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THE ROLE OF THE PRESIDENT OF THE ENERGY REGULATORY OFFICE IN RESOLVING DISPUTES RELATED TO REFUSAL TO CONNECT A RENEWABLE ENERGY INSTALLATION

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Abstract. The competences of the President of the Energy Regulatory Office include, inter alia, resolving disputes between parties of specific contractual relations in which at least one party is an energy enterprise. One of the categories of such disputes is refusal to connect a renewable energy installation. The analysis presented in this paper leads to a conclusion that due to the multidimensional goals laid down in energy law, technical and economic conditions should be examined while taking into account interests of all stakeholders. This article presents analyses the law in force, involving a case study of a Polish example and a comparative analysis. As a result, the author has come to the conclusion that resolving disputes by the President is a legal instrument that serves to ensure equal treatment and connection of market participants who request it, at the same time facilitating reduction of CO2 emissions and energy neutrality pursuant to the principles adopted by the European Union and the international community. The article draws on selected acts of ordinary law, the relevant literature, decisions made by courts and tribunals, as well as data published by the President and by industry entities.

Keywords: energy law; President of the Energy Regulatory Office; resolving disputes; renewable energy sources.

INTRODUCTION

The aim of research in this article is to establish criteria that should guide the President of the Energy Regulatory Office (hereinafter President) in resolving disputes concerning a refusal to connect an RES installation to the grid.

In the legal system of countries and international organizations, legislators refer to the question of axiology in many instances [Działocha and Jarosz-Żukowska 2009, 82]. Therefore, law is not an aim in itself, it is a tool applied to achieve intended goals (they are directly expressed in provisions of the law or may be interpreted out of them). It is assumed that the legislator always acts intentionally. The basic pillar for administrative law is the protection of the common good, optimally harmonized with the interest of the individual [Duniewska 2015, 104-105].

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The Energy Law of 10 April 1997,[1] is one of the legal acts in Poland in which the legislator refers to the entire pool of values already in the first provisions. Pursuant to Article 1(2) EL, the purpose of the Act is to create conditions for sustainable development of the country, energy security, efficient and rational use of fuels and energy, development of competition, counteracting negative consequences of natural monopolies, consideration of natural environment protection requirements and obligations stemming from international agreements and balancing the interests of energy enterprises and fuel and energy customers. The broad array of goals emphasizes the importance of the energy sector and provides reasons for regulating it.

The set of objectives of the Polish energy law is impacted by the EU's laws, including primary legislation, the Treaty on the Functioning of the European Union,[2] secondary legislation and international law. Pursuant to Article 194(1) TFEU, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

The provisions of Article 194 TFEU are further elaborated in the entire EU climate and energy package, where the EU takes independent action and supports and initiates global action. During the 21st session of the Conference of the Parties to the United Nations Framework Convention on Climate Change – COP21 and the 11th session of the Meeting of the Parties to the Kyoto Protocol, held from 30 November to 11 December 2015 in Paris, 195 countries executed an international climate agreement that will limit global warming by up to 2°C by reducing greenhouse gas emissions.[3] The European Union and all its Member States have signed and ratified the Paris Agreement and are determined to implement it.[4]

The decisions of the Paris Agreement are explicitly referred to in Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.[5] Its recitals 2, 3 and 4 indicate that the increased use of energy from renewable sources is an important part of the package of measures necessary to reduce greenhouse gas emissions and meet the EU's commitments under the 2015 Paris Agreement on Climate Change.

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[1] Journal of Laws of 2024, item 266 as amended [hereinafter: EL].

[2] OJ EU C 83, 30.03.2010, p. 47-403.

[3] See https://unfccc.int/event/cop-21 [accessed: 04.12.2023].

[4] See https://www.consilium.europa.eu/pl/policies/climate-change/paris-agreement/ [accessed: 04.12.2023].

[5] OJ EU L 328, p. 82-209.

