ENERGY | NEWSLETTER

February 2020

Grid capacity in the Netherlands

Due to rapid growth in the development of renewable electricity projects such as solar and on-shore wind in recent years, grid transport capacity has become scarce in certain areas of the Netherlands. Grid operators are therefore preparing large-scale grid reinforcements. In the meantime, several (interim) solutions have recently been put forward, including:

- an announcement by grid operator Enexis that it will to invest EUR 43 million in mobile substations (e-houses) in congested areas to increase its grid capacity; and
- a proposal by the Minister of Economic Affairs and Climate Policy, Minister Wiebes, to enable grid operators to release the emergency capacity in their networks (*i.e.*, using the existing back-up capacity and thereby temporarily abandoning the so-called 'n-1' norm).

Advocate-General opinion may have legal and fiscal impact

Following a request of the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*), Advocate-General (A-G) Wattel rendered an opinion (in Dutch) on 3 December 2019, in a case with potentially far-reaching implications. The case concerns a dispute between regional grid operator Liander and the ACM regarding the statutory obligation to provide a grid connection. A grid operator is obliged to provide a grid connection for each immovable property object (*WOZ-object*) within the meaning of the Valuation of Immovable Property Act (*Wet waardering onroerende zaken*) upon request of the owner of such immovable property. In practice, a connected party sometimes legally splits up its ownership in order to create several immovable property objects and thus obtain several (relatively cheap) small connections, instead of one (more expensive) large connection to the grid. Therefore the question arose, whether grid operators and the ACM are allowed to deviate from prior definition of the immovable property object (which is the prerogative of the municipal (tax) authority). A-G Wattel answered this question in the affirmative.

The case has been referred to the Grand Chamber, comprising a joint committee of the Trade and Industry Appeals Tribunal, the Supreme Court and the Council of State, which indicates the importance of the matter. It cannot be ruled out that the final judgement will also have fiscal implications, *e.g.* with respect to energy tax and the way the tax authorities will treat (volumes supplied via) an "*aansluiting*" with more than one "*verbindingspunt*".

SDE+ transport indication

The SDE+ sustainable energy production subsidy scheme has been made conditional upon a positive transport indication obtained from the relevant grid operator. The transport indication must prevent that SDE+ subsidy decisions are granted to projects at locations where, due to lack of capacity on the electricity grid, such projects cannot be realized within the applicable time limits. On 19 December 2019, Minister Wiebes announced his plans for the 2020 SDE+ spring tender round. The 2020 SDE+ spring tender round is open from 17 March 9am CET to 2 April 5pm CET with a budget of 2 billion euros. The 2020 SDE+ spring tender round has 3 phases. The phase limits have been lowered compared to the 2019 SDE+ autumn tender round, to take account of cost price reduction and to allow sufficient competition between techniques.

From 17 February 2020 on, it is possible to request a transport capacity indication for the 2020 SDE+ spring tender round. Because the transport capacity can change, a transport indication from 2019 is not sufficient. The transport capacity indication must be issued in 2020.

The grid operator should issue a transport indication upon request, unless the application is made in an area where the grid operator has made a formal pre-announcement of congestion to the Dutch energy regulator (ACM), the congestion investigation has been completed and published and the investigation shows that congestion management cannot be applied. In that case, no transport indication is provided unless the congestion is resolved within the realization period of the SDE+ project. For example, if the project has a realization period of 3 years and the grid operator expects to resolve the capacity bottleneck within 2 years, then a positive transport indication should be provided, even though the application is in a "red" area.

Recent case law

Two judgements with regard to congestion management between customers and grid operators have recently been issued:

1) Court of Oost Brabant 24 December 2019 (*Pottendijk/Enexis*) and
2) Court of Oost Brabant 30 January 2020 (*Zehnder/Enexis*).

From these judgements (and also Court of Gelderland 16 April 2019) some interesting conclusions can be drawn (provisionally, since appeals are still pending in some cases).

