

LEGAL NATURE OF SELECTION OF RES PROJECTS AND APPLICATION OF ANTI-MONOPOLY LAWS TO THE PROCEDURE FOR SELECTION OF RES PROJECTS

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States, companies and ordinary people all over the world currently pay more and more attention to development of use of renewable energy sources. This approach is justified by concern for the future generation and the environment.

In the Russian Federation, there is great potential for electricity generation using renewable energy sources. In this article, the author will provide an overview of the mechanism for stimulation of use of renewable energy sources on the wholesale electricity and capacity market in Russia. In particular, the author will tell about the procedure for competitive selection of investment projects for construction (reconstruction, modernization) of generating facilities operating on the basis of renewable energy sources (hereinafter referred to as the selection of RES projects), which is determined in the Rules of the Wholesale Electricity and Capacity Market approved by Resolution of the Government of the Russian Federation No. 1172 dated December 27, 2010.

We will attempt to study the legal nature of the selection of RES projects using current judicial practice. We will also analyze application of the rules of anti-monopoly laws to the procedure for selection RES projects.

Keywords: energy law, renewable energy sources, selection of RES projects, Rules of the Wholesale Electricity and Capacity Market.

In the field of electric power industry, more and more attention is currently paid to development of generation on the basis of use of renewable energy sources (hereinafter also referred to as the RES).

In accordance with the definition given in Article 3 of Federal Law No. 35-ΦЗ dated March 26, 2003, *On the Electric Power Industry*, [1] the renewable energy sources

include solar energy, wind energy, water energy, tidal energy, wave energy of water bodies, including ponds, rivers, seas, and oceans, geothermal energy using natural underground heat carriers, low-potential thermal energy of earth, air, and water using special heat carriers, biomass, including plants specially grown for energy, including trees, as well as production and consumption waste, except for waste generated upon use of

hydrocarbon material and fuel, biogas, gas emitted from production and consumption waste at landfills for such waste, and gas generated in coal mines.

The policy for development of generation facilities operating on the basis of use of the RES is established at the legislative level.

Such an approach is definitely justified and determined both by concern for the environment and for the future of new generations.

In this article, we will focus on encouragement by the state of development of “alternative” generation, we will give a brief overview of the procedure for competitive selection of investment projects for construction (reconstruction, modernization) of generating facilities operating on the basis of use of renewable energy sources (hereinafter referred to as selection of RES projects or the SRP), and analyze the legal nature of the selection of RES projects and application of anti-monopoly laws upon the SRP using judicial practice.

We should start with the fact that the body that forms the main lines of activity in the field of stimulation of generation and consumption of electricity produced using the RES is the Government of the Russian Federation (hereinafter referred to as the Russian Government).

On January 8, 2009, Order of the Russian Government No. 1-p approved the Main Areas of the State Policy in the Field of Improvement of Energy Efficiency of the Electric Power Industry Based on the Use of Renewable Energy Sources for the Period up to 2024 (hereinafter referred to as the Main Lines). [2]

In accordance with the Main Lines, it is planned to gradually increase the volume of generation and consumption of electricity produced by generating facilities operating on the RES. According to this document, by 2024, this volume should be 4.5 percent in the total volume of electricity generation and consumption in the Russian Federation.

To achieve these goals, the Russian Government specified a number of support measures in the Main Lines. These measures include without limitation attraction of extrabudgetary funds for construction and modernization of the generating facilities operating on the basis of

RES, and establishment of the obligation to acquire a certain amount of electrical energy produced by the generating facilities using RES for the wholesale market entities.

And, according to the author, the selection of RES projects also pertains to the measures of state support for development of the generating facilities operating on the basis of use of the RES. The procedure for selection is specified in the Rules of the Wholesale Electricity and Capacity Market approved by Resolution of the Russian Government No. 1172 dated December 27, 2010 (hereinafter referred to as the Wholesale Market Rules). [3]

The goal of the procedure for selection of RES projects is to identify the most economically sound projects, for which agreements for supply of capacity of qualified generating facilities operating on the basis of use of renewable energy sources (hereinafter referred to as the ASC RES) will be concluded.