The mere vows to improve the condition of and to protect the environment by changing the technologies used or various restrictions on human activity may be insufficient. Therefore, we need legal instruments that on the one hand will encourage positive environmental attitudes and behaviours (e.g., support systems for energy production from specific sources or compensation for entrepreneurs for investing in modern technologies), and on the other will oblige partiers to exercise such attitudes and behaviours while maintaining and respecting the rights of individuals and entrepreneurs. Such a model is prescribed for, e.g., by Article 9(2) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU:[6] "Having full regard to the relevant provisions of the TFEU, in particular Article 106 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including the security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection […]."

Going back to the objectives set out in Article 1(2) EL, it should be pointed out that they constitute an interpretative directive for the public administration bodies that apply energy law, including the President, courts, and entities which are parties to relations under administrative law created by EL's provisions [Czarnecka and Ogłódek 2012, 3]. A number of specific objectives of the regulation of the energy sector also result from EL's complementing statutes, which concretize the obligation to implement the above-cited acts of the EU law. They include the Renewable Energy Sources Law of 20 February 2015,[7] which sets out, among other things, terms and conditions for running an activity that involves electricity generation from renewable energy sources and mechanisms and instruments to support electricity generation from renewable energy sources in RES installations.

The state energy policy, which is adopted every 5 years by resolution by the Council of Ministers at the request of the minister responsible for energy, also has a major impact on the implementation of these regulatory objectives. The purpose of the state energy policy is to ensure national energy security, to increase the competitiveness of the economy and its energy efficiency, as well as to protect the environment, including the climate (Article 13 EL).

The current national energy policy is the "Energy Policy of Poland until 2040" which was adopted by the Council of Ministers on 2 February 2021.[8]

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[6] OJ EU L 158, p. 125-99.

[7] Journal of Laws of 2022, item 1378 as amended [hereinafter: RESL].

[8] Announcement of the Minister of Climate and Environment of 2 March 2021 on the national energy policy until 2040, Polish Monitor of 2021, item 264 [hereinafter: PEP2040].

As it explains, "Shaping the national energy strategy is strongly affected by the European Union's (EU) climate and energy policy, including its long-term vision of striving for EU climate neutrality by 2050 and the regulating mechanisms stimulating the achievement of effects in the coming decades."[9]

In order to achieve the above assumptions, the development of renewable energy sources was identified as one of the specific objectives of PEP2040 (no. 6). Increasing the share of RES in gross final energy consumption is one of the three priority areas of the EU climate and energy policy, as well as global policies and actions to combat climate change.[10]

To sum up, the aim of this study was to determine the criteria that the President must follow in resolving disputes concerning the refusal to connect a micro-installation of a renewable energy source to the grid.

1. SPECIAL STATUS OF THE PRESIDENT OF THE ENERGY REGULATORY OFFICE

At the outset, it should be explained that until 2015 there had been no law of statutory rank in Poland that would deal exclusively with the broadly understood renewable energy sector. Partial solutions concerning this energy sector were included in the Energy Law. The Polish legislator, guided by the scale of the challenges related to the development of the use of renewable energy sources, decided to enact a separate act, i.e. the currently binding Renewable Energy Sources Law of 20 February 2015. An important effect of the adoption of the Renewable Energy Sources Law was the separation and systematisation of the support mechanisms for RES energy contained so far in the provisions of the Energy Law. This solution was based on the experience of other EU Member States that had enacted dedicated laws that made it possible to guarantee sustainable development of an energy economy based on the use of RES resources in the context of climate and environmental protection.[11]

The President of the Energy Regulatory Office plays an important role in ensuring that the assumptions adopted for the remodelling of the Polish electricity system and increasing the use of renewable energy sources are implemented. Therefore, a brief presentation of the systemic position of this regulatory authority is in order.

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[9] PEP2040, p. 3.

[10] PEP2040, p. 63-69.

[11] Cf. Explanatory Memorandum to the Government Draft Law on Renewable Energy Sources of 7 July 2014. Printing No. 2604 Part I, the Sejm of the 7th term, p. 3, https://orka.sejm.gov.pl/Druki7ka.nsf/0/64BB00DA8D2BD103C1257D150044500D/%24File/2604%20cz%20I.pdf [accessed: 05.12.2023].

