

## PROCEDURAL ACT OF THE ENERGY COMMUNITY SECRETARIAT

**PA 2018/06/ECS-EnC: Rules on Access to the Case File**

THE SECRETARIAT OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community, and in particular Article 67 thereof,

Whereas:

- (1) On 16 October 2015 the Ministerial Council of the Energy Community adopted Procedural Act 2015/04/MC-EnC on amending Procedural Act 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for dispute settlement under the Treaty,
- (2) Article 7 of Procedural Act 2015/04/MC-EnC calls upon the Energy Community Secretariat to adopt a Procedural Act laying down specific rules on access to the case file,
- (3) Under point (e) of Article 67 of the Treaty, the Secretariat may adopt Procedural Acts,

ADOPTS THE FOLLOWING PROCEDURAL ACT:

### **Article 1**

The Director of the Energy Community adopts the Rules on Access to the Case File as attached.

### **Article 2**

This Procedural Act enters into force on the day of its adoption.

For the Energy Community



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Janez Kopač

Done in Vienna on 10 December 2018

## **Energy Community Rules on Access to the Case File**

### **Article 1 – Applicants**

- (1) Parties, Participants and Observers to the Energy Community Treaty, the complainant as well as private or public bodies shall be entitled to exercise their right of access to the case file under Article 7(1) of the Consolidated Rules of Procedure for Dispute Settlement under the Treaty in accordance with the rules established in this Procedural Act.
- (2) The authorized representatives of the parties to the case and the complainant shall not have to provide any reasons for requesting access to the case file of the specific case to which they are a party or complainant. Their right of access to the case file is limited only in accordance with Article 2 of this Procedural Act.
- (3) Public authorities which are imputable to Parties, Participants and Observers to the Energy Community Treaty shall not have to provide any reasons for requesting access to any case file.
- (4) In case a private or public body which does not fall under paragraph 2 or 3 of this Article (hereinafter “interested parties”) requests access to a case file, such access is only granted in case of evidence for a legitimate interest of this body in accordance with paragraph 5 of this Article. The applicant shall claim and demonstrate specific circumstances and put forward specific, substantiated reasons which justify such legitimate interest in the document(s) requested. The existence of a legitimate interest shall be assessed on a case-by-case basis in accordance with paragraph 5 and 6 of this Article.
- (5) Access to the case file by a private or public body can be based on a legitimate interest if the access to the document(s) requested is necessary, appropriate and proportionate, to satisfy a commercial, individual or wider public interest in the outcome of the case which does not contradict any applicable legal provisions, guidelines or codes of practice or ethics.
- (6) Access to the case file based on legitimate interest shall not justify access to the file by a private or public body, unless there is an overriding public interest in disclosure, if
  - a. the disclosure of the document(s) would undermine the protection of the public interest such as public security, international relations, the financial, monetary or economic policy of the Energy Community; and/or
  - b. the disclosure of the document(s) would constitute a breach of any legal right protecting commercial interests of a natural or legal person, including intellectual property,
  - c. the disclosure of the document(s) would endanger the outcome of pending dispute settlement proceedings and the objective of any inspections, investigations and audits associated with it.
- (7) Public media shall be deemed to have a legitimate interest in access to case files in the sense of paragraph 5 of this Article in principle. In case one of the circumstances under paragraph 6 of this Article applies, access to the case file shall nevertheless be granted in the form of a summary of the relevant document(s), as far as possible and appropriate.

## **Article 2 - Case file**

- (1) The access to the case file concerns documents (in electronic form or paper format) held by the Energy Community Secretariat which have been drawn up or received by it with regard to and aimed at a specific dispute settlement case, registered in accordance with the Consolidated Rules of Procedure for Dispute Settlement under the Treaty.
- (2) The case file shall not include all internal documents and communication between the case handler and the other staff members of the Energy Community Secretariat in relation to the specific case, as well as any notes made by them.
- (3) Access to the case file to parties to the dispute and/or the complainant shall not include documents and/or communication which have either been drawn up by themselves or have already been sent to them during the dispute settlement process, including the preliminary procedure.
- (4) If the complainant has requested confidential treatment when filing its complaint, the identity of the complainant shall not be disclosed when granting access to the file.

## **Article 3 – Applications**

- (1) Access to the case file is granted upon application only.
- (2) All applications for access to the file shall be sent by mail or e-mail in English to the Head of the Legal Unit of the Energy Community Secretariat.
- (3) The application shall identify
  - a. the case it refers to,
  - b. the identity of the applicant,
  - c. the document(s) to which access is requested, and
  - d. if applicable, the legitimate interest of the private or public body in the sense of Article 1(5) of this Procedural Act.

## **Article 4 – Procedure**

- (1) The Head of the Legal Unit shall reply to applications within 10 working days from the date of receipt of the complete application, stating whether access will be granted or not.
- (2) In the case of complex applications, the deadline may be extended. Reasons will be given for any extension of the deadline and it will be notified to the applicant before expiry of the initial deadline.
- (3) If an application does not comply with Article 3(3) of this Procedural Act, it is deemed to be incomplete. In this case, the Head of the Legal Unit shall invite the applicant to provide additional information. If the applicant does not provide such information within the deadline set, the application is deemed to be withdrawn. The deadline under paragraph 1 of this Article only runs from the date of receipt of such additional information.

## **Article 5 - Refusal to grant access to file**

- (1) The Secretariat shall refuse access to the documents identified in accordance with Article 3(3) of this Procedural Act if
  - a. the applicant is not an authority imputable to a Party, Participant or Observer to the Energy Community Treaty and has not proven its legitimate interest in accordance with Article 1(5) of this Procedural Act;
  - b. the document(s) do(es) not form part of the case file or is/are excluded from access under Article 2 of this Procedural Act;
  - c. the document(s) or the information contained therein has/have been published; or
  - d. the document(s) or the information contained therein violate rights of third parties, such as for example but not limited to business secrets.
- (2) If a document or the information contained therein has been published, the answer shall consist of the publication references and/or the place where the document is available.
- (3) If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be disclosed.
- (4) The decision to refuse access to the file shall be communicated to the applicant by the Head of the Legal Unit, and it shall be accompanied by a short reasoning. If the applicant is not satisfied by the decision to refuse and the reasoning provided, it may ask for reassessment. In case of doubt about granting or refusing access to the file, the Head of the Legal Unit may ask the Director of the Energy Community Secretariat to assess the circumstances of the case.

## **Article 6 - Access to the file**

- (1) If access to the file is granted, as far as reasonably possible, access shall normally be granted by transmitting the relevant document(s) to the applicant via email.
- (2) In case of more complex requests, the timing and means of access shall be agreed between the applicant and the Energy Community Secretariat, having due regard to the number and volume of the document(s) requested.