Nefndasvið Alþingis,
Austurstræti 8 - 10,
150 Reykjavík

HS ORKA HF

16. apríl 2012

Varðar: Umsögn um tillögu til þingsályktunar um útgáfu virkjanaleyfa o.fl., 491. mál

Skv. tillögunni ályktar Alþingi að fela ríkisstjórninni að skipa fimm manna nefnd sem geri úttekt á eftirfarandi:

a. Hvort ástæða sé til, með tilliti til þess að tryggja þurfi öllum landsmönnum sanngjarnan arð af sameiginlegum orkuauðlindum landsins, að við úthlutun virkjanaleyfa til raforkuframleiðslu, jafnt á eignarlöndum sem þjóðlendum, verði við það miðað að virkjanir stærri en 5–10 MW verði í eigu orkufyrirtækja sem að a.m.k.2/3 hlutum séu í eigu ríkis eða sveitarfélaga eða félaga í þeirra eigu a.m.k.2/3 hlutum.

b. Hvort hagkvæmt sé fyrir ríkissjóð og landsmenn alla að gefa öflugum innlendum fjárfestum, eins og lífeyrissjóðunum, kost á því að eignast hlut í Landsvirkjun í áföngum á næstu fimm árum með samtals eignarhlut allt að 30%. Einnig þarf að skoða hvernig hægt sé að tryggja að slíkur eignarhlutur sé ekki framseljanlegur.

c. Hvort ástæða sé til að setja almennar reglur og viðmiðanir í lög um skýra heimild fyrirtækja í eigu opinberra aðila (ríkis og sveitarfélaga) til að standa að verkefnafjármögnun stærri fjárfrekra verkefna með öðrum fjársterkum aðilum, innlendum og/eða erlendum eftir atvikum, svo sem vegna einstakra vatnsafls-, gufuafls-, vindorku- og sjávarfallavirkjana, og hvernig að slíkum verkefnum skuli almennt staðið við þær aðstæður.

d. Hvort ástæða sé til þess að ríkið hafi frumkvæði að því að marka skýra stefnu um hvernig best verði staðið að vinnu, undirbúningi og hagkvæmnisathugun vegna lagningar rafmagnskapals (strengs) frá Íslandi til Evrópu (hugsanlega með skipun sérstakrar stefnumörkunarnefndar af hálfu ríkisins) og með hvaða hætti helstu raforkufyrirtæki landsins, Landsvirkjun, Orkuveita Reykjavíkur, HS Orka, Rarik, Orkubú Vestfjarða og Landsnet hf., komi að því undirbúningsstarfi. Jafnframt þarf að skoða og meta kosti og galla m.a. áhrif á atvinnusköpun, verðhækkanir á raforku vegna útflutnings o.fl.

e. Hvaða breytingar þurfi að gera á gildandi lögum til að hrinda framangreindum breytingum í framkvæmd (einkum a-, b-, c- og d-lið) og að hverju þurfi helst að gæta í þeim efnum. Nefndin setji fram hugmyndir að slíkum lagabreytingum og leggi eftir atvikum fram drög að lagafrumvarpi um efnið, þyki henni ástæða til.

HS Orka tekur í öllum meginatriðum undir álit Samorku á málinu og gerir álitið að sínu.

Varðandi a-liðinn leggur HS Orka áherslu á að umræða um málefni orku- og veitufyrirtækja snýst allt of mikið um eignarhald á auðlindum og veitukerfum. Hægt er að stýra starfsemi allra orku- og veitufyrirtækja mjög nákvæmlega í krafti laga og reglna án tillits til eignarhaldsins, þar með talið gjaldtöku af nýtingu auðlinda í opinberri eigu. HS Orka leggst því eindregið gegn ákvæðum a-liðar.

Hvað b-liðinn varðar telur HS Orka hf ekki rétt að lýsa sérstöku áliti á æskilegu fyrirkomulagi eignarhalds tiltekinna orkufyrirtækja. HS Orka ítrekar þó í þessu sambandi fyrri ummæli um a-lið tillögunnar og telur að allt eigi að vera opið í þessum efnum.