The legal status of the President and his status may be analysed on different levels [Przybylska 2012, 130-47]. Firstly, the President is a national regulatory authority that enjoys independence understood in many dimensions and that performs a number of regulatory functions both at the level of national law and the European Union law. These, in turn, play an important role in implementing EU law into the legal systems of Member States [De Somer 2018, 581]. The notion of a *national regulatory* authority is a legal concept as it features in many EU regulations and directives that address grid sectors. This concept emerged as a result of progressive Europeanisation of administrative law, which then resulted in the progressing convergence of different legal systems [Widdershoven 2002, 289-306; Schwarze 2005; de Lange, Prechal, and Widdershoven 2007, 6-9; Schwarze 2011, 7-11].

Pursuant to Article 57(1) of Directive 2019/944/EU, each Member State shall designate a single regulatory authority at the national level. The obligation to ensure independence of such an authority[12] derives from Article 57(4) of Directive 2019/944/EU. It imposes an obligation on Member States to guarantee the independence of the regulatory authority and to ensure that it exercises its powers impartially and transparently. For that purpose, Member States shall ensure that, when carrying out regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority: a) is legally distinct and functionally independent from other public or private entities [Kaschny and Lavrijssen 2023, 715]; b) ensures that its staff and the persons responsible for its management: (a) act independently from any market interest; and (b) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks; this being the case, this requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 59.

On the basis of the above catalogue, it can be concluded that this independence spans multiple dimensions and manifests itself in personal, organisational, financial and decision-making aspects [Larsen et al. 2006, 858-870; Nowak 2010, 113-16]. Analogous requirements for national regulatory authorities are stipulated in Article 39(1) of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.[13]

In a different approach, the President is the central body of government administration that performs tasks in the field of regulation of fuel and

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[12] The Independence of National Regulatory Authorities Council of European Energy Regulators. White Paper series (paper # V) on the European Commission's Clean Energy Proposals, 30 June 2017, https://www.ceer.eu/documents/104400/5937686/The+independence+of+National+Regulatory+Authorities/d20f3828-2679-782d-d0d7-81bd4619bfc5 [accessed: 08.12.2023].

[13] OJ EU L 211, 14.8.2009, p. 94.

energy economy and competition promotion enumerated in statutes (Article 21(1-2) EL). These statutes primarily include the Energy Law with consideration to the state energy policy. Thus, it is evident that the national (independent) regulatory authorities were formed in the organisational structure of the national public administration under a strong influence of the EU law [Kiczka 2013, 54].

2. OBLIGATION TO CONCLUDE A CONNECTION AGREEMENT

This analysis must now move on to a presentation of the legal basis for dispute resolution carried out by the President.

First of all, it should be pointed out that, pursuant to Article 7(1) EL, an energy enterprise that deals with the transmission or distribution of gaseous fuels or energy is obliged to enter into a grid connection agreement with entities that request connection to the grid, on the basis of equal treatment and equal connection, as a priority, of a renewable energy source installation if there are technical and economic conditions for connecting it to the grid and supplying these fuels or energy and if the entity requesting the conclusion of the agreement meets the conditions for grid connection and reception. However, in the case of connecting a source or storage of electricity, the connection capacity of this source or storage of electricity may be less than or equal to its installed electrical capacity. In the event that the energy enterprise refuses to enter into a grid connection agreement or to first connect a renewable energy source installation, it is obliged to immediately notify the President and the interested entity of its refusal in writing, stating the reasons for the refusal. The grid connection obligation does not apply to the case where the entity applying for the conclusion of a grid connection agreement does not have the legal title to use the real property, facility or premises to which the gaseous fuels or energy are to be supplied (Article 7(3) EL).

To that end, the entity applying for a grid connection should file a request for determining requirements for grid connection (that is to obtain connection requirements) with the energy enterprise to whose grid it is requesting to connect.

Pursuant to Article 2(22) RESL, a renewable energy source is a renewable non-fossil energy source including wind energy, solar energy, aerothermal energy, geothermal energy, hydrothermal energy, hydropower, wave energy, current and tidal energy, energy obtained from biomass, biogas, agricultural biogas and bioliquids. A renewable energy source installation is defined in Article 2(13) RESL, as an installation that is a separate set of: a) energy generation facilities described by technical and commercial information, in which energy is produced from renewable energy sources, or, b) buildings

and equipment forming a technical and functional whole that is used to produce agricultural biogas and also an electricity storage unit or an agricultural biogas storage unit connected to it.

