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DIRECTORATE-GENERAL FOR ENERGY

Director-General

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Ministry for Economic Affairs,
Agriculture and Innovation
Energy Market Directorate
PO Box 20101
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The Netherlands

Dear Mr V

Congestion management in Netherlands electricity transmission system

I am writing in response to your letter of 24 May 2011 and the attached note regarding the proposed introduction of a congestion management regime in the Netherlands. This email followed an earlier meeting between DG Energy and the Netherlands Ministry of Economy to discuss the proposed scheme and cost allocation regime for congestion management within the Netherlands including its application to generators using renewable sources of electricity. You specifically raise two questions, namely:

- Can the Services of the Commission confirm that the proposed implementation in the Netherlands of article 16.2 of Directive 2009/28/EC on renewable energy and specifically the proposal to pass the remaining costs of congestion management through to generators participating in the bidding system within the congested area, is not in conflict with the European legal framework?
- Annex B of the new Regulation 838/2010 introduces a tariff ceiling for the costs a transmission operator can charge to generators connected to the grid for transmission services. In that respect you seek advice as to the legal status of the financial contribution by generators in the cost of congestion management. Must this contribution be regarded as a tariff as mentioned in Article. 31(1) jo. 37(6)(a) of Electricity Directive 2009/72/EC?

Description of proposed congestion regime

The Netherlands proposes to introduce mechanisms for its electricity market whereby new generators are connected to the grid even if there is currently not enough capacity in the part of the system where they wish to connect. The transmission system operator

(hereinafter "TSO") will then be obliged to manage the resulting congestion by redispatching, i.e. paying generators in congested area to reduce production and paying generators in uncongested areas to increase production to keep the system in balance.

To a greater or lesser extent, such balancing actions¹ are a standard part of a TSO's activities. The effect of the NL decision to introduce what constitutes a "connect and manage" approach is to increase, at least temporarily, the costs of operating the transmission system.

The Netherlands proposes to oblige all generators except renewables, to participate in the balancing market. This will mean that all non renewables generators will be obliged to submit offers to the transmission system operator indicating the price which they require to increase or decrease their production. The Netherlands has not indicated that they intend to control the offers of generators in this regard.

Renewable generators are excluded from this obligation on the basis that priority access (provided for in both the Renewables Directive and the Electricity Directive) should "ensure[] that all renewable electricity sold and supported in the market obtains access to the grid". Providing this balancing service will increase the cost of operating the transmission system. This cost must be borne by system users. NL foresees passing the cost onto those generators who participate in the balancing market, thus excluding all renewable generators for those costs².

Compliance with EU Legislation

The role of the TSO is, inter alia, to ensure transmission capacity to meet reasonable demands for the transmission of electricity (Electricity Directive, Article 12(a)). They must also manage electricity flows on the system (Electricity Directive Article 12(d)). These costs are paid for by system users through regulatory approved tariffs which are applied objectively and without discrimination between system users (Electricity Directive Article 32)

Article 14(1) of the Electricity Regulation requires that these charges be transparent, take into account the need for network security and reflect actual costs insofar as they correspond to an efficient network operator. Article 14(2) goes on to state that, where appropriate the tariffs applied shall provide locational signals at EU level, and take into account the network losses and congestion caused.

It follows that generators may face tariffs which reflect the congestion caused. These may be locational³, that is the charge faced by system users may depend of their geographical

¹ It is important to distinguish between balancing actions which are designed to keep individual market participants in balance, and balancing actions which are designed to keep the system in balance.

² If, in a congested area, the TSO calculates that the quantity of non-renewable generation which could be constrained off is less than the total amount by generation must be reduced, then renewable generators in that area will be constrained off.

