

BULGARIA – ENERGY REGULATOR'S DECISION ADVERSE TO WIND RES PRODUCERS REPEALED BY COURT

On February 23 2018, the Administrative Court–City of Sofia ("**ACCS**") rendered a Judgment repealing two chapters of Decision SP-1/31.07.2015 ("**Decision SP-1**") of the Bulgarian Energy and Water Regulatory Commission ("**EWRC**"), which had considerable adverse effects on producers of electricity from wind energy, commissioned before the July 1 2011. This long waited positive development has the potential for a major positive impact on the wind RES business in Bulgaria and to a certain extent mitigates the series of adverse measures adopted by the State in the last 3 years.

The case, argued by the Wolf Theiss Sofia office on behalf of a leading wind GenCo, is expected to confirm the positive trend in respect of appeals against Decision SP-1 before the Bulgarian courts.

Decision SP-1

The Decision SP-1 was adopted by EWRC in 2015 following an amendment of the Bulgarian Energy Act ("**EA**") adopted in July 2015 requiring EWRC for the first time to set-up the Net Specific Generation of Electricity ("**NSGE**") of RES GenCos. The claimed aim of the EA amendment was to reduce the imbalances in the energy sector, in particular by limiting the amounts of electricity subject to mandatory off-take under Feed-in Tariffs ("**FiTs**"). According to the amendments, the electricity produced by RES GenCos would be purchased by the end suppliers and the public supplier under the FiTs up to a predetermined amount (the NSGE) to be set by EWRC, where any surplus would be either sold on the liberalized market on freely negotiated prices or to the end suppliers/public supplier at a significantly reduced (almost 8 times) purchase price (i.e. the price for surplus on the balancing market).

The NSGE provided under Decision SP-1 represents a specific amount of electricity per 1 kW installed capacity to be purchased by the end suppliers and the public supplier under the FiTs. In practice it considerably reduced the revenues from the amounts of electricity sold under FiTs for most RES GenCos as some of the RES GenCos reached the NSGE already in August of the same year.

Decision SP-1 was rendered by the EWRC in great rush - within only 1 week of the adoption of the amendments to the EA and it was not subject to public discussion. After publishing a first draft on the website of the EWRC on July 31 2015, it disappeared from the official website and a new draft was published on August 3 2015 with some prices for PV power plants being amended. As a result, the adopted NSGE values were very controversial and led to a number of court cases.

The Court Procedures

Most of the RES GenCos on the Bulgarian market initiated court appeals against Decision SP-1 in 2015. In addition, the Bulgarian Public Prosecution Office also filed an appeal requesting the courts to declare the nullity of the decision due to some suspicions for manipulation of the NSGE levels evident from the decision versions published in two different days. All of the cases initiated by RES GenCos were suspended until the termination of the case initiated by the Public Prosecution Office. The latter, obtained and initial success at first instance, where Decision SP-1 has been declared null and void, but afterwards this first instance judgment was revoked by the Supreme Administrative Court ("**SAC**") and consequently terminated by the ACCS.

After the termination of the appeals filed by the Public Prosecution Office, the panels of the ACCS reinitiated the pending cases initiated by RES GenCos. The EWRC defended the legality of the decision using numerous procedural tricks and irrelevant requests to courts, which slowed down the proceedings.

The Judgment

Judgment No. 1177 of February 23 2018 issued under administrative case No. 8522/2015 revokes Chapters 1.7 and 1.8 of Decisions SP-1, which set the NSGE for wind RES GenCos, commissioned before July 1 2011. Although this is not the first ACCS judgment revoking chapters of Decision SP-1, it is of paramount importance as it is the first to concern the majority of wind GenCos and it is one of the firsts rendered in cases where an economic expert report has been admitted as evidence.

The ACCS panel has considered that Decision SP-1 is entirely deprived of factual grounds and argumentation, which is a serious breach of administrative procedural rules and of the rules relating to the form of the decision. The ACCS has fully reproduced claimant's arguments in respect of the full lack of data on how and on the basis of which data EWRC has determined the NSGE thresholds.

Further, the ACCS panel also entirely rejected the attempts by the EWRC to justify the decision by presenting a so called "financial model", which allegedly served as a ground and argumentation when rendering Decision SP-1. The panel also considered that the economic expert report requested in the court proceedings by the EWRC also did not satisfied the evidentiary burden of the EWRC to prove all legal prerequisites for rendering the decision, including factual and legal grounds, arguments, motivation etc.

Comment

Although the Judgment is not final and may be subject to appeal by the EWRC or the National Electricity Company NEK (participating as interested party) before the SAC, it is based on solid and well-articulated arguments, which should provide a clear and persuasive message to the EWRC that when adopting decisions, affecting RES GenCos, the rule of law is still applicable and the legal framework should be strictly respected.

If this Judgment and other judgments concerning different chapters of Decision SP-1 should be confirmed by the SAC, the revocation of the decision should have a retroactive effect – i.e. it should be considered as revoked as of its adoption back in year 2015. This could allow RES GenCos to initiate damages or specific performance claims against end-suppliers and the public supplier.

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