established offices in Germany, Brussels, China and Russia we advise large and mid-sized companies and corporate groups from various industries, banks and financial institutions as well as the public sector.