

## New case law on area grids

### Current situation

In a decision of 9 February 2015, the Federal Supreme Court of Switzerland basically confirmed the Federal Electricity Commission's ("ElCom") treatment of area grids, applying the Electricity Supply Act ("**StromVG**") to end users connected to area grids (i.e. electrical power lines for dispersion). Furthermore, the Court dealt with questions arising from this situation.<sup>1</sup>

### Background

The Liegenschaften-Betrieb AG ("**area grid operator**") is the owner and operator of the Panorama Center Thun Süd ("**shopping centre**") and as such the lessor of retail space. The shopping centre is supplied by a 16 kV medium voltage line which was constructed by Energie Thun AG ("**distribution grid operator**" / "**respondent**"). The electrical installations in the shopping centre belong to the area grid operator. Both various companies hiring premises from the area grid operator ("**end users**") and the area grid operator itself obtain electricity from the distribution grid operator. Before the shopping centre was opened, the area grid operator and the end users (together "**the plaintiffs**") approached ElCom on various legal issues. ElCom's decision was forwarded to the Federal Administrative Court and ultimately to the Federal Supreme Court.

### Requests for declaratory statements

Inter alia, the Federal Supreme Court was asked for its declaratory statements on the following issues:

1. The Court shall state that the Electricity Supply Act does not apply to the end users connected to the electric power lines of the shopping centre in their personal capacity.
2. Furthermore, it shall be stated that if the end users in the area grid do not request their own access or connection to the grid distribution operator's grid, the area grid operator should pay the user charge for the upstream levels.
3. It shall be stated that the area grid operator basically has the right to bundle energy consumption in the area and to obtain energy on the free market, provided that it does not intend covering its own usage as end user below 100 MWh or its own usage above 100 MWh without a market entry declaration.
4. Finally, it shall be stated that the distribution grid operator is not entitled to supply basic supply energy up to the exit point of end users in the shopping centre and that the area grid operator does not have to tolerate the transmission of basic supply energy via the power lines to the shopping centre.

### 1. Applicability of the Electricity Supply Act

Initially, the plaintiffs requested that the Electricity Supply Act not be applied to the end users.

According to the statements of the Federal Administrative Court as prior instance, the Electricity Supply Act does apply to end users. The justification given was that if end clients connected to the area grid, i.e. the end users, were not subject to the Electricity Supply Act, their basic power supply would not be ensured. However, the plaintiffs argued before the Federal Supreme Court that one could forgo the rights under the Electricity Supply Act. There was no obligation on the part of the end users to enter into a contractual relationship with the distribution grid operator. By this waiver the end users would personally not be subject to the Electricity Supply Act.

The Federal Supreme Court clarified that the reasoning of the plaintiffs was justified insofar as end users were not obliged to obtain electricity from the respondent. Under Art. 6 Electricity Supply Act there was the obligation of the distribution grid operator to supply electricity but they held no supply monopoly.<sup>2</sup> In actual fact, the fixed end users normally had no chance of obtaining power from anyone else except the distribution grid

<sup>1</sup> cf. decision of the Swiss Federal Supreme Court 2C\_300/2014 of 9 February 2015: ElCom Newsletter 08/2012, p.1 f.

<sup>2</sup> According to Art. 6 of the Electricity Supply Act, distribution grid operators ensure the basic power supply for fixed end users (households and other end users of less than 100MWh annually per user site).

operator. Provided that they were able to obtain electricity from another source without having access to the grid, there was no legal reason for not permitting that. Within an area grid it would thus also be permissible for end users to obtain power from the area grid operator which the latter or another power producer within the area had produced.

However, - as the Federal Supreme Court noted - presently the plaintiffs did not assert that they wanted to implement an intra-area power supply. If they wanted to obtain electricity supplied by the distribution grid operator, this would be possible both on a contractual or, if need be, on the basis of Cantonal legal provisions or regulations. Since, based on Art. 6 of the Electricity Supply Act, they assumed that the distribution grid operator was obliged to supply the electricity they required, they themselves would invoke the Electricity Supply Act, so that it would be contradictory for them to request not to be subject to the legislation.

Based on this argument, the Federal Supreme Court affirmed that the Electricity Supply Act currently does apply to end users.

## 2. Grid usage charges

Secondly, it was uncertain to whom the grid usage charges were to be paid. The area grid operator claimed that the end users should be paying the grid usage charges to it directly as being the area grid operator and not to the distribution grid operator because the end users were connected to the electrical lines in the shopping centre and not to those of the respondent.

The Federal Supreme Court stated that according to Art. 14 para. 2 of the Electricity Supply Act the distribution grid operator was entitled to the grid usage charges for electricity as it fed into the area grid. Whether the distribution grid operator was to receive the charges from the area grid operator or directly from the end users would have to be contractually settled.

## 3. Bundling of end users' power consumption

Thirdly, the area grid operator asserted that it wanted to buy electricity on the free market and re-sell it to the end users. However, this would only be possible if the distribution grid operator's grid could be used.

According to Art. 13 para. 1 of the Electricity Supply Act, grid operators are obliged to let third parties have access to the grid. However, fixed end users form an exception according to Art. 6 para. 6 of the Electricity Supply Act. They have no the right to access the grid. End users are households and other end users who use

less than 100 MWh annually per consumption site. This limit also applies to area grids.<sup>3</sup>

The Federal Court stated that as the distribution grid operator did not hold a legal supply monopoly, it was not impossible for the area grid operator to buy power on the free market and resell it to end users. End users connected to the area grid have a right to access the grid provided that they use at least 100MWh annually. End users are defined as single consumption site end users. End users are to be considered individually. In view of legal grid access (Art. 13 of the Electricity Supply Act) usage cannot be bundled.

## 4. Consent to transmission of basic electricity

As owner of the lines to electric facilities within the shopping centre, the area grid operator brought up a fourth point: that the distribution grid operator was not entitled to supply basic electricity up to the exit point of the end users. The area grid operator was not obliged to tolerate such transmission because the end users were not obliged to connect to the grid of the distribution grid operator.

The lower instances decided that due to the area grid operator's obligations under tenancy law, power transmission had to be tolerated. The Federal Supreme Court stated that under the Electricity Supply Act end users had a right to be supplied with basic electricity by the distribution grid operator. The area grid operator itself had no legal claim to being supplied with power by the distributor grid operator in order to resell it to end users. This means that the distribution grid operator is entitled to supply basic power up to the end user's exit points.

## Summary

The Federal Supreme Court's decision states that the Electricity Supply Act does in fact apply to end users connected to the area grid. ElCom's practice is thus being confirmed. Moreover, the Federal Supreme Court stated that electricity supply legislation did not ultimately regulate the entire electricity supply. Specifically with regard to area grids, several issues remain unresolved. Hence, contractual solutions to regulate legal relationships between distribution grid operators, area grid operators and end users continue to be permitted unless legislation states otherwise.

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<sup>3</sup> cf. Art. 11 par. 4 Electricity Supply Act.

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