The RES projects are selected by the Commercial Operator (hereinafter also referred to as TSA, JSC) in accordance with the requirements of the Wholesale Market Rules and the Agreement on Accession to the Wholesale Market Trading System (hereinafter referred to as the AOA).

The SRP is held annually for each type of the generating facilities, power plants operating on the basis of photovoltaic conversion of solar energy, power plants operating on the wind energy, power plants with an installed capacity of less than 25 MW operating on the basis of water flow energy, and power plants operating on the production and consumption waste.

For the purpose of selection of RES projects, in accordance with clause 202 of the Wholesale Market Rules, the Commercial Operator shall publish information on basic limit amount of capital expenses for construction of 1 kW of installed capacity of the generating facility, the planned volume of capacity required for delivery, localization targets, requirements to the content of applications for participation in the selection of projects as well as the methods of their submission for participation in the selection of projects and the term for their submission, and other information that

must be published upon preparation of the selection of projects in accordance with the AOA (hereinafter referred to as the information required for the selection of RES projects) on the official website.

Wholesale market players wishing to participate in the selection of RES projects shall submit applications for participation in the SRP to TSA, JSC.

The Commercial Operator shall examine the submitted applications and, based on the results of the examination, prepare a list of the applications that meet the requirements of the Wholesale Market Rules and the AOA.

The procedure for selection of RES projects shall be performed in two stages.

At the first stage, the Commercial Operator shall prepare a list of projects, which applications comply with the requirements of the Wholesale Market Rules and the AOA.

This list shall contain information on the type of the generating facility, the planned volumes of installed capacity and the planned capital expenses per 1 kW of installed capacity of the generating facility.

At the second stage, the most economically sound projects shall be selected in the manner specified in the AOA.

Following the results of the selection, the Commercial Operator shall form and publish a list of the selected projects.

The list shall contain the data specified by the participant of the selection in the relevant application: the name of the participant, the name of the project, the planned volume of installed capacity of the facility, the planned expenses per 1 kW of installed capacity, etc.

The ASC RES shall be concluded for the projects selected on the basis of the results of the SRP.

The procedure for selection of RES projects may be considered quite specific, but it fully meets the goal, development of such a “non-standard” type of generation as the generating facilities operating on the basis of use of the RES.

Nevertheless, understanding of the legal nature of the selection of RES projects is of great importance, including for correct application of legal norms.

In the opinion of the author of this article, to understand the legal nature of the SRP, attention should be paid to case No. A40-251307/2017 initiated upon application of TSA, JSC, to the Federal Antimonopoly Service of the Russian Federation (hereinafter referred to as the FAS of Russia) for invalidation of the decision of the FAS of Russia in case No. 1-10-89/00-21-17 dated September 27, 2017.

The court of first instance did not find grounds for invalidation of the said decision, and the applicant filed an appeal.

In this article, Resolution of the Ninth Arbitration Court of Appeal No. 09АП-23131/2018 dated June 21, 2018, on the application of TSA, JSC, to the FAS of Russia (hereinafter referred to as the Resolution of the Appellate Instance) will be considered.

As follows from the text of the Resolution of the Appellate Instance, by the decision in case No. 1-10-89/00-21-17 dated September 27, 2017, the FAS of Russia recognized that TSA, JSC, violated Part 1, Article 17 of Federal Law No. 135-Φ3 dated July 26, 2006 *On the Protection of Competition* (hereinafter also referred to as Federal Law No. 135-Φ3).

The following circumstances served as the grounds for the FAS of Russia to initiate proceedings under case No. 1-10-89/00-21-17 in respect of TSA, JSC.

On March 10, 2017, TSA, JSC, published the information required for the selection of RES projects for 2018, 2019, 2020, and 2021 on its website in the Internet in accordance with clause 202 of the Wholesale Market Rules.