A small installation is defined as an installation of a renewable energy source with a total installed power capacity of more than 50 kW and no more than 1 MW, connected to a power grid with a rated voltage of less than 110 kV, or with a cogenerated thermal input of more than 150 kW and less than 3 MW, with a total installed capacity of more than 50 kW and no more than 1 MW (Article 3(18) RESL). Pursuant to Article 2(19) RESL, a micro-installation is defined as an installation of a renewable energy source with a total installed capacity of no more than 50 kW, connected to an electromagnetic grid with rated voltage of less than 110 kV, or with a cogenerated thermal capacity of no more than 150 kW, where the total installed capacity is no more than 50 kW.

Therefore, in order to classify an installation as a micro- or small installation, all prerequisites regarding the level of installed capacity and rated voltage of the power grid must be met.

In summary, for an electricity company to have a legal obligation to enter into a contract, the following conditions must be met: 1) there are technical (on the part of both the power company and the entity being connected) and economic conditions in place for connection to the grid and for fuels or energy supply (Article 7(1) EL); 2) the party requesting the conclusion of the agreement meets the conditions for connection to the grid and for reception (Article 7(1) EL); 3) the entity applying for the conclusion of a grid connection agreement holds the legal title to the use of the real property, facility or premises to which the gaseous fuels or energy are to be supplied (Article 7(3) EL).

As it is accepted among legal scholars [Kościuk 2023] and in judicial decisions,[14] the abovementioned obligation on the part of energy enterprises under Article 7(1) EL is of public law nature and is fulfilled when the statutory prerequisites are met.

In the event of a dispute as to the existence of such an obligation, the consequence of the existence of an obligation under public law to connect an entity to the grid involves the drafting of a grid connection agreement with the amount of the connection fee set pursuant to Article 7(8) EL. The fee is charged for connecting (joining) the installation of a new energy producer to the grid of an energy enterprise and covers the expenditure for the execution of that connection. The fee is not charged for the extension of the enterprise's grid for the purpose of the connection. As stipulated in the law itself, the execution of the connection of facilities, installations or networks to the grid or heating grid shall be understood to mean the construction of

[14] Judgment of the Supreme Court of 8 May 2014, ref. no. III SK 46/13, Lex no. 1482418.

a section or element of the grid that serves to connect the facilities, installations or network of the entity applying for their connection to the electricity grid or heating grid to the rest of the grid.

It should be further pointed out that neither the concept of technical conditions nor the concept of economic conditions has been defined by the Polish legislator. Legal scholars and commentators believe that the lack of technical conditions for connection should be understood as a permanent technical impediment that cannot be removed, despite attempts made to do so. Therefore, there must be objective and insurmountable obstacles preventing the execution of the investment intended to connect the real property, facility or premises of the entity applying for the conclusion of the agreement in order to state that there are no technical conditions for connection [Muras et al. 2016, 866].

Judicial decisions demonstrate that the technical and economic conditions of connection should always be applied to a specific facility to be connected, taking into account the content of the declarations of intent made by the parties during the process of applying for the connection and the entire context of the operation of network enterprises, the principles and mechanisms of network infrastructure development (and its financing in particular), and investments in new connection capacity. There is no doubt that, when viewed independently, the premise of technical conditions of the connection refers to the possibility, already existing as of the date of issuing the connection conditions, to connect a newly-built generation installation to the grid of the enterprise obliged to conclude a connection agreement. It can also be assumed that the technical conditions premise is fulfilled when such conditions exist on the planned date of execution of the connection agreement in connection with modernisation works conducted by the network enterprise.[15] By analogy, this also applies to the customer's holding of a legal title to the property. Where such works are not conducted (or are planned with a completion date allowing for the connection of a new installation by the date specified in the connection terms and conditions), the premise of the technical conditions of the connection loses its independent character. It is because whether and when such conditions come into existence shall be determined by the premise of the economic conditions of the connection, which affects the scope of the grid enterprise's obligation to finance the works necessary to connect new generation facilities.[16] In fact, these premises overlap. With the current state of technology, it is in fact al-

[15] See judgment of the Supreme Court of 11 April 2012, ref. no. III SK 33/11, OSNP 2013, no. 9-10, item 120; judgment of 22 May 2014, ref. no. III SK 51/13; judgment of the Court of Competition and Consumer Protection of 16 January 2017, ref. no. XVII AmE 109/16, http://orzeczenia.Warsaw.so.gov.pl [accessed: 08.12.2023].

