

Collection of capacity fee – role of distribution system operator

21 June 2021 | Contributed by Kubas Kos Gałkowski

Energy & Natural Resources, Poland

- 📌 Introduction
- 📌 Capacity fee collection system
- 📌 Comment

Introduction

On 1 January 2021 the capacity fee came into force (for further details please see "Capacity fee enters into force"). However, the system for its determination and collection is not entirely clear in light of the wording of the Act on the Capacity Market (*Journal of Laws* 2020.247, 17 February 2020). In this regard, the act creates specific obligations for some system participants, including distribution system operators (DSOs). The wording of the provisions on this matter may give rise to some interpretative difficulties when applied in practice.

Capacity fee collection system

Article 69 of the Act on the Capacity Market, which, among other things, regulates the capacity fee collection system, should be interpreted in the order of its sections, but also as a whole (with subsequent sections of the article giving meaning to the preceding sections). The act provides for a step capacity fee collection system where the decisive criterion is the grid to which a given entity obliged to pay the capacity fee is connected. In simple terms, the principle is that the capacity fee is paid to the entity to whose transmission network or distribution grid the entity is connected. The entity that ultimately receives the capacity fee, either directly from entities connected to its transmission network or from payers of this fee which are obliged to pay the capacity fee on behalf of other entities, is the DSO, which follows from Article 75.2 of the Act on the Capacity Market.

Article 69.1 of the Act on Capacity Markets sets out the general principle for the collection of the capacity fee:

The Operator shall collect a fee for the payment of consideration for the performance of capacity obligations, corresponding to the cost of the purchased capacity obligation and the justified costs of the settlements referred to in Article 77(4), hereinafter referred to as the 'capacity fee'.

Pursuant to Article 69(2) of the act, the operator (ie, the 'transmission system operator', as defined in the Energy Law Act) will collect the capacity fee from:

- the end users directly connected to the transmission network;
- electrical power DSOs (capacity fee payers);
- energy companies engaged in the business activity involving the transmission or distribution of electricity, which are not the capacity fee payer and which are directly connected to the transmission network; and
- electricity generating companies directly connected to the transmission network.

It follows from the above that the DSOs which the act assigns as the capacity fee payer has a special role in the capacity fee collection system.

Section 3 of the article specifies from whom the DSOs collect the capacity fee. There is a particular distinction between the two types of DSO that exist in the electrical system market:

- a DSO directly connected to the transmission network of the transmission system operator (DSOp); and
- a DSO not directly connected to the transmission network of the transmission system operator, but connected to that grid via another DSO (DSOn).

This distinction may be important from the point of view of the capacity fee collection under Article 69.3 of the Act on Capacity Markets, according to which the capacity fee payer collects the capacity fee from:

- end users;
- energy enterprises engaged in business activities involving the transmission or distribution of electricity, which is not the capacity fee payer; and
- electricity generating energy enterprises.

The above is indicated in the doctrine: "the DSO is the payer of the capacity fee only for entities directly connected to its distribution grid."**(1)**

Articles 69.4 and 69.5 of the Act on Capacity Markets further regulate the electricity enterprises engaged in the business of electricity transmission or distribution, which are not the capacity fee payers, and the electricity enterprises generating electricity from which the capacity fee will be collected.

In light of the above, and due to the fact that the Act on the Capacity Market does not distinguish between DSOpS and DSOnS, but establishes each DSO as the capacity fee payer to the extent indicated in the act, regardless of its connection to the transmission network, the wording of Article 69.6 therein offers relevant insight:

An energy enterprise engaged in the business of transmission, distribution, or generation of electricity shall be deemed to be an end-user in the part in which, pursuant to an agreement with the energy enterprise, it receives or draws electricity from the facilities, systems, or network of the energy enterprise and consumes it for its own use. Own use does not include electricity used for the generation, transmission, or distribution of electricity.

The Energy Law Act defines an 'end user' as:

a consumer who purchases fuel or energy for their own use; own use does not include electricity purchased for consumption in the generation, transmission, or distribution of electricity.

From the point of view of the issue of collection and payment of the capacity fee by DSOpS (ie, operators directly connected to the transmission network), it can be assumed that this category of entities will include all DSOnS (ie, electricity distribution companies) and other energy enterprises mentioned in this provision which have their own agreement with a DSOp, under which they draw electricity from facilities, systems or networks of the energy enterprise and for their own use. Therefore, it may be the case that such a DSOn, in addition to its own function as an operator, is also an end user and uses energy for its own use – namely, to supply energy for activities not related to energy distribution (eg, to supply its own office premises with electricity).

Therefore, each DSO (irrespective of whether it is directly connected to the transmission network) is the capacity fee payer, with regard to the entities listed in Section 3 of the Act on Capacity Markets (ie, entities connected to its distribution grid).

With regard to its own non-network needs, to the extent that an enterprise indicated in the act draws energy on the basis of its own agreement as described in Section 6 of the act, it will be treated as an 'end user' within the meaning of the act. Therefore, the distinguishing issue is the conclusion of an agreement for an entity's own non-network needs with another energy enterprise indicated in Section 6 of the act, where such enterprise acts as the end user.

The end-user category is also mentioned in Article 69.2 of the Act on Capacity markets – it is the end user directly connected to the transmission network. The enterprises mentioned in Section 6 of the act, which are directly connected to the transmission network, insofar as they are deemed end users, pay the capacity fee directly to the transmission system operator, but as an end user and not another entity as mentioned in Section 2 of the act.

Article 75(5) of the Act on the Capacity Market may play a complementary role in the interpretation process. It states as follows:

The end-user, the energy company engaged in the business activity of electricity transmission or distribution, which is not the payer of the capacity fee, and the energy company generating electricity, connected to the distribution grid, shall transfer funds from the capacity fee to the payer of the capacity fee, within the period specified in the regulations issued under Article 76.

Therefore, this provision indicates a category of entities that are energy companies directly connected to the transmission network. Such enterprises are obliged to pay the capacity fee directly to the transmission system operator, bypassing the payer (the DSO).

Comment

DSOs not directly connected to the transmission network can play a double role in the capacity fee collection system – namely, as the capacity fee payer to the extent indicated in Article 69.3 of the Act on the Capacity Market and also as the end user to the extent indicated in Article 69.6 of the act.

The above interpretation of the Act on the Capacity Market was confirmed in the tariff of Polskie Sieci Elektroenergetyczne SA, which is the transmission system operator in the Polish electric energy system. According to Point 8.49 of this tariff:

[e]nergy companies engaged in the business activity of distribution or generation of electricity are considered end-users if, in purchasing electricity and transmission or distribution services from third parties, they use the purchased electricity for their own use, i.e. for purposes related to their business activity other than the provision of distribution or generation services, and pay a capacity fee in this respect to the company to whose facilities, systems, or networks they are connected.

For further information on this topic please contact Patrycja Nowakowska at Kubas Kos Galkowski's Krakow office by telephone (+48 12 619 40 40) or email (patrycja.nowakowska@kkg.pl). Alternatively, contact Kamil Zawicki at Kubas Kos Galkowski's Warsaw office by telephone (+48 22 206 83 00) or email (kamil.zawicki@kkg.pl). The Kubas Kos Galkowski website can be accessed at www.kkg.pl.

Endnotes

(1) M Kraśniewski, "Opłata mocowa w rynku mocy", PUG 2019/9/8-16.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Patrycja Nowakowska



Kamil Zawicki