On April 21, 2017, due to the entry into force of Resolution of the Government of the Russian Federation No. 432 dated April 11, 2017, *On Introduction of Amendments to the Rules of the Wholesale Electricity and Capacity Market* (hereinafter referred to as Resolution No. 432), the procedure for selection of RES projects changed, which affected, in particular, the procedure for determining the planned volumes of capacity required for delivery. Moreover, in accordance with these changes, the calendar year of selection was added.

On April 27, 2017, to meet the requirements of the laws to the procedure for selection of RES

projects, taking into account effective Resolution No. 432, the Commercial Operator published the revised information required for the selection of RES projects for 2018, 2019, 2020, 2021, and 2022.

Pursuant to clause 203 of the Wholesale Market Rules, information specifying the methods for submission of the applications for participation in the selection of RES projects, the requirements to the content of these applications, the terms for their submission for the purposes of participation in the SRP cannot be revised prior to the end date of the term for submission of the applications for participation in the selection of projects.

The end date of the term for submission of the applications for participation in the selection of projects shall be set in the AOA, and it cannot be later than June 10.

Based on the fact that on April 27, 2017, the Commercial Operator published the revised information required for the selection of RES projects on the official website, the FAS of Russia brought case No. 1-10-89/00-21-17, by decision dated September 27, 2017, on which it was recognized that TSA, JSC, had violated Part 1, Article 17 of Federal Law No. 135-Φ3 dated July 26, 2006, *On the Protection of Competition*.

The court of first instance concluded that the FAS of Russia lawfully adopted the decision in case No. 1-10-89/00-21-17 dated September 27, 2017.

By the Resolution of the Appellate Instance dated June 21, 2018, the decision of the court of first instance was left unchanged. [4]

We would like to remind you that Part 1, Article 17 of Federal Law No. 135-Φ3 dated July 26, 2006, *On the Protection of Competition* contains a ban on actions that lead or may lead to prevention, limitation, or elimination of competition while holding tenders, requesting quotations and proposals.

Next, we will analyze the findings of the court and the arguments of the parties.

According to the text of the Resolution of the Appellate Instance under consideration, the argument cited by the Commercial Operator that the selection of RES by its legal nature shall not be referred to biddings and

other procedures specified in Part 1, Article 17 of Federal Law No. 135-Φ3 dated July 26, 2006, *On the Protection of Competition*, was rejected by the court of first instance.

The court of appeal considered this position to be lawful and confirmed the conclusion of the court of first instance, according to which the selection of RES by its nature is competitive and it shall be deemed to be the biddings.

Since the goal of selection of RES is to determine economically sound projects of the generating facilities, for which the ASC RES will be concluded, the author of the article considers it reasonable to refer to clause 5, Article 1057 of the Civil Code of the Russian Federation (hereinafter referred to as the CC of the RF), which states that the rules provided for by Chapter 57 of the CC of the RF shall apply to the public biddings providing for the obligation to conclude an agreement with the preferred bidder unless otherwise specified by Articles 447 to 449 of the CC of the RF.

However, if one refers to these articles of the CC of the RF, one can identify a number of conflicts with the terms and conditions for the selection of RES projects.

Let us consider some of them as examples.

First, we would like to highlight the difference in the role of the trade institutor and the Commercial Operator, which is authorized to perform the selection of RES in accordance with the current laws. Pursuant to clause 2, Article 447 of the CC of the RF, the owner of the thing, the holder of a different property right to it, another person interested in conclusion of the agreement with the preferred bidder as well as a person acting on the basis of a contract with these persons and on its own behalf or in its own name may act as the trade institutor unless otherwise provided for by the law (notary, specialized organization, etc.).

It is clear that TSA, JSC, is not included in the set of persons defined by the CC of the RF as possible trade institutors. As already indicated above, the Commercial Operator selects the RES in accordance with the Wholesale Market Rules and the AOA.

It should be noted that the rights and obligations under the ASC RES shall arise between the buyers of capacity and the seller, whose project

of the generating facility was selected following the results of the RES selection. While performing the RES selection, the Commercial Operator does not act as the party to the ASC RES. Herewith, the ASC RES shall be concluded with all players of the wholesale market, the capacity buyers: both those who acted as the wholesale market entities at the time of announcement of the results of the RES selection, and those players who will receive the status of the wholesale market entity in the future.