[16] Order of the Supreme Court of 22 October 2014, ref. no. III SK 13/14, http://www.sn.pl [accessed: 08.12.2023].

most always possible to create technical conditions for connection and supply; it is only a question of the amount of outlays to be incurred.[17] Thus, it may be concluded that the existence of technical conditions is correlated with the existence of economic conditions.

An assumption that the technical conditions must be in place as at the date of submitting the application, without taking into account evidence in the form of the company's development plans and network development capacities, leads to an unacceptable conclusion that the existence of the obligation to connect is not determined by the prerequisites arising from Article 7(1) EL, but only by the will of the network or distribution enterprises that have a monopolistic position on that market.[18] Therefore, if the prerequisites for the fulfilment of the public obligation to conclude an agreement by the energy enterprise are stipulated in the provisions of Article 7(1) EL and, *a contrario*, Article 7(3) EL, it should be concluded that they do not include the requirement for the physical existence of the facility to be connected, which also cannot be construed as a failure to fulfil the technical conditions for connection. It is possible to conclude a grid connection agreement in the physical absence of the facility to be connected.[19]

In its decision of 29 January 2019 (I NSZ 1/18), the Supreme Court stated, on the other hand, that in order to determine "whether the prerequisites set out in Article 7(1) EL exist, it is necessary to examine whether the economic conditions for the connection to the grid exist." The economic conditions should be assessed taking into account the content (scope) of the development plan referred to in Article 16 EL, agreed by the energy enterprise with the President. This also requires an assessment of whether the network enterprise's tariff – approved by the President – actually allocates funds for the implementation of the investment included in the development plan. In one of the rulings, the Court of Competition and Consumer Protection pointed out that from the axiological point of view, a state of a lack of economic conditions for supply may only occur in exceptional cases, e.g. when the recipient's facility is located at a considerable distance from the grid or in a place that is particularly difficult to access.[20]

These shortcomings in the statutory regulation unfortunately leave energy enterprises with considerable discretion in determining whether the

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[17] Judgment of the Court of Appeal in Warsaw of 9 June 2016, ref. no. VI ACa 92/15, http://orzeczenia.waw.sa.gov.pl [accessed: 08.12.2023].

[18] Judgment of the Court of Appeal in Warsaw of June 16, 2015, ref. no. VI ACa 890/14, www.orzeczenia.ms.gov.pl [accessed: 08.12.2023].

[19] Judgment of the Court of Appeal in Warsaw of 26 April 2012, ref. no. VI ACa 1500/11, www.orzeczenia.ms.gov.pl [accessed: 08.12.2023].

[20] Judgment of the Court of Competition and Consumer Protection in Warsaw of 18 September 2002, ref. no. XVII Ame 100/01, Lex no. 1727654.

premises in question are met. In order to clarify the premises to be applied in the assessment of the existence of the economic conditions, on 29 June 2010 the President of the Energy Regulatory Office issued its position No. 10/2010 concerning the procedure in the case of refusal to connect to the grid due to the lack of economic conditions (application of Article 7(1) and Article 8(1) of the Energy Law).[21] In this position, the authority indicated the evaluation criteria it would follow when resolving disputes concerning refusal of connection to the grid due to a lack of economic conditions.

In section 3(1), the President reinforced that energy enterprises build and expand electricity transmission or distribution networks for their area of operation based on the draft development plan agreed with him (Article 16 EL). This agreement means that the President, by approving the tariff, provides the enterprise with financial resources to implement the plans indicated in the draft development plan (both by name and by area). For the company, on the other hand, this agreement entails an obligation to connect entities seeking a connection from the area covered by the agreed draft plan, and relieves the enterprise from having to conduct an effectiveness analysis for each connection request.

