Possible actions of generators in relation to the DSO's announcements on unfulfilled connection agreements

In July 2024, announcements appeared on the websites of the four largest Distribution System Operators in connection with the published ERO President's Notice No. 37/2024 and the call on both Electricity System Operators and generators to verify connection agreements due to the expiration of the maximum time limit set by the RES Act up to which generators could extend the deadline for supplying electricity to the grid for the first time by submitting an appropriate application, as referred to in Article 184d (1) and (1a) of the RES Act.

According to what appears to be a consistent position of the DSOs, the Operators intend to send inquiries to generators who are parties to still unfulfilled connection agreements for RES installations to demonstrate the inclusion of the connected installation in the won power market auction or the advanced stage of implementation of the installation. This information is to be the basis for further actions by Operators related to the expiration of the deadline referred to in Article 184d(1) of the RES Act. This text is a continuation of our considerations on this topic, following the article that appeared on CIRE (https://www.cire.pl/artykuly/brak-kategorii/co-dalej-z-niezrealizowanymi-umowami-o-przylaczenie-do-sieci-po-16-lipca-2024-r).

This raises the question of what further actions generators interested in continuing to implement connection agreements can take if they receive a call from the Operator and, in the future, perhaps terminate the connection agreement.

REQUIRED LEVEL OF DEVELOPMENT OF INVESTMENTS

While the aforementioned prerequisite for the inclusion of a RES installation in a successful power market auction does not raise any major interpretative doubts and follows from the law (cf. Article 81(9) of the RES Act), the prerequisite of the degree of progress of the RES installation is difficult to interpret at this point. It should be noted that the legislator has not indicated the criteria for such an assessment. This means that the ESOs, in determining the aforementioned prerequisites, have a certain discretion, limited, however, by the principle of equal treatment of users as well as by the prospect of allegations of abuse of subjective rights. It will probably also be necessary to analyse specific facts, the degree of advancement of the project, the costs incurred, and the realistic prospect of execution of the connection agreement. These circumstances should be indicated by generators in response to the Operator's request. This is because one cannot lose sight of the climate policy goals that force increased generation from RES. This would be helped by leaving and continuing to implement those projects that promise final success and the fulfilment of connection agreements while terminating those connection agreements with which there is no chance of implementation. Thus, such "projects" not only do not help but actually harm (by blocking capacity) in achieving these goals.

VERIFICATION OF THE PROVISIONS OF THE CONNECTION AGREEMENT

When analysing the possibility of terminating a connection agreement, it will also be necessary to review the content of the contractual provisions. The provision of Article 7.2a(2) of the Energy Law only introduces the obligation to include a provision in the connection agreement of a RES installation, according to which the basis for termination of the agreement is the failure to supply electricity to the grid for the first time within the period indicated in the connection agreement, not exceeding 48 months from the conclusion of the connection agreement. However, it does not specify the exact moment at which a party to the agreement may exercise its right to terminate the agreement on this basis (make the relevant declaration of intent). Therefore, it should be considered that the parties to the connection

agreement could have specified the issues of termination in the agreement referred to in Article 7.2a(2) of the Energy Law, which seems justified by the need for the parties to be certain about the continued performance of the connection agreement in the situation of failure to deliver energy to the grid on time for the first time. If the time limit within which the parties may exercise their right to terminate the agreement is clarified, the possibility of terminating such a connection agreement should be analysed taking into account the specific provisions contained therein.

ENTITY COMPETENT TO SETTLE DISPUTES

However, if a dispute arises against the background of the concluded agreement - e.g., the generator disputes the effectiveness of the termination of the agreement, or the dispute involves issues of improper performance or non-performance of contractual obligations - the question of the entity with subject matter jurisdiction to resolve the dispute should also be considered. Pursuant to Article 8 sec. 1 of the Energy Law, with respect to disputes arising under a connection agreement, the President of the ERO is competent to resolve them only if the disputed case concerns a refusal to conclude a connection agreement (including an increase in connection capacity) or a refusal to amend the agreement referred to in Article 7 sec. 2a of the Energy Law with respect to the date on which electricity is first delivered to the grid. Thus, while the second case indirectly relates to the ERO President's cognizance under Article 184d(3) of the RES Act, it should be recognized that it is limited only to a dispute concerning the refusal to amend the agreement with respect to the first-time delivery of electricity to the grid as of the date indicated in the generator's application, and not to disputes arising against the background of the termination of the connection agreement due to the lack of timely performance of this obligation. Thus, the view should be shared with the doctrine, according to which the competence of the ERO President to resolve disputes should be understood narrowly, limiting it only to the cases enumerated in Article 8(1) of the Energy Law.

Therefore, the court competent to resolve disputes concerning the determination of the ineffectiveness of the termination of the agreement or the contractual liability of the parties due to improper performance of the agreement will be the common court. Such a view is also confirmed by the case law, where the Supreme Court, in its judgment to ref. III SK 35/07 ruled that the resolution of the issue of whether the termination of the agreement was in accordance with the law (the provisions of the agreement and the Energy Law) is not within the cognition of the ERO President but within the jurisdiction of a common court. In turn, in the Antimonopoly Court's ruling to XVII AmE 80/01, the Court noted that resolving the issue of whether the non-performance of an agreement is an illegal act or is legally justified is not within the scope listed in Article 8(1) of the Energy Law, as this is the competence of common courts. The plaintiff may assert its rights by bringing an appropriate lawsuit.

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