Furthermore, we would like to highlight the differences in the possible form of the biddings and the SRP. Pursuant to clause 4, Article 447 of the CC of the RF, the form of the biddings shall be determined by the owner of the thing being sold or the holder of the property right being sold unless otherwise provided for by the law.

The form of the SRP is specified at the legislative level. Although the Commercial Operator selects the RES projects, it performs this function in accordance with the requirements of the current laws and does not have the opportunity to change the form of the SRP.

According to clause 3, Article 448 of the CC of the RF, the trade institutor shall determine the terms and conditions of the agreement to be concluded with the preferred bidder at its own discretion. The terms and conditions of the agreement shall be specified in the notice of bidding.

In contrast to the trade institutor, the Commercial Operator does not define the terms and conditions of the ASC RES concluded following the results of the SRP. The terms and conditions of the ASC RES are not referred to the information required for the selection of RES projects in accordance with clause 202 of the Wholesale Market Rules and, therefore, they are not published by the Commercial Operator.

The legal approach to the possible transfer of the rights and obligations under the agreements concluded following the results of the biddings and on the basis of the results of the SRP is also different.

Pursuant to clause 7, Article 448 of the CC of the RF, the preferred bidder may not assign the rights and transfer the debt under the obligations arising out of the agreement concluded in the biddings. The obligations under this agreement shall

be fulfilled by the preferred bidder itself unless otherwise provided for by the law.

According to clause 214 of the Wholesale Market Rules, the rights and obligations of the supplier under the ASC RES concluded as a result of the SRP may be transferred in accordance with the procedure established by the AOA.

The list of differences between the selection of RES and the bidding procedure containing the obligation to conclude an agreement with the preferred bidder mentioned herein is not exhaustive.

Based on the foregoing, the court's conclusion that the selection of RES projects by its legal nature shall be deemed bidding cannot be considered indisputable, according to the author of the article.

Application of Part 1, Article 17 of Federal Law No. 135-Φ3 to the procedure for selection of RES projects is controversial too.

Taking into account the possibility of different approaches to interpretation of this norm, we would like to refer to the scientific literature and quote the scientific and practical comments on Part 1, Article 17 of Federal Law No. 135-Φ3: "As for the possibility of application of the anti-monopoly requirements to other ways of concluding agreements and defining the suppliers (contractors, providers), this was directly related to the qualification by the courts of the relevant procedures as the biddings regardless of their actual name." [5]

Pursuant to the above comment, it shall be possible to apply Part 1, Article 17 of Federal Law No. 135-Φ3 to the procedures with features of the bidding, but being guided by the differences in the above regulation of the selection of RES projects and in the requirements of Article 447 to 449 of the CC of the RF, it seems unreasonable to apply the norm under consideration to the SRP.

It should also be noted that the relations in the electric power industry market are not covered by regulation of bidding and procurement procedures, which is established at the legislative level.

For example, according to Part 2, Article 1 of Federal Law No. 325-Φ3 dated November 21, 2011, *On Organized Biddings*, it shall not apply to the relations in the wholesale electricity (capacity) market.

Since, in accordance with Part 5, Article 17 of Federal Law No. 135-Φ3 dated July 26, 2006, *On the Protection of Competition*, the provisions of Part 1, Article 17 of this law also apply to all purchases of goods, work, and services in accordance with Federal Law No. 223-Φ3 dated July 18, 2011, *On Procurement of Goods, Work, and Services by Certain Types of Legal Entities* (hereinafter referred to as Federal Law No. 223-Φ3), it should be noted that, in accordance with clause 8, Part 4, Article 1 of Federal Law No. 223-Φ3, it shall not govern conclusion and performance of the agreements being binding on the players the electricity (capacity) market.