Varðandi c-liðinn fær HS Orka ekki séð að neinn skortur sé á almennum lagaheimildum til beitingar á verkefnisfjármögnun við einstakar orkuframkvæmdir, eða að sérstök vandamál séu til staðar hvað það varðar, svo lengi sem áhugi aðila er til staðar.

Loks, varðandi d-liðinn, þá er lagning sæstrengs afar áhugavert viðfangsefni og full ástæða til að hagkvæmni slíkrar framkvæmdar sé til skoðunar. HS Orka minnir þó á að á vettvangi Landsvirkjunar er nú unnið að slíkri úttekt og því e.t.v. ekki ástæða til að stofnað sé til annarrar en sambærilegrar vinnu á vegum ríkisins á sama tíma.

Almennt séð er því ekki þörf á umræddu nefndarstarfi að mati HS Orku hf og leggst fyrirtækið gegn efnisatriðum þingsályktunartillögu þessarar.

Loks er meðfylgjandi lögfræðiálit varðandi málið sem er reyndar á ensku en verður sent á íslensku innan örfárra daga.

Virðingarfyllst,

F.h. HS Orku hf

Júlíus Jónsson
forstjóri

LEX
LAW OFFICES

MEMO

To: HS Orka hf. / Júlíus J. Jónsson CEO

From: LEX Law Offices / Dýrleif Kristjánsdóttir Attorney at Law, Hulda Árnadóttir Attorney at Law

Date: 21 February 2012

Subject: Proposal for a Parliamentary Resolution in the Energy Field

I.
Introduction

LEX has been retained Júlíus J. Jónsson on behalf of HS Orka hf., to briefly comment on and evaluate a proposal for a parliamentary resolution put forth by the Progressive Party.[1] According to the proposal the Government is to form a committee that is to investigate *inter alia* whether, in light of the necessity of ensuring that the nation as a whole benefits from the shared energy resources of the country, there is reason to limit the issuing of power development licenses for power plants with capacity exceeding 5-10 MW, to energy undertakings fulfilling the criterion of at least 2/3 of ownership being in the hands of the State, municipalities or undertakings which are owned by the state or municipalities to at least 2/3.

LEX has more specifically been asked to answer the question to which extent it would be necessary to amend current legislation to enact the limitation mentioned and whether such a limitation would be contrary to the energy and competition legislation.

The memorandum *firstly* holds a general discussion on the proposal (point II). *Secondly*, the question of whether the proposed limitation is contrary to energy and competition law will be explored (point III). *Thirdly*, LEX considers it necessary to elaborate on whether the proposed limitation could be conceived as unconstitutional (point IV). *Fourthly*, the possible amendments to legislation will be touched upon (point V) and finally the main conclusions will be set forth (point VI).

[1] Parliamentary doc. no 752, 491, case no 491, 2011-2012

II.
General

The proposal's underlying assumption seems to be that, by making the awarding of power development licenses above a certain MW capacity dependent upon the ownership of the energy undertakings fulfilling certain criteria, the objective of ensuring that the nation as a whole benefits from the shared energy resources of the country, should be achieved, thus by conditioning the ownership to a particular model (2/3 state/municipal and 1/3 private) the public at large will benefit.

The assumption is however not clarified or particularly substantiated in the explanatory statement to the proposal and the connection between conditioning the ownership to the above model and ensuring the nation a fair share of the returns on the utilization of energy resources remains unclear and highly speculative. There is no discussion of other possible ways of accomplishing the same goal, such as carefully structured provisions on sharing the dividends from utilization or the possibility of resource taxes that might materialize the same objective, without conditioning the ownership. In the light of the principle of proportionality it can be questioned whether the proposed limitations on the ownership are appropriate, necessary or reasonable.