³ While Article 14(2) of the Regulation mentions only EU wide locational charges, there is no reason to consider that this rules out national level locational charges, particularly as congestion is a result of the location of generation load. Charges for access to the network should reflect actual costs incurred, and it is clear that these may depend on location. For example it is reasonable to assume that it costs more to construct a transmission network to the islands of Scotland or the north of Norway.

location. They should reflect actual costs incurred provided they correspond to the costs of an efficient operator and should be applied in a non-discriminatory way. To ensure that the network charges are efficient, it will be important, that the TSO is provided with a sufficient incentive to construct the necessary infrastructure to relieve the congestion, for example if the TSO does not realise the identified investments within a reasonable period of time, he should cease to be able to recover the congestion management costs. Congestion costs which are a result of previous underinvestment by the TSO should not be included. These are matters for the Regulator to decide when approving tariffs.

Therefore, setting aside the question of the non-participation of renewable generators in the congestion management framework, the Netherlands proposals as described appear to be in line with relevant EU legislation, provided the national regulatory authority has the power to exclude the congestion costs in the tariff where they result from underinvestment by the TSO.

Differential treatment of renewables

It could be possible for the Netherlands to require the removal of some elements of tariffs, in the nature of a public service obligation for the TSO, justified on the grounds of promoting renewable generation. This would have to be treated like any other aspect of subsidy or support implemented through connection or transmission charging regimes, and notified to the Commission in accordance with Article 3(9) of the Electricity Directive, and potentially for state aid approval.

However, absent such an explicit public service obligation, once priority access has been achieved, the renewable generator should be treated in a non-discriminatory manner. Therefore, it would be normal to expect renewable generators to pay charges for access to the network on the same basis as conventional generators, unless there is a difference in their use of, or impact on, the transmission system. There are no reasons to consider that the electricity generated from renewably is qualitatively different from that generated from conventional sources⁴.

Participating in a market to provide balancing services, is not equivalent to access to the grid. Conventional generators who participate in this market by offering the TSO the possibility to constrain their production off in return for a financial consideration, continue to have access to the grid. The exclusion of renewable generators from compulsory participation in this market, while placing such an obligation to participate on other generators, constitutes discrimination unless it can be objectively justified. As the costs of balancing the system are passed on only to those who participate in the market, this would constitute further discrimination, again unless an objective justification is provided.

Priority access and the source of congestion

If priority access is interpreted as meaning that renewable energy does not cause congestion, not passing on the balancing costs incurred could be argued to be cost reflective. However, locational balancing charges such as those proposed by the Netherlands have a similar effect to creating price zones – in effect there are different

⁴ The benefits of renewables which led the legislator to grant priority access to the grid are not related to the management of the transmission system.

market prices in different locations. Priority access does not extend to granting renewable generators preferential access to interconnection capacity compared to conventional generators. The Commission is of the view that the rules applying at borders between price zones within Member States should be in line with the general rules set out in Regulation 714/2009.

Legal status of contribution by generators to cost of congestion management

The limit on average transmission charges for producers of electricity established in Commission Regulation 838/2010 should not affect the operation of this balancing market. This is because, Point 1.2 of Part B of the Annex to this Commission Regulation specifically excludes charges paid by producers related to ancillary services. Balancing the system to ensure its efficient operation is such an ancillary service.

Conclusions

Based on the above analysis, it is the view of the services of DG Energy that:

- (1) The proposed mechanism as described in your note of 14 March in the Netherlands is in line with European internal market legislation provided that:
 - The national regulatory authority ensures that there are appropriate incentives on the transmission system operator to ensure that the transmission capacity is realised to relieve the congestion where this can be economically achieved; and
 - The special treatment of renewables can be justified as a public service obligation in accordance with Article 3 of Directive 2009/72/EC. This requires notification to the Commission in accordance with Article 3(9) of the Electricity Directive;
- (2) The balancing costs faced by generators as a result of the proposed mechanism as described in your note of 14 March do not count towards the ceiling set out in Commission Regulation 838/2010.

Please note that this letter is not legally binding. Giving binding interpretation of Union law is ultimately the role of the European Court of Justice. This letter does not create any new legislative rules. It merely sheds light on the current understanding of the services of DG Energy on how certain provisions of European internal energy market legislation are to be interpreted.

Yours sincerely


Philip Lowe