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NATIONAL COMMISSION FOR STATE REGULATION OF
IN THE FIELDS OF ENERGY AND UTILITIES

DECREE
23.04.2021 № 714

On refusal of certification of NPC Ukrenerg

In accordance with paragraph 7 of part one of Article 17 of the Law of Ukraine "On the National Commission, state regulation in the fields of energy and utilities", paragraph 3 of part three of Article 6, Article 34 of the Law of Ukraine "On the Electricity Market", part two of Article 1 of the Law of Ukraine "On ratification of the Protocol on Ukraine's accession to the Agreement on the Establishment of the Energy Community", the conclusion of the Energy Community Secretariat of February 5, 2020 No. 1/20, the National Commission for State Regulation of Energy and Utilities

To decide on the refusal of certification of the PRIVATE JOINT STOCK COMPANY "NATIONAL ENERGY COMPANY UKRENERGO" (EDRPP code 00100227) on the basis of the attached justification.

Acting Chairman of the National Energy and Utilities Regulatory Commission O.Magda

Annex to the NEURC Resolution
23.04.2021 № 714

JUSTIFICATION

PRIOR TO THE DECISION TO REFUSE CERTIFICATION OF THE PRIVATE JOINT STOCK COMPANY "NATIONAL ENERGY COMPANY UKRENERGO"

1. Introductory part

Articles 9 and 10 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 on common rules of the domestic electricity market and on the abolition of Directive 2003/54/EC (hereinafter referred to as the Directive) and Article 3 of Regulation 71 On July 13, 2009, the European Parliament and the Council of 13 July 2009 on the conditions for access to the grid for cross-border electricity exchange (hereinafter referred to as the EU Regulation) defines the requirements for the appointment of a business entity that has received a certification decision in accordance with the requirements of the DIRECTIVE and the EU Regulation. The implementation of these requirements of the Directive and the EU Regulation in the national legislation is envisaged by the international obligations of Ukraine adopted within the framework of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand (the Agreement was ratified by the Law of Ukraine "On Ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand), the Agreement on the Establishment of the Energy Community, which was signed on September 24, 2010 in Skopje (Macedonia) and ratified by the Law of Ukraine "On Ratification of the Protocol on Ukraine's Accession to the Treaty on the Establishment of the Energy Community", as well as the Law of Ukraine "On the Electricity Market" (hereinafter – the Law).

According to the Law, the transmission system operator may be exclusively the owner of the transmission system, which is defined as the ownership separation model (OU separation model).

PRIVATE JOINT STOCK COMPANY "NATIONAL ENERGY COMPANY UKRENERGO" (hereinafter referred to as PJSC NPC Ukrenerg) submitted a request to the NEURC for certification of the transmission system operator (letter No. 01/30692 of August 14, 2019) together with the documents data and information required in accordance with the Procedure for certification of the electricity transmission system operator approved by the NEURC Resolution No. 1016 of August 10, 2017 (hereinafter – the Certification Procedure).

NEURC considered the documents, data and information submitted by PJSC NPC Ukrenerg on compliance with the requirements for the separation and independence of the electricity transmission system operator provided for by the Law, as well as information provided from other institutions and enterprises, and resolution No. 2094 of October 7, 2019, made a preliminary decision on certification of the electricity transmission system operator, which stipulates that in order to make a final decision on certification of the transmission system operator.

1) amend the Charter of PJSC NPC Ukrenerg in terms of excluding provisions that do not meet the requirements of the Law and other regulatory acts in the field of energy in terms of compliance with the requirements for the separation and independence of the transmission system operator, in particular paragraphs 2.2.15, 2.2.18 – 2.2.20, 2.2.24 – 2.2.27 of the Charter;

2) amend part three of Article 32 of the Law in terms of the possibility of consolidating the transmission system operator on the right of economic management of the transmission system.

In this regard, on October 7, 2019, the NEURC informed the Energy Community Secretariat of the preliminary decision and provided information and information provided by PJSC NPC Ukrenerg in accordance with the requirements of the Certification Procedure.

On February 5, 2020, the NEURC received the conclusion of the Energy Community Secretariat No. 1/20, according to which PJSC NPC Ukrenerg cannot be certified according to the ownership separation model (OU), given the specifics of Ukrainian legislation.

2. Legislation applicable

According to part one of Article 34 of the Law, the procedure for certification, which contains requirements for notifications, documents, data and information provided by the subject requesting certification, the term of their submission, the amount and procedure for payment for certification, the validity of the certification decision are approved by the Regulator.

In pursuance of the requirements of the NEURC Law, resolution No. 1016 of August 10, 2017 approved the Certification Procedure.

The procedure for separating the transmission system is defined by Article 32 of the Law, the provisions of which stipulate that the transmission system operator is a legal entity that is not an integral part of a vertically integrated business entity and which carries out economic activities that do not depend on activities for the production, distribution, supply of electricity and trader activities. The transmission system operator has no right to carry out activities for the production, distribution, supply of electricity and trading activities. The transmission system operator can only be the owner of the transmission system. In order to ensure the independence of the transmission system operator, any individual or legal entity (if a person or persons are state bodies, then two different state bodies that control the transmission system operator or transmission system, on the one hand, and control over a business entity that carries out activities for the production (production) and / or supply of electricity (natural gas), on the other hand, should not be considered as different persons) has no right to simultaneously:

1) directly or indirectly exercise sole or joint control over at least one business entity (including foreign ones) that conducts activities for the production (production) and/or supply of electricity (natural gas), and directly or indirectly exercise sole or joint control over the transmission system operator (including being the owner of the transmission system) or enjoy any right regarding the transmission system operator (including any

