

ENERGY AGENCY
OF THE REPUBLIC OF SERBIA
No: 312-3/2016-C-I
Date: May 3, 2018
Belgrade, Terazije 5/5

Energy Community RECEIVED						
Date: 07. Mai 2018						
D	LEGAL	FIN	EL	GAS	INFR	ECRB
Original:			Copy:			

ENERGY COMMUNITY SECRETARIAT
-Mr. Janez Kopač, Director -

Am Hof 4
1010 Vienna

Reference: Your request of September 20, 2017 for the renewal of Joint Stock Company "Elektromreža Srbije" Belgrade certification procedure

By the Decision of the Energy Agency of the Republic of Serbia No. 312-3/2016-C-I of August 4, 2017, in line with the Energy Law ("Official Gazette of RS", No. 145/14), the Joint Stock Company "Elektromreža Srbije", Belgrade was awarded with an electricity transmission system operator certificate.

The provision of Article 103 of the Energy Law ("Official Gazette of RS", No. 145/14) prescribes that the Energy Agency of the Republic of Serbia initiates a new certification procedure in case when the competent authority, in accordance with the obligations arising from ratified international agreements, submits a justifiable request.

In your document of September 20, 2017, you addressed the Energy Agency of the Republic of Serbia with a request to initiate new certification procedure in order to reassess the compliance of the Joint Stock Company "Elektromreža Srbije", Belgrade (hereafter: „EMS" JSC, Belgrade) with the criteria related to the control over the transmission system operator and control over energy entities performing electricity, i.e. natural gas production and supply.

The request for the initiation of a new certification procedure is based on the following:

1. amendment to the national legal framework;
2. impact of amendments to the national legal framework to the compliance of "EMS" JSC, Belgrade with the unbundling criteria.

Namely, in the given request it was highlighted that it was neither clear from the Decision of the Energy Agency of the Republic of Serbia No. No. 312-3/2016-C-I of August 4, 2017 on the issuance of the certificate to the electricity transmission system operator nor from the amendments to the Law on Ministries whether the Ministry of Mining and Energy and the Ministry of Economy took over full and separate control over the transmission system operator and the control over energy entities performing electricity, i.e. natural gas production and supply. The Secretariat considers that the given issue is subject to doubt even after the amendments to the Law on Ministries since it seems that the Government seems to remain the only legal person which "represents the Republic of Serbia and exercises the rights and obligations which the Republic of Serbia has as the founder of public enterprises" – Article 4 of the Law on the Government "Official Journal

RECEIVED

of the Republic of Serbia" No. 55/2005, 71/2005, 101/2007, 65/2008, 16/2011, 68/2012 - decision of the Constitutional Court, 72/2012, 7/2014 - decision of the Constitutional Court and 44/2014). The Secretariat finds that the Decision on Certification of "EMS", JSC, Belgrade does not confirm whether the condition related to true separation between two state bodies is complied with, i.e. one should check if the state body which controls the transmission system operator performs these tasks under amended circumstances provided by the amended Law on Ministries in full autonomy and if it subordinates them to another collegial or single body (such as the Government or the Prime Minister) controlling (also) electricity generation or supply undertakings.

It is also stated that the final decision refers to the Law on State Administration without indicating the relevant articles or the importance of that law for the given case. The Decision prescribes that "the ministry shall be managed by the minister who shall represent the ministry and shall pass legislation and decisions in administrative and other matters and decide on other issues from the scope of the work of the ministry and who shall be accountable to the Government for the work of the ministry and for the situation in the fields from the scope of work of the ministry". In addition, it is stated that the Agency concludes that it arises from this law that there is not interaction between the work of the ministry in charge of economy and the ministry in charge of energy and that there is no common control over the transmission system operator and energy entities performing electricity production and supply. The Secretariat highlights that the Agency bases its conclusion within its final decision that "EMS", JSC, Belgrade complies with the conditions for transmission system operator certification on this provision pursuant to the Energy Law.