The assertion in the explanatory statement that the Norwegian system has been very profitable for the nation lacks all factual substance. The Norwegian system was established in the beginning of the twentieth century and one of its principal aims was to hinder foreign investment in this sector. Thus the Norwegian system has its particular historic roots. Norway however has recently amended its basic legislation regarding ownership of undertakings and concessions after the EFTA Court delivered its judgment in Case No. E-2/2006.[2] The aim of the amendments is to exclude all private ownership of undertakings in the hydropower sector.

As the proposal refers to Norway and the Norwegian system it should be noted that Iceland and Norway are not comparable in all regards. The Norwegian legal regime clearly stipulates a transparent and clear *policy* according to which energy production should be in the hands of public undertakings.[3] As to date no general long-term energy policy has been adopted in Iceland where this is one of the goals. Recently however, a proposal for an energy policy was submitted to the Parliament[4]. At this time it remains to be seen whether the majority of the Parliament will adopt this report as a general policy. The policy document as presented to the Parliament does not reflect the same clear policy on ownership of energy production as the Norwegian system provides for.

Generally and as far as can be deduced from legislation as such, no policy decision on the ownership of energy generation undertakings has been taken in Iceland. However such a decision has been taken regarding the ownership of natural resources; *cf.* the changes made to legislation in the energy field with Act No 58/2008.

---

[2] Judgment of the EFTA Court in Case No. E-2/2006, The EFTA Surveillance Authority vs. The Kingdom of Norway, para 13-29.
[3] Act No 16 of 14. December 1917 Relating to Acquisition of Waterfails, Mines and Other Real Property, with later amendments.
[4] Parliamentary doc no 286, case no 266, 2011-2012

It is of interest to note the EFTA Surveillance Authority's[5] (hereinafter ESA) comment in case E- 2/2006, where ESA "contests *inter alia* that public ownership allows for better management and control, and better protection of security of energy supply and environmental concerns than steering via regulatory methods alone" (para 39). Furthermore ESA "also argues that it would run contrary to EEA law to presume that national public undertakings will behave differently and more reliably than private undertakings and that there is no reason to believe that they will actually do so" (para 39).

III.
Energy and Competition Legislation

As previously stated LEX was specifically asked to explore whether the proposed condition for the grant of a power development license is contrary to energy and competition legislation. In this context LEX firstly perceives necessary to explore the compatibility of the proposal with the Electricity Act No. 65/2003, as subsequently amended, and secondly with the Competition Act No. 44/2005, as subsequently amended.

The Electricity Act

One of the main objectives of the Electricity Act is to create a competitive market for the generation and trade of electricity. This is put forth in Article 1 of the Act which *inter alia* provides that the purpose of the Act is to promote an economic electricity system and to that end a competitive environment shall be ensured for the generation and trade of electricity, with such restrictions as may prove necessary for the security of supply and other public interests. It follows that restrictions which the legislator deems necessary to protect public interests may be applied in this respect. Accordingly, the Electricity Act as it stands does not prevent the legislator from passing provisions to enact the proposed limitation to the grant of a power development license if it perceives it to be in the public interest. Moreover the legislator could regardless amend the Act on grounds of its legislative powers, however limited by the state´s obligations under the EEA Agreement.

The Electricity Act implements the EC regime concerning common rules for the internal market in electricity in accordance with the state´s obligations under the EEA Agreement. Under Article 6 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity the Member States shall adopt an authorization procedure for new capacity, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria. It is however left to the Member States to lay down the criteria considering several points further stipulated in the aforementioned Article. None of the points in question restrict the possibility of laying down ownership limitations in this respect. Moreover, Article 125 of the EEA Agreement provides that the Agreement

[5] The role of the EFTA Surveillance Authority (ESA) in the EFTA pillar of the European Economic Area (EEA) is comparable to that of the Commission in the EU pillar of the EEA.

does not in any way prejudice the rules of the Member States governing the system of property ownership. Accordingly, LEX concludes that such restrictions would not be explicitly contrary to the state's obligations under the EEA Agreement. Moreover criteria such as the proposed limitations to ownership would be considered non-discriminatory under the EEA Agreement as they would apply equally to nationals of Iceland as to nationals of other EEA Member States.