2) directly or indirectly exercise sole or joint control over the transmission system operator (including being the owner of the transmission system) and directly or indirectly exercise sole or joint control over at least one business entity (including a foreign entity) that carries out activities for the production (production) and / or supply of electricity (natural gas), or enjoy any right regarding at least one business entity (including a foreign one) that carries out activities for the production (production) and / or supply of electricity (natural gas);

3) appoint at least one official of the transmission system operator and directly or indirectly exercise sole or joint control over at least one business entity (including foreign ones) that conducts activities for the production and/or supply of electricity, or enjoy any right with regard to at least one business entity that conducts activities for the production and/ or supply of electricity;

4) be an official of the transmission system operator and at least one business entity (including a foreign one) that conducts activities for the production and/or supply of electricity,

where the term "right" refers to:

1) the right to vote in the bodies of a legal entity, if the formation of such a body is provided by the charter or other constituent document of such a legal entity;

2) the right to appoint officials of bodies of a legal entity;

3) possession of 50 percent or more of corporate rights of a legal entity.

Taking into account Article 34 of the Law, the Regulator, after receiving the conclusion of the Energy Community Secretariat regarding the preliminary decision on certification, considers it and makes a final decision on certification or refusal of certification. If the Regulator makes a final decision on certification or certification refusal, which takes into account the conclusion of the Energy Community Secretariat regarding the preliminary decision on certification or refusal of certification, such a final decision, together with the conclusion of the Energy Community Secretariat, is to be made public by posting on the Regulator's website.

3. Conclusions and recommendations of the Energy Community Secretariat

On February 5, 2020, the Energy Community Secretariat adopted and published Decision No. 1/20 on certification of PJSC NPC Ukrenergo (hereinafter – the Conclusion), which was prepared in accordance with the requirements of Part One of Article 3 of Regulation (EC) No. 714/2009 and Part Six of Article 10 of Directive 2009/2009 72/EC on the analysis of compliance of the NEURC Resolution No. 2094 of October 7, 2019 "On the adoption of a preliminary decision on certification of the electricity transmission system operator" (hereinafter referred to as the preliminary decision of the NEURC) with the requirements of part two of Article 10 and Article 9 of Directive 2009/72/EC (hereinafter referred to as the Electricity Directive).

Thus, the Secretariat carried out a normative and legal assessment of the selected model of property separation – the OU model and states that Articles 32, 34 – 36 of the Law contain requirements for the separation and certification of the transmission system operator provided for by the Electricity Directive.

In assessing the compliance of the previous decision of the NEURC, the unbundling model, which is enshrined in the Electricity Directive, the following aspects matter:

a) a business entity subject to certification must own the assets of the electricity transmission system in accordance with the requirements of paragraph "a" of part one of Article 9 of the Electricity Directive;

b) a business entity subject to certification must perform the functions and tasks of the transmission system operator as required by paragraph "a" of part one of Article 9 of the Electricity Directive;

c) control and exercise of the rights of a business entity subject to certification must be separated from the control and exercise of the rights of business entities engaged in the production or supply of electricity and natural gas, as required by parts 1 - 3rd, 6th, seventh and twelfth of Article 9 of the Electricity Directive.

Compliance with paragraph "a" of part one of Article 9 of the Electricity Directive is the main condition for certification and provides that each business entity that owns the transmission system acts as the transmission system operator, that is, the business entity applying for certification owns assets, in particular the transmission system. Ownership of assets of the transmission system is one of the key elements of the model of separation of property, since it ensures uncompromising independence of TSOs when making decisions on management and investment in the system and excludes a potential conflict of interest with any third party that owns assets, as well as reduces the legal and economic complexity caused by the need to establish potentially ambiguous and non-transparent contractual relations between TSOs and asset owner.

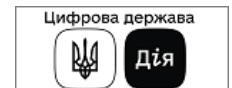
To separate PJSC NPC Ukrenergo, this requirement is critical, as it requires amendments to legislative acts. Thus, in the Conclusion, the Secretariat focused on the issue of property rights. At the same time, the Secretariat has no prejudice regarding the compliance of PJSC NPC Ukrenergo with other requirements stipulated by paragraphs "b" and "c" of part one of Article 9 of the Electricity Directive.

Having considered the preliminary decision of the National Energy and Utilities Regulatory Commission, the Secretariat noted that PJSC NPC Ukrenergo does not own either the assets of the transmission system or the rights equivalent to the ownership of the transmission system assets, and therefore the requirement for the ownership of assets of the electricity transmission system of PJSC NPC Ukrenergo has not been fulfilled. Thus, today PJSC NPC Ukrenergo cannot be certified according to the ownership separation model (OU model), given the specifics of Ukrainian legislation.

In order to ensure compliance of PJSC NPC Ukrenergo with the requirements of the Electricity Directive, the Secretariat recommended amending the Law that would allow PJSC NPC Ukrenergo to be certified according to the model of an independent transmission system operator (ISO model).

4. Conclusions

Given the documents, data and information provided by PJSC NPC Ukrenergo, other interested persons and organizations, as well as the conclusions of the NEURC, highlighted in the justification for the preliminary decision on certification of the Private Joint Stock Company "National Energy Company "Ukrenergo", adopted in accordance with the NEURC Resolution No. 2094 of October 7, 2019, as well as the conclusion of the Energy Community Secretariat of February 5, 2020 No. 1/20, the NEURC refuses to certify PJSC "NPC"



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