licensee which requires the licensee to make application, receive approval and conduct the well abandonment within 60 days. Should a licensee still fail to comply with an abandonment order, the AEUB will initiate the appropriate action to ensure the well is properly abandoned or otherwise disposed of.

3) Industry must inform ADOE whenever a lessee wishes to link a non-abandoned wellbore to a different active mineral agreement. This should ideally coincide with the expiry of the current agreement mineral rights expiry/cancellation, although it may also occur as soon as possible after the AEUB has notified the Crown lessee to abandon a particular wellbore in the spacing unit. The AEUB will confirm and authorise the wellbore re-entry with ADOE, thereby creating a one-window approach for industry.

The oil and gas industry in Alberta is expected to welcome a regulatory one-window approach, and in general is supportive of ADOE's and AEUB's efforts to curb the proliferation of orphan wells, as the burden and cost of abandoning such wells is ultimately attributed back to companies that operate oil and gas wells throughout the province. The abbreviated time frame for effecting abandonments is not expected to impose an onerous burden on senior oil and gas companies within Alberta, as abandonment programmes are routinely undertaken by them on a timely basis. It is, however, a potentially more onerous burden for those smaller companies whose capital resources and cash flow streams may, of financial necessity, cause them to attribute lower priority to abandonment programmes. Nonetheless, the approach taken by ADOE and AEUB will provide the regulators with a greater opportunity than has historically existed, to attach responsibility for abandonments in a timely fashion and where it belongs—to those well licensees who drilled but did not complete a well which now requires abandonment.

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ELECTRICITY SECTOR
Taxation

ECJ sees import duty calculation as discriminatory

The European Court of Justice ruled in a judgment dated April 2, 1998 that Finnish legislation on import of electricity from other E.U. countries is discriminatory. In Finland, the duty on electrical energy of domestic origin depends on the method of generation. Finnish legislation recognised (on environmental grounds) differential rates of duty based on the fuel source of the energy produced. For imported electricity, the rate of duty is not dependent on the fuel source. The duty is calculated to correspond to the average rate levied on electricity produced in Finland.

The Finnish electricity company Outokumpu Oy brought an action in 1996 against a decision of the Finnish District Customs Office regarding the duty on electricity imported from Sweden to the Uusima Provincial Administrative Court which referred the matter to the European Court of Justice for a preliminary ruling. The ECJ came to the conclusion that a variable rate of duty on electricity which is based on environmental considerations is in accordance with the principles governing the E.U. only if it is imposed on electricity of domestic origin in the same way as on imported electricity, and accordingly considered the Finnish legislation at issue to be discriminatory.

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GAS SECTOR
Competition

Abusive pricing by public utility
SpreeGas GmbH and Federal Cartel Authority
Court of Appeal of Berlin
Kart 25/95
January 15, 1997
WuW 1997/1010

Facts: The Court of Appeal of Berlin was concerned with a case in which the SpreeGas GmbH company of Cottbus (in the south of the German province of Brandenburg) appealed against the Federal Cartel Authority's order concerning the appellant's alleged abusive pricing. SpreeGas is engaged in the regional distribution of gas in the south east of Brandenburg. It also supplies nearby territories of neighbouring German provinces. SpreeGas distributes natural gas to some 20,000 households. It has concluded concession agreements for the laying and operating of fixed mains with some 80 towns and territorial authorities according to Article 103 of the German Act Against Restraints of Competition.

In the northern parts of the German province of Brandenburg natural gas is distributed by the EWE AG company which, like SpreeGas, obtains its supply mainly from the Netherlands, the German province of Lower Saxony and from the subsoil of the North Sea. A comparison of the appellant's and EWE's prices for sale shows that in the case of an annual purchase of 1,386 kW/h, SpreeGas is 40 per cent more expensive than EWE. In the case of an annual purchase of 3,908 kW/h the difference is 56 per cent, for 24,423 it is 13 per cent and for 43,473 12 per cent. Upon these verifications the Federal Cartel Authority issued an order against SpreeGas on October 25, 1995 in which it prohibited SpreeGas from selling natural gas to tariff customers and special users at prices which exceed those prices which its competitor EWE charged within the territory of

Brandenburg. SpreeGas appealed against the order of the Federal Cartel Authority to the Court of Appeal of Berlin.