Subsequently, in section 3(2) the President indicated that the refusal to connect entities to the grid other than those specified in section 3(1) must be preceded by an economic analysis. The method for assessing economic efficiency consists in the assessment of the internal rate of return [IRR] with additional consideration of the net present value [NPV] and the net present value ratio [NPVR]. In the case of the enterprise's future customers, the calculation of the efficiency indicators should take into account provisions set out in section 3(5). The economic efficiency analysis shall be conducted on the basis of a discounted cash flow statement over a period of at least 20 years. The share of the connected entity in the investment outlays corresponding to its share in the use of the increased transmission capacity should be taken into account in the analysis if the grid must be extended. The IRR threshold constituting the basis for the assessment of the lack of economic conditions should correspond to the weighted average of the average profitability of 10-year Treasury bonds with fixed interest rates from tenders from the year immediately preceding the year of the efficiency assessment (section 3(3)). The President further explains that pursuant to the Law, by approving an electricity tariff, an energy enterprise engaged in the transmission or distribution of electricity obtains revenue in an amount allowing it to cover its planned justified own costs (operating costs, taxes, depreciation), carry-over costs and return on capital employed in this activity (section 3(5)).

[21] See https://www.ure.gov.pl/pl/urzad/informacje-ogolne/komunikaty-prezesa-ure/3599,Informacja-nr-102010.html [accessed: 08.12.2023].

The President also clearly indicates that electricity is an indispensable and universal good, whereby any potential refusal to connect to the grid for economic reasons should be preceded by a detailed analysis based on an economic calculation, taking into account all entities applying for connection from a given area. It is also impermissible to make the entry into force and execution of grid connection agreements conditional on the signature of such agreements by a certain number of entities.

3. DISPUTE SETTLEMENTS BY THE PRESIDENT OF ENERGY REGULATORY OFFICE

The possibility to submit a dispute concerning a refusal to connect renewable energy sources to the grid for adjudication by the President is one of the types of cases falling within the competence of the regulatory authority.

The need for independent regulatory authorities in each Member State to be able to resolve disputes is referred to in recital 84 of Directive 2019/944/EU. It lays down that regulatory authorities should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. To that end, regulatory authorities should be able to request relevant information from electricity undertakings, to conduct appropriate and sufficient investigations, and to settle disputes.

This obligation of granting the President with relevant powers is concretized in Article 8(1) LE. Pursuant to this provision, in cases of disputes concerning refusal to conclude a grid connection agreement, including those related to increasing connection capacity, a sale agreement, an agreement for the provision of fuel or energy transmission or distribution services, an agreement for the provision of natural gas transport services, an agreement for the provision of gas fuel storage services, an agreement referred to in Article 4c(3), a natural gas liquefaction agreement or a universal agreement, as well as in cases of non-substantiated suspension of gas or energy supply, refusal to connect as a priority a renewable energy source installation or a public road transport charging infrastructure or a public charging station referred to in Article 7(1), as well as a refusal to connect a micro-installation, failure to connect a micro-installation despite the lapse of the 30 day time limit referred to in Article 7(8d[7])(2), non-substantiated limitation of operation or disconnection of a micro-installation from the grid, or a refusal to amend the agreement referred to in Article 7(2a) as regards the date of the first delivery of electricity to the grid, shall be resolved by the President of the *Energy* Regulatory Office upon a request from a party.

Therefore, the resolution of disputed issues does not only arise from the obligation set forth in Article 7(1) EL. Pursuant to further provisions, where the entity applying for connection of a micro-installation to the distribution grid is connected to the grid as a final customer, and the installed capacity of the micro-installation to which the entity is applying for connection is no greater than that specified in the terms and conditions for the connection, the grid connection shall take place pursuant to an application for connection of the micro-installation, filed with the energy enterprise to whose grid the micro-installation is to be connected, after installing appropriate protection systems and metering and billing devices. Otherwise, the connection of the micro-installation to the distribution grid shall be made pursuant to a grid connection agreement. The cost of installing the protection system and the metering and billing equipment shall be borne by the electricity distribution system operator (Article 7(8d[4]) EL.