It should be noted that LEX believes that the proposed ownership conditions are not fully coherent with the objective of completing the internal market in electricity and of creating a level playing field for all electricity undertakings established in the EEA. As limitations in this respect are however not unambiguously prohibited under the Directive LEX concludes with reference to Article 125 of the EEA Agreement that diverse systems of ownership can be established in this field, provided that the objective is legitimate and pursued in a non-discriminatory and proportionate manner.

The Competition Act

As stipulated in Article 1 of the Competition Act its objective is to promote effective competition and thereby increase the efficient allocation of resources. As further described this objective shall be achieved *firstly* by preventing unreasonable barriers and restrictions on freedom of economic operation; *secondly* by preventing harmful oligopoly and restriction of competition; and *thirdly* by facilitating the entry of new competitors into the market.

As such all limitations relating to the ownership of undertakings in any given market are accordingly contrary to the objective of the Act unless such limitations are specifically invoked to promote effective competition. Limitations that provide for all undertakings in a specific market to be owned in majority by the same party and thus be controiled by the same party, as would be the case if the proposed limitation would be endorsed, would therefore obviously be contrary to the objective of the Act.

The Competition Act is however a general Act and does not prohibit the legislator from passing specific provisions in other areas of the law that are contrary to the objectives of the Act, if the legislator deems it necessary to pursue other aims. The Competition Act in effect does not by itself prevent the legislator from passing provisions to enact the proposed ownership condition for the grant of power development licenses.

In this context it should however be noted that under Article 8, paragraph c, of the Competition Act one of the functions of the Competition Authority is to observe that measures taken by public entities do not restrict competition, and to indicate to the authorities any means by which competition can be made more effective and the entry of new competitors into the market facilitated. In light of this function of the Competition Authority the legislator generally requests its opinion before passing provisions that touch upon competition related matters.

In LEX's opinion it is highly likely that the Competition Authority will have strong objections against invoking the proposed limitations to ownership of energy undertakings. Whether a submission on behalf of the Competition Authority to that extent will affect the legislator is however a different subject and remains to be seen.

IV.
Some constitutional issues

If the ideas of the proposal would become law it would result in the situation that only energy undertakings which are at least two thirds in the ownership of the State or municipalities, or in the ownership of undertakings which are owned by the state or municipalities to at least two thirds, could be awarded electricity development licenses for power plants that generate more than 5/10 MW. To legally operationalize these ideas, some amendments to Icelandic legislation are necessary as further explored under point V, mainly to some of the provisions of the Energy Act No. 65/2003.

Such changes would preclude that a company that does not fulfill the criteria on ownership would be awarded a license for power plants generating more than 5/10 MW. In effect, changes in this respect could be considered as preventing the company from pursuing its future business to such a degree that it could be contrary to the provision on freedom of occupation in Article 75 of the Constitution where it says in the first paragraph: *"Everyone is free to pursue the occupation of his choosing. This right may however be restricted by law, if such restriction is required with regard to the public interest."* Whether it is possible to restrict this freedom thus depends on the strength and quality of the argumentation for the restriction being necessary with regard to the public interest. The proposal does not include any such argumentation.

It should be noted that should such a new system regarding ownership be enacted it could only apply to new licenses. The legislator would then have to consider the situation of companies that have already accrued substantial costs, such as research and development costs, with the intent to develop further power plants. Thus this situation and interests would have to be reflected in some kind of an inter temporal arrangement stipulated by new legislation. The committee envisioned in the proposal would have to investigate this matter thoroughly and make suggestions on how to compensate the companies in full for the costs accrued. Such arrangements can be considered as equal to expropriation.