Held: The prices of a public utility which exceed the prices of a competing public utility and which cannot be based on reasons lying in the structure of the territory of supply have to be considered as abusive. For the purposes of this assessment factors which determine the cost price of the individual public utility may not be taken into account.

Comment: By means of concession agreements public utilities acquire from territorial authorities the exclusive right of way for the laying and operating of fixed mains under ways and streets. This practice was exempted from the prohibition of agreements in restraint of competition in Article 103(1) clause 2 of the German Act Against Restraints of Competition. However, as the court correctly observed, the legislator had subjected the benefiting public utilities to the control of abusive pricing in Article 103(5) second sentence, clause 2 of the Act.[1] The court held that SpreeGas violated Article 103(5) sentence 2, clause 2 of the Act which prohibits abusive pricing by public utilities.[2] The court reasoned that the EWE company was a public utility of the same kind as SpreeGas. When assessing the similarity, the consumer's view is decisive. Accordingly, only undertakings can be compared which are engaged on identical distribution levels. The court considered it as decisive that both public utilities distributed the natural gas to end users and that the natural gas even originated from the same source. Differences in the structure of the relevant territories must not be taken into account and may, if at all, be considered for the evaluation of those factors which can justify the charging of higher prices. The court held further that the price differentiation was relevant—more than 50 per cent in the case of smaller consumption and 7 to 8 per cent in the case of large consumption.

The court held that the appellant had failed to establish evidence according to which the differentiation could be justified by structural factors, §103(5) 2nd sentence, clause 2 of the Act. They could not rely on particular characteristics of the more expensive public utility, as the court explained with reference to the German Federal Supreme Court's judgment *Electricity Price Schwäbisch-Hall*.[3] According to the legislator's intention only structural disadvantages of the territory of supply may be taken into account. Such factors are, for example, different cost situations for the use of primary energies, or a small number of consumers and a long distribution network of fixed mains.

The mere fact that the appellant's territory of supply has only half the number of inhabitants or consumers as EWE's territory is not sufficient to justify the assumption of a structural disadvantage. The number of inhabitants or households may be relevant for the assessment whether, for economic reasons, the distribution of natural gas can be undertaken at all. The court stated that there was no principle based on experience according to which a larger number of consumers leads necessarily to an increase in economic efficiency. The appellant would have had to prove why a smaller number of consumers is bound up with additional costs and how these costs affect the final price for end consumers. Likewise, a weak bargaining position concerning the acquisition of natural gas is not a structural disadvantage. To obtain advantageous conditions is essentially a matter of individual capability to negotiate. The fact that EWE may enjoy a larger number of customers was considered to be due to its greater efficiency, namely its successful efforts relating to the acquisition of customers.

The court did not recognise a structural disadvantage which would have caused higher expenses for the construction and maintenance of fixed mains in SpreeGas's territory and which could have justified higher prices. No geological conditions rendered the distribution via a network of grids more difficult within this territory than in EWE's. The appellant's argument that its territory of supply related to a rural area whereas the relevant territory of EWE included the green belt of Berlin was not valid to establish a factor justifying the price differentiation, because it did not create a reason for the alleged disadvantage of SpreeGas. The appellant would have had to establish where these particular elements for the increase of costs could be found and how they would have affected the final prices.

SpreeGas argued that the general duty to connect customers would have caused a structural disadvantage, taking into account its mainly rural territory of supply. However, the court rejected this allegation with reference to Article 6(2) clause 1 of the German Energy Economy Act, according to which a public utility is not bound by a duty to connect if this connection can only be made on conditions which deviate from those of a typical tariff consumer so that connection cannot reasonably be demanded on such general conditions and tariffs.

Finally, the court rejected SpreeGas' argument that it was structurally disadvantaged by reason of the fact that its establishment was based on a former

1 Arnold Vahrenwald, "Gas Supply in Germany and Anti-trust Law", [1993] 6 O.G.L.T.R. 174–183 at 178 and 181.

2 Article 103(5) sentence 2 clause 2 of the German Act Against Restraints of Competition states: "An abuse within the meaning of sentence 1, clause 1 [which means an abuse of a market position constituted by the implementation of the exemption from the general prohibition of agreements in restraint of competition —here a concession agreement in the sense of Article 103(1) clause 2 of the Act] shall be present in particular, where:

> ...
> 2 a public utility imposes less favourable prices or business conditions than public utilities of the same kind, unless it proves that the difference arises from distinguishing circumstances which are not attributable to it, provided that clause 1 above shall remain unaffected hereby.