Grid operators have an unconditional statutory obligation to provide parties with a grid connection upon request (Article 23 of the Dutch Electricity Act 1998, (E-Act)). The non-discrimination provision of Article 23(2) E-Act entails that grid operators cannot distinguish between new customers and existing customers in the allocation of transport capacity. A *'first come, first served'* method, as used by certain grid operators, is deemed to be in violation of the non-discrimination principle.

Grid operators have a statutory obligation to provide transport capacity equally to all customers (*i.e.*, parties with a grid connection) upon request (Article 24 E-Act). A request for transport capacity can only be refused where transport capacity is reasonably unavailable (*i.e.*, where the network is physically congested).

Only actual physical congestion justifies a refusal of transport capacity and not so-called "contractual congestion" (*i.e.*, the maximum capacity being exceeded merely 'on paper' because of already contracted capacity). Before a grid operator is allowed to refuse a request for electricity transport on grounds of physical congestion, the grid operator must have applied congestion management or must at least prove to have investigated whether (voluntary) congestion management could offer relief. Congestion management comprises a system of (bid/offer) price mechanisms (incentives) under which customers can be requested to decrease production (or demand) in return for financial compensation. The Electricity Grid Code stipulates that congestion management should only be applied in order to prevent transport refusal.

If (voluntary) congestion management cannot offer relief, and the grid operator can prove that physical congestion exists, the grid operator may declare its network (or part of it) congested and apply obligatory curtailment (in a non-discriminatory manner). This has not yet occurred, as in none of the cases was the grid operator able to prove that the grid was congested and that therefore transport capacity was not reasonably available.

Urgenda climate case

On 20 December 2019, the Dutch Supreme Court confirmed the earlier judgements of the District Court and Court of Appeal in the Hague ordering the Dutch Government to reduce greenhouse gas ("GHG") emissions by at least 25% by 2020 compared to 1990 levels, instead of the 20% reduction target that the government had adopted since 2011.

The Supreme Court based its judgment on the UN Climate Convention and on the Dutch State's legal duties to protect the life and well-being of citizens in the Netherlands, which obligations are laid down in Article 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). The Supreme Court ruled that the life and well-being of Dutch residents could be seriously affected by the risk of dangerous climate change.

The Dutch State had argued that its 20% reduction target was reasonable, and also that issues such as a GHG reduction target are not legal but inherently political. However, the Supreme Court found these arguments unpersuasive.

According to the Supreme Court, the Dutch Constitution requires the Dutch courts to apply the provisions of the ECHR. This role of the courts to offer legal protection is an essential element of a democracy under the rule of law. The courts are responsible for guarding the limits of the law. That is what the Court of Appeal had done in this case, according to the Supreme Court.

The Supreme Court also determined, since there is a large degree of consensus in the scientific and international community on the urgent need for developed countries to reduce GHG emissions by at least 25% by the end of 2020,

In letters of 20 December 2019 and 31 January 2020, Minister Wiebes responded to the Supreme Court ruling and emphasized that the Cabinet will continue to work on measures aimed at reducing GHG emissions in order to implement the irrevocable order of the Supreme Court.

Recent projects HVG Law

Recent sustainable energy projects HVG Law has worked on include:

- Cooperation Netherlands Climate Fund (*Klimaatfonds Nederland*) and IX Solar
- Development combined wind/solar park Pottendijk
- Financial close windpark Oostermoer
- World's largests wind turbine Haliade-X
- Windpark SwifterwinT (Windplan Blauw)

About us

HVG Law is a trusted partner in the energy sector. We are an independent quality-driven *full-service* law firm, with over 200 lawyers and civil-law notaries in the Netherlands and Belgium, a unique partnership with EY Tax and a global international network (EY Law) with 2,500+ lawyers in over 75 jurisdictions worldwide.

The HVG Law Energy & Utilities team is closely involved in projects, transactions and proceedings in the energy sector, covering all areas of law. Our experts have broad experience in regulation, M&A, development, structuring and financing of renewable energy projects, including solar, wind, biogas and geothermal.

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