The submitted request indicates that the Secretariat was included in the certification procedure in the phase when factual ground was different in comparison to the one at the moment when the final Agency decision was adopted, i.e. the current moment, which results in the fact that the opinion of the Secretariat was not based on the same circumstances, facts and regulations as was the case with the final Agency decision. At the same time, the final decision which is based on new legal circumstances opens a set of issues the Secretariat did not have an opportunity to give their opinion on in order to provide an opportunity for the Agency to take that opinion into account and it seems that this piece of legislation requires a more detailed analysis and comparison with the provisions on ownership unbundling. For these reasons, the Secretariat requests from the Agency to launch a certification procedure for the assessment of compliance of the transmission system operator with the unbundling criteria prescribed by Article 9 of the Directive 2009/7/EC and transposed in Articles 98 and 99 of the Energy Law because circumstances changed after the Secretariat Opinion 3/17 of June 15, 2017 was issued.

Considering the justification of the submitted request and considering the statements made in your request, we would like to stress the following:

Acting upon the application of "EMS", JSC, Belgrade of October 25, 2016 for electricity transmission system operator certification, the Energy Agency of the Republic of Serbia adopted a preliminary Decision on certification of "EMS", JSC, Belgrade No. 312-3/2016-C-I of January 26, 2017 which was submitted to the Secretariat for the purpose of opinion issuance by the act of this Agency No.312-3/2016-C-I of February 13, 2017 (Article 102 of the Energy Law).

Upon the receipt of the Secretariat Opinion No.3/17 of June 15, 2017, a final decision on "EMS", JSC, Belgrade certification No. 312-3/2016-C-I of August 4, 2017 was adopted. The final decision was adopted by the Agency adding up to the already established factual situation with a fact that after the preliminary decision was made, amendment was made to the Law on Ministries ("Official Gazette of RS", No.

44/14, 14/15, 54/15, 96/15-state law and 62/17) which regulates the conditions in order to create conditions for the certification of the electricity transmission system operator. Namely, the amendments to the given law provided for the separation of jurisdiction over the transmission system operator and over energy entities performing electricity and natural gas production and supply. Thereby, on one hand, the Ministry of Economy has jurisdiction and control over electricity transmission while, on the other hand, the Ministry of Mining and Energy has jurisdiction and control over electricity production and supply.

The given Law, i.e. Article 4 prescribes that the Ministry of Economy performs state administration activities related to the improvement of work and operation, monitoring and drafting legal acts on the appointment and discharge of management bodies in public enterprises except in public enterprises performing electricity, i.e. natural gas production and supply. The Article 7 prescribes that the Ministry of Mining and Energy performs state administration activities related to the preparation of drafts on the appointment and discharge of management bodies as well as other legal acts related to the work and operations of public enterprises and companies performing electricity, i.e. natural gas production and supply.

Apart from this, the Agency assessed other regulations which are relevant for the regularity of the decision, i.e.:

Article 123 of the Constitution of the Republic of Serbia ("Official Gazette of RS", No. 98/06) which prescribes the jurisdiction of the Government as a collective body within the legal system of the Republic of Serbia and Article 125 of the Constitution which prescribes that the Prime Minister shall manage and direct the work of the Government, take care of coordinated political activities of the Government, coordinate the work of members of the Government and represent the Government while the ministers shall account for their work and the situation within the competence of their ministries. The power system within the legal system of the Republic of Serbia is separated into legislative, executive and judiciary power with relations based on balance and mutual control (Article 4 of the Constitution of the Republic of Serbia).

Article 7 of the Law on State Administration ("Official Gazette of RS", No. 79/05, 101/07, 95/10 and 99/14) prescribes that ministries are independent in the performance of their activities and which work within and based on the Constitution of the Republic of Serbia, laws and other regulations and general acts and Article 23 of the same Law prescribes that a minister shall manage the ministry, represent it, pass legislation and decisions in administrative and other individual matters and decide on other issues from the scope of the work of the ministry and shall be accountable to the Government and National Assembly for the work of the ministry and for the situation in all fields from the scope of work of the ministry.

Article 46 of the Law on State Administration ("Official Gazette of RS", No. 79/05, 101/07, 95/10 and 99/14) prescribes that a ministry cannot supervise the work of another ministry.