Of course such changes to legislation could not be retroactive. The changes considered necessary by the legislator as means to phase out of one system and into another would need to be carefully prepared with regard to the interest and legal status of the companies the interests of which would be affected. The licenses that have been issued are without time limits. Although not specifically mentioned in the proposal the possibility of limiting the period of validity of the licenses could arise in the context of such changes. Then a special "phase out" provision would have to be adopted. Such provisions are known to the Icelandic legal system. One recent example is found in the amendments made to the law adopted to secure the Icelandic State's property rights over the natural resources of the sea bed. The changes entailed that licenses that had been issued under the older legal regime were shortened in line with a new one. The companies were given a certain time frame to adjust to the new legal situation. In case no. 182/2007 the Supreme Court of Iceland accepted that particular public interests justified the new legal regime that resulted, *inter alia*, in a duty to conduct an environmental impact assessment that had previously not been necessary.

The issue at hand is whether possible changes that would limit the validity in time of issued licenses could be considered to be expropriation in the meaning of Article 72 of the Constitution and would thus have to be compensated for. It cannot be excluded that such a change would have to be accepted without the possibility of any right to compensation. One of the important issues here relates to the fairness of the provision, that needs to be proportional, clear and reasonable, and the time frame that would be given to adjust to a new situation. When deciding what is reasonable in this respect issues relating to time and the return on the capital invested in a power plant could be crucial. If the time frame is unreasonably short, it cannot be excluded that courts would consider this to be expropriation in the sense of Article 72 of the Constitution.

According to the proposal energy companies are to be at least two thirds in public ownership (State/municipalities) or in the ownership of companies that are themselves at least two thirds in public ownership. Thus the possibility of private ownership in the energy companies is envisioned, up to one third, and even that energy companies could be in two thirds ownership of a company that itself is only two thirds in public ownership. The proposal does not address the issue of who could be a possible owner to this one third part, whether it is to be limited to the pension funds or if all private parties should have this possibility. If this would be adopted, and then it does not matter whether the ownership is limited to specific private entities or not, the legislation on the existing public energy companies would have to be changed.

This is not an exhaustive discussion of the possible constitutional issues that might arise should the ideas in the proposal be enacted but LEX perceives those discussed to be relevant in regards to HS Orka.

V.
Necessary legislative amendments

The most important amendments would be to the Energy Act No. 65/2003, and the provisions on power development licenses. The Water Act No. 15/1923 and the Act on the Survey and Utilization of Ground Resources both refer to other legislation, now the Energy Act, regarding such licenses and thus do not need amendments in this respect.

If private parties are to be allowed to invest in the power companies that are now in public ownership the Acts on each of these companies need amendments. Finally, possibly some adjustments would be necessary to the legislation on foreign investment (No. 34/1991) to increase transparency and foreseeability.

VI.
Main conclusions

According to the above there are some fundamental defects to the proposal as the underlying assumption of the proposal, *i.e.* that ownership that fulfils certain criteria is necessary to ensure that utilization of energy resources benefits the public at large is not substantiated and it is doubtful that this could be argued convincingly, see further general comments under point II on the EFTA Court case.

As stipulated under point III, neither the Energy Act nor the Competition Act explicitly restricts the possibility to invoke ownership conditions for the granting of power development licenses as those proposed. However, with reference to Article 125 of the EEA Agreement a system of ownership such as that envisioned could only be established provided, at least, its objective is legitimate and pursued in a non-discriminatory and proportionate manner.

As explained under point IV, there are several constitutional issues that have to be carefully considered. The main issue is Article 75 on the freedom to pursue the occupation of one's choosing. It is difficult to foresee how it could be argued convincingly that such restrictions as the proposal entails are required with regard to the public interest.

Changes to the legal framework would include changes to the Energy Act, changes to the Acts on the individual publicly owned power companies to open up the companies to private investment and possibly some adjustment to the Act No. 34/1991 on Investment by Non-Residents in Business Enterprises.

Lastly it should be noted that this memo only contains a brief evaluation of the complex issues at hand. Should a more thorough investigation be requested we remain at your disposal.

DK/HÁ