3 German Federal Supreme Court, in WuW 1995/501 at 508.

communist combine the activities of which were exclusively limited to the distribution of natural gas to end consumers, and that it has a still undetermined number of capital owners and accordingly suffered from a difficulty in obtaining credit in the capital market. The court considered that a substantial change of shareholders which might affect the interests of existing shareholders in the ownership of their shares could not be expected. The court pointed out that expectations relating to the trade with natural gas were generally positive and that the appellant's difficulties which were caused by Germany's reunification could not be pleaded as an excuse without limitation in time.

Some principal observations concerning the control of prices of public utilities concluded the court's reasons. The idea of a closed territory of supply lies at the basis of any control of abusive pricing. This concept is directed towards the avoidance of the uneconomic laying and maintenance of duplicated fixed mains. But this concept means also that prices of this public utility should be considered as abusive which are not based on factors resulting from structural disadvantages but from weaknesses caused by low individual cost effectiveness. The aim derived from the price advantage would be inverted if, for whatever reason, a financially weak public utility could use the absence of competition within the closed territory of supply as a means to improve its profits through the charging of prices which exceed those of similar undertakings. Such an undertaking may not enjoy a guarantee for its existence as a public utility. If it is not able, at the lower price level, to maintain its tasks concerning the security of supply or the safety of operations, it may be ordered to stop its economic operations in application of Article 8(1) of the German Economy Law in whole or partially and another public utility may be charged with the taking over of supply of natural gas.

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OIL & GAS SECTOR
Exploration
Administrative procedures for awarding contracts reviewed

India's Prime Minister, Inder Kumar Gujral, has directed the Petroleum Ministry to follow up the guidelines of the Group of Ministers for the awarding of the 12 small and medium-sized discovered oilfields and the 47 exploration blocks to the private sector. He has also demanded that various procedures which were causing delays in the exploitation of oil resources either through production sharing contracts of discovered oilfields or the offer of exploration blocks should be simplified. He has asked the Petroleum Ministry to prepare its action plan in this regard and submit it for Cabinet approval as soon as possible. This was expected to include the issue of the dismantling of the administered pricing mechanism (APM).

A high-level independent group has also been established which will enable the public sector oil companies to enter into contracts abroad for the exploration and production of oil in a quick and transparent manner.

The awarding of oilfield contracts to the private sector had been put on hold following the exposé by the Comptroller and Auditor-General of India of serious irregularities in the awarding of the Panna-Mukta oilfields. Following these allegations, a Group of Ministers (GOM) was constituted to look into the matter and decide whether the policy of giving discovered oilfields to the private sector on production-sharing contracts should be continued. The GOM had decided to continue the policy subject to certain guidelines in view of the CAG exposure.

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ENERGY SECTOR
Exploration
Exploration activities in National Park considered
Eni SpA v. Maiella National Park
Regional Administrative Tribunal, Abruzzo Region
Judgment No. 221
February 2, 1998
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Hydrocarbon exploration in the territory of National Parks and other areas protected on account of their particular environmental importance is an activity authorised by the Italian law and, therefore, legitimate. For this reason, hydrocarbon exploration cannot be opposed by the National Parks and by the authorities entrusted with the preservation of other protected areas unless it is technically demonstrated that: i) the procedures for carrying out hydrocarbon exploration activities are such that they will jeopardise the preservation of the landscape and the protected natural environment; and ii) it is possible to carry out exploration activities according to procedures other than those proposed by the oil company, and which are compatible with the environment.

By invoking these two important principles, the Regional Administrative Tribunal ("TAR") for the Abruzzo Region recently upheld a complaint filed by Eni SpA, Agip Division, against two incidents in 1996 and 1997 when the Maiella National Park (located in southern Italy) refused to grant its authorisation for the carrying out of a seismic survey within the Park's territory.

The Maiella Park had justified its refusal by stating that the recording of the seismic survey by Eni SpA would have necessarily involved activities, such as site