The provisions of the Law on Public Enterprises ("Official Gazette of RS", No. 15/16), i.e.: Art. 17, 22, 24, 26. para.2, 29, 31, 32, 36, 37, 40, 41, 53, 59, 66, 67 and 69 of the Law which regulates the appointment of the Supervisory Board, the scope of its work, procedure for the appointment of the manager, of the acting manager, approval of annual, i.e. three-year operation program, monitoring programs implementation, authorization of the founder, provision of public interest protection.

Article 4 of the Law on Government ("Official Gazette of RS" No. 55/05, 71/05.... and 44/4) prescribes that the Government shall represent the Republic of Serbia as a legal person and thereupon exercise rights and duties the Republic of Serbia possesses as a founder of public enterprises, institutions and other

organisations, unless otherwise provided by law. Article 14 prescribes that a Minister shall be liable for execution of Government programmes and policy, for decisions and measures he or she has passed or failed to pass or take and for the implementation of mandatory instructions and tasks entrusted to him by the President of the Government.

Article 8 of the Law on Government prescribes that the Government shall supervise the work of state administration authorities, direct the state administration authorities in implementation of policy and execution of laws and other general acts and harmonise their work.

Rules of Procedures of the Government ("Official Gazette of RS", No. 61/06 – consolidated version, 69/08, 88/09, 33/10, 69/10, 20/11, 37/11, 30/13 and 76/14) define in more detail the regulation, method of work and decision-making process of the Government in a way that it prescribes that a state authority with the scope of work related to the topic of documentation is entitled to propose and submit the documentation for the Government session while public enterprises, institutions and other organisations submit documentation via a ministry to which scope of work they belong. A Government decision draft is prepared by the Ministry (Articles 35 and 36 of the Rules).

In addition, in order to establish full factual grounds for the assessment of the given application, in line with Article 80 of the Law on State Administration ("Official Gazette of RS", No. 79/05, 101/07, 95/10 and 99/14), the Agency asked the Ministry of Mining and Energy to issue an opinion on the implementation of Articles 98 and 99 of the Energy Law in connection with the above given regulations. The Ministry of Mining and Energy gained and submitted the following opinions: an opinion of the Ministry of Economy which is the body competent for the issuance of opinion on the implementation of the Law on Public Enterprises (Article 4 of the Law on Ministries); an opinion of the Ministry of State Administration and Local Self-Administration which is the state authority competent to issue an opinion on the implementation of the Law on State Administration (Article 10 of the Law on Ministries) and an opinion of the Republic Legislation Secretariat which is a separate organization competent for the creation, monitoring and improvement of the legal system of the Republic of Serbia, for the harmonization of regulations and general acts in the legal system of the Republic of Serbia and for the issuance of the opinion on the implementation of the Law on Government and the Law on Ministries (Article 24 of the Law on Ministries).

It arises from the submitted opinions that the ministries are independent in the performance of their activities and that they work within and on the basis of the Constitution of the Republic of Serbia, laws and other regulations and general acts and a ministry cannot supervise the work of another ministry (Articles 7 and 46 of the Law on State Administration).

Based on the above mentioned regulations and the facts established during the decision-making procedure, it was assessed that there is no mutual influence in the work of the ministry in charge of economy and the ministry in charge of energy, or of the Government in relation to the work of ministries and thereby, no common control over the transmission system operator on one hand and energy entities performing electricity production and supply on the other hand regardless of the fact that the ministers are accountable for their work and the situation in the scope of work of their ministries to the Government, which is an element of state administration not only in the Republic of Serbia, but in other countries with the same organization form as well where the Government is always a collective authority. It is also stressed that there is no mutual influence in the work of the given ministries in terms of the appointment of management bodies since the appointment of the bodies of an energy performing electricity transmission is made by the Ministry of

Economy without interference by the Ministry of Mining and Energy which is competent to propose the members of management bodies in energy entities performing electricity production and supply.

In line with the above given, the Agency adheres to the final Decision that was adopted and considers that the request for the launch of a new certification procedure for "EMS", JSC, Belgrade is not grounded.

Hereby, we would also like to ask the Secretariat to inform us if proofs of opposite grounds are available.

Copy:

- 1) Addressee;
- 2) Archive

PRESIDENT OF THE COUNCIL