According to the author of this article, it cannot be denied that the selection of RES projects has a competitive nature, but attribution of the SRP to the procedures subject to Part 1, Article 17 of Federal Law No. 135-Φ3 is contrary to both legal regulations and the position specified in the scientific literature.

Since both the court of first instance and the court of appeal agreed with the arguments of the FAS of Russia, according to which republication by the Commercial Operator of the information required for the selection of RES projects shows signs of actions that may prevent, limit, or eliminate competition, it should be restated that publication by TSA, JSC, of the revised information was related to the entry into force of changes in the procedure for the selection of RES projects introduced by Resolution No. 432.

The court of appeal notes that Resolution No. 432 does not provide for the possibility of republication by the Commercial Operator of the information on the selection of RES projects for 2018, 2019, 2020, 2021, and 2022 prior to June 10, 2017.

However, we take the liberty of bringing this argument into challenge. To this end, one should pay attention to the procedure for entry into force of the acts of the Russian Government, which is specified in Decree of the President of the Russian Federation No. 763 dated May 23, 1996, *On the Procedure for Publication and Entry into Force of Acts of the President of the Russian Federation, the Government of the Russian Federation, and Regulatory Legal Acts of the Federal Executive Bodies* (hereinafter referred to as the Decree).

According to clause 6 of this Decree, the acts of the Government of the Russian Federation affecting the rights, freedoms, and duties of a person and citizen, establishing the legal status of the federal executive bodies as well as organizations shall synchronously enter into force throughout the Russian Federation upon expiry of seven days after their first official publication.

Resolution No. 432, which amends the Wholesale Market Rules, was published on the official Internet portal of legal information on April 13, 2017, and in accordance with clause 6 of the Decree, it entered into force on April 21, 2017.

Since the Commercial Operator selects the RES projects in accordance with the current requirements of the Wholesale Market Rules, the court's argument that Resolution No. 432 does not provide for the possibility of republication of the information required for selection of RES projects is not completely clear.

If the Commercial Operator did not publish the revised information taking into account the effective amendments to the Wholesale Market Rules, the selection of RES projects held in 2017 would not meet the requirements of the laws on electricity applicable at the time of the selection.

For example, in 2017, the wholesale market players would have been deprived of the opportunity to apply for participation in the selection of RES projects for 2022. This non-compliance with the requirements of the laws in force at the time of the SRP would have infringed the rights of participants who wished to participate in the selection of RES projects.

It is likely that the SRP held without account for the amendments to the Wholesale Market Rules could be qualified as the actions that led to prevention, limitation, or elimination of competition.

It is clear that the author of this article does not cast doubt on the need for anti-monopoly regulation of the electricity markets.

But, summing up, we would like to remind that the anti-monopoly laws and, in particular, Article 17 of Federal Law No. 135-Φ3 are intended to protect competition and provide conditions for the efficient functioning of the commodity markets.

We will leave open the question whether recognition of republication by the Commercial Operator of the information required for the selection of RES projects caused by introduction of amendments into the Wholesale Market Rules as the actions that lead or may lead to prevention, limitation, or elimination of competition ensures achievement of the objectives of the anti-monopoly laws.

At the time of writing of this article, consideration of case No. A40-251307/2017 was not completed, and it is clear that it is too early to talk about the current judicial practice concerning qualification of the procedure for selection of RES projects as the bidding or another procedure provided for by Part 1, Article 17 of Federal Law No. 135-ΦЗ.

According to the author, it is very important to correctly understand the legal nature of measures

to support “alternative” generation and, in particular, the procedure for selection of RES projects. The SRP, undoubtedly, has a competitive nature, but at the same time, there are statutory requirements for its performance, which set apart the SRP from a number of procedures subject to Part 1, Article 17 of Federal Law No. 135-ΦЗ, and make its legal nature unique.

To conclude, we would like to note that in the Russian Federation, there is a great potential for electricity generation using renewable energy sources. The normative regulation of the “alternative” electric power industry is probably still imperfect; however, the statutory policy for development of the generating facilities operating on the basis of use of the RES is of great importance for the development of the entire electric power industry. ■

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