

Bulgaria: Interim access fees decrease the income of renewable energy plants in Bulgaria

On Friday evening, 14 September 2012, at a closed session the Bulgarian energy regulator ("DKEVR") approved interim fees for grid access for producers of electricity from renewable energy sources ("RES") without previous announcement or public discussion, as a standard procedure would require.

The new fees are to be charged as of 18 September 2012 monthly per MWh of produced electricity until the standard procedure for approval of the final grid access fees is completed by the regulator in a couple of months.

The key issue concerning these interim fees is that they are applicable to RES producers only and being based on the preferential price under the power purchase agreement of the respective RES and its date of commissioning, can hardly be described as justified or objective.

By these newly introduced fees for the access of RES projects to the grid, the regulator effectively decreases the preferential feed-in tariffs for RES projects. This is a decrease with a retroactive effect, i.e. it affects also all projects, commissioned in the past with effective power purchase agreements and feed-in tariffs that have been believed to be secured.

Considering that these additional fees render a significant number of RES projects developed over the past years into a pure loss, we expect that all associations representing the interest of RES producers will appeal against the DKEVR decision, that a number of producers will join such proceedings and that the major producers of all RES sources file appeals on their own.

Background

The grid access agreements, although required by the law, have rarely been executed in practice with regard to RES projects. Thereby, with an amendment of the Bulgarian Renewable Energy Act in July 2012, a deadline for execution of these agreements has been introduced - the producers with operating RES without such agreements, as well as all other producers, were required to conclude access agreements with the respective electricity grid operator not later than 17 September 2012. The access fee, being a key condition of these access agreements, is to be approved by DKEVR and it is not subject to negotiation between the parties.

On 13 September 2012 the grid operators filed a request with the regulator to approve grid access fees specifically for RES projects, claiming that the latter are responsible for most of their costs for balancing and dispatching. Given the upcoming deadline of 17 September 2012, they also requested that DKEVR enacts interim grid access fees, applicable for the period until the standard procedure is completed.

On the next day the regulator granted their request and without previous announcement or public discussion, as a standard procedure would require, at a closed session issued a decision for approval of interim access fees for RES producers.



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Effect

The interim grid access fees will be applicable for a limited period of time until the standard procedure for approval of the final fees is completed following a public discussion and other steps, required by the law.

The fees are calculated on the basis of the applicable preferential feed-in tariff for the respective RES and its date of commissioning, not on the costs of the grid operators which is one of the objective criteria, set out in the applicable law.

As of 18 September 2012 the RES producers will be charged by MWh of produced electricity monthly fed to the grid with these interim fees thus effectively decreasing the income (the preferential feed-in tariff) of the RES.

RES type	fee/applicable feed-in tariff
wind parks	approx. 10 %
hydro power plants	approx. 10 %
solar parks, commissioned until 31 December 2011	approx. 20 %
solar parks, commissioned from 31 December 2011 to 30 June 2012 ¹	approx. 39 %
solar parks, commissioned in July and August 2012	approx. 5 %
for solar parks, commissioned in September 2012 and later until 30 June 2013 ²	approx. 1 %
biomass power plants	approx. 1 %

*Wind and solar figures expressed as percentage are based on a calculation, provided by the Bulgarian Wind Energy Association.

Available remedies to investors

In general, there are two main remedies, available to investors under the effective law:

(i) Statutory Compensation:

Since the announced access fees are "interim", if upon completion of the standard procedure for approval of the final access fees, DKEVR establishes that the amount should have been lower, together with the final fees the regulator shall approve also

1 This category includes the most common type of 5 MW solar parks which have managed to secure the feed-in tariff of BGN 485.60 (approx. EUR 248) per MWh, net VAT, before the significant decrease of the feed-in tariff on 1 July 2012 when it was set at BGN 237.05 (approx. EUR 121).

2 The feed-in tariff for solar parks of 1 July 2012 was decreased further as of 1 September 2012; the latter will be applicable until the next regular update of the feed-in tariff in June 2013, unless the regulator decides that it should be amended due to a significant change of a pricing component (as it was the case with the September update).

compensatory mechanisms to remedy the losses, caused to the RES producers by the interim access fees. Considering that the producers will depend for this remedy on the good will of DKEVR, it is not very likely that this remedy will be enforced by the regulator.

(ii) Appeal of DKEVR decision:

The decision will entitle the grid operators to charge the interim access fees as of 18 September 2012 and it will be enforceable unless it is revoked by the court. Therefore, an appeal by RES producers before the Supreme Administrative Court against the decision is one of the key remedies, even though the appeal will not suspend its application. According to our preliminary estimation, there are grounds to challenge successfully the decision and demand compensation for the loss, caused by the interim access fees, particularly with regard to producers with solar parks. We see, however, also a risk that the Supreme Administrative Court denies admitting the appeal e.g. with the argument that the appealing producers have no legal interest in setting aside the DKEVR decision on the interim access fees since the producers are sufficiently protected by the Bulgarian law that ensures a compensation mechanism (see (i) above). We nevertheless believe that all producers are well advised to appeal against the DKEVR decision in order not to miss a chance to defend against the interim access fees.

The deadline for appeal of the DKEVR decision in court is 28 September 2012 and at the moment the motions are being prepared by RES industry associations and RES producers. The court proceedings are likely to take several months and besides being a challenge for the Supreme Administrative Court and the energy regulator, they could be regarded also as an indication for the development of the renewable energy sector in Bulgaria in the future.