Pursuant to Article 7(8d[7]) EL an electricity distribution enterprise: 1) shall acknowledge the filing of the application by noting the date of its filing; 2) shall be obliged to connect the micro-installation to the grid based on the application within 30 days from the submission of the application.

An energy enterprise that deals with the transmission or distribution of electricity is required to specify in the terms and conditions of connection the projected schedule for the connection of the renewable energy source installation, taking into account individual stages of the grid extension, as well as the schedule of planned works (Article 7(8d[8]) EL.

It should be noted that dispute resolution by the President is one of the few cases of interference of a public administration body in the regulation of civil law relations between private law entities. The dispute resolution procedure can be initiated by an individual consumer (natural person who is the final consumer) or by the energy enterprise.[22] The decision of the President of the Energy Regulatory Office issued pursuant to Article 8(1) EL must take into account the objectives of the energy law as indicated in Article 1(2) EL, including the obligation to balance the interests of both parties, and not only the entity requesting the connection.[23] Moreover, pursuant to Article 23(1) EL, the President regulates the activities of energy enterprises not only in accordance with the law, but also in accordance with the national energy policy, aiming to balance the interests of energy enterprises and fuel and energy consumers.

The well-established line of judicial decisions demonstrates that the catalogue of cases specified in Article 8(1) EL is closed and should be interpreted

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[22] See Information of the President of the Energy Regulatory Office of 15 December 2006 on the decision on resolving the dispute between Polskie Sieci Elektroenergetyczne S.A. and STOEN S.A., "Biuletyn Branżowy URE – Energia Elektryczna" 52 (2006), p. 20.

[23] Judgment of the Court of Appeal in Warsaw of 9 June 2016, ref. no. VI ACa 92/15, http://orzeczenia.waw.sa.gov.pl [accessed: 08.12.2023].

strictly. As the Supreme Court noted: "The decision of the President of Energy Regulatory Office 'replaces' the declarations of intent of the parties, in the functional sense of 'replacement', while according to the legal nature of the decision, it constitutes the basis for an independent formation of an obligation relationship with regard to the matters disputed between the parties."[24] A constitutive[25] administrative decision of the President: "creates, independently and directly, an obligation relationship between the grid entrepreneur and the entity applying for connection" [Walaszek and Walaszek-Pyzioł 2006, 9-12; Pokrzywniak 2013, 142]. Vesting a public administration body with the competence to resolve disputes between civil law entities is an example of an exception to the principle of the administration of justice by common courts [Czarnecka and Ogłódek 2012, 207].

The established line of judicial decisions provides that: "a refusal to conclude a connection agreement occurs not only when the energy enterprise expressly declares that it will not conclude the agreement but also when it presents such terms and conditions for connection to the grid (and a draft agreement) that are unacceptable to the entity seeking connection to the grid. The refusal to conclude an agreement cannot be reduced only to the case when the grid enterprise expressly does not agree to conclude the agreement."[26]

Where it is the President who resolves the dispute, he is obliged to take into account the provisions of Article 7(2) and (2a) EL when drafting the content of the agreement. A grid connection agreement should include at least the following information: 1) the date of the execution of the connection, 2) the connection fee, 3) the place of separation of the ownership of the grid of the energy enterprise and the installation of the entity to be connected, 4) the scope of works necessary to carry out the connection, 5) the requirements concerning the location of the metering and billing system and its parameters, 6) the connection schedule, 7) the conditions of making the real property belonging to the connected entity available to the energy enterprise in order to construct or extend the grid in the scope necessary for the connection, 8) the anticipated date of conclusion of the contract on the basis of which gas or energy will be supplied, the anticipated quantities of gas or energy to be received, 9) the connection power, 10) the liability of the parties for breach of contract, and in particular for delay in the completion of works in relation to that agreed in the contract, 11) the duration of the contract and the conditions for its termination.

In addition to the above provisions, an agreement for connecting a renewable energy source installation to the grid should also contain provisions

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[24] Judgment of the Supreme Court of 12 April 2011, ref. no. III SK 42/10, Legalis no. 432332.

[25] Judgment of the Court of Appeal in Warsaw of 4 June 2012, ref. no. VI ACa 1508/11, Legalis no. 532610.

[26] Judgment of the Supreme Court of 6 October 2016, ref. no. III SK 50/15, http://www.sn.pl [accessed: 08.12.2023].

specifying: 1) the deadline for the first delivery of electricity produced by that installation to the grid, where this deadline shall not be longer than 48 months from the date of conclusion of that agreement, or 120 months in the case of a renewable energy source installation that uses offshore wind power to produce electricity; 2) that failure to deliver the electricity produced by that installation to the grid for the first time by the date specified in the connection agreement shall constitute grounds for the termination of the connection agreement.

One should also note the exception provided for RES installations. Pursuant to Article 7(8d) EL, if an energy enterprise that deals with the transmission or distribution of electricity refuses to connect an RES installation to the grid due to a lack of technical conditions for the connection resulting from a lack of the necessary grid capacity within the timeframe proposed by the entity applying for the connection of an RES installation, the energy enterprise shall specify the planned date and conditions for the necessary grid extension or upgrade, as well as the date of connection.

Proceedings before the President are governed by the principles set forth in the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure,[27] which implies in particular the need to take into account the protective (guarantee) function of the administrative procedural law consisting in the protection of interests of individual entities subject to the process of law application and the protection of social interest. Pursuant to Article 30(2) and (3) EL, the decision of the President may be appealed at the Regional Court in Warsaw – the anti-monopoly court, within two weeks from the date of receipt of the decision. The appeal proceedings against the decision of the President shall be carried out in accordance with the provisions of the Code of Civil Procedure on proceedings in *energy* regulatory cases. The court proceedings take into consideration the evidence gathered in the administrative proceedings, but this does not deprive the parties of the possibility to bring new claims in fact and new evidence, according to the rules applicable in separate proceedings in commercial cases.

CONCLUSIONS

The analysis presented here leads to the conclusion that the criteria applied by the President in adjudicating disputes may be divided into legal, technical, economic and axiological as set out in Article 1(2) EL.

Giving the President the competence to adjudicate disputes has a protective function by ensuring a legal possibility to protect the interests of

[27] Journal of Laws of 2022, item 2000 as amended.

consumers against arbitrariness of energy companies which refuse to connect RES installations or micro-installations in the first place without a justified reason. The institution of dispute settlement by an independent regulator also has a preventive function. This conclusion stems from the fact that an energy enterprise, conducting its business activity rationally, should bear in mind that in the event of an unjustified refusal, the content of the agreement and the obligation to connect will be determined by the President by way of a decision. In the author's opinion, the dispute resolution process is also beneficial to the energy enterprises themselves, as the model thus established allows the reasons for the company's refusal to be verified by a specialised and independent body (and subsequently by a court). Thus, the addressee of the refusal can obtain an impartial assessment of its validity and accept the fact that there are objective reasons preventing connection to the grid, which increases trust in energy enterprises. The proper drafting by the President of the justification for the decision resolving the dispute, taking into account the application of the principles of objective truth (Article 7 of the Code of Administrative Procedure), the principle of trust (Article 8(1) of the Code of Administrative Procedure) and persuasion (Article 11 of the Code of Administrative Procedure), plays a significant role in this. The factual justification of the decision resolving the dispute should, in particular, contain an indication of the facts which the authority found to be proven, the evidence on which it relied and the reasons why it denied the credibility and evidentiary value of other evidence, whereas the legal justification should include an explanation of the legal basis of the decision, quoting the provisions of law (Article 107(3) of the Code of Administrative Procedure in conjunction with Article 30(1) EL).

Taking into account the fact that not all criteria are sufficiently defined in the statute, *de lege ferenda*, in order to increase the transparency of reasons for refusal to conclude a grid connection agreement for an RES installation, the Polish legislator should define by law the notion of technical and economic conditions. This would help avoid misunderstandings and suspicions of arbitrary refusal to conclude a grid connection agreement by energy enterprises, and thus allow for increasing the number of installations connected to the grid.

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