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Vattenfall response to Ministry of Petroleum and Energy consultation: "Endringer i energiloven – Utenlandsforbindelser" ("the Proposal")

Vattenfall would like to give a response to the Norwegian Ministry of Petroleum and Energy consultation: "Endringer i energiloven – Utenlandsforbindelser" ("the Proposal").

Vattenfall provides about 20 per cent of the total electricity supply in the deregulated Nordic electricity market and also owns a 25 percent share of the NorthConnect joint venture project that plans to build and operate a HVDC interconnector between Norway and the UK.

Vattenfall considers that the Proposal, which includes an ownership restriction in favour of Statnett, is contrary to the intentions of the 3rd package and is denying the specific procedural rights of Article 17 of Regulation 714/2009 and Article 7 of Regulation 1228/2003.

In addition it is considered to be contrary to the duty of EU/EEA Member States not to enact measures which will lead a State-owned undertaking with a potential to abuse its dominant position in transmission system operation as well as EU/EEA rules on the free movement of capital. This is also the opinion of WilmerHale law firm; please see attached their legal opinion on the EU/EEA Aspects of the Proposal.

There is an urgent need for a borderless perspective on transmission reinforcements and new interconnectors

The development of new cross border capacities is recognised as crucial for the further development of the internal energy market and accommodation of new renewable generation exemplified by the recent proposal for a European regulation set to facilitate Project of Common Interest for the internal market. Vattenfall considers transmission development to be the most important outstanding challenge the internal European market face and is convinced that all options need to be utilized to make it happen.

Increased transmission capacity to and from the Nordics facilitates socioeconomic utilisation of flexible and low carbon resources for the benefit of European citizens. This potential is also recognised by ENTSO-E in the 2012 edition of the European Ten Year Network Development Plan ("TYNDP"):

“While reaching for EU 2020 targets, the Nordic countries are expected to become a surplus area. New investments in interconnectors between the countries will be beneficial to utilize this surplus.” (p 39 “TYNDP - Regional Investment Plan Baltic Sea”).

“The interconnections which should be focused on in future studies are Sweden-Poland, Sweden-Germany, Sweden-Denmark West, Norway-UK, Norway-Germany, Norway-Netherlands and Lithuania-Poland”. (p 73 “TYNDP - Regional Investment Plan Baltic Sea”

Given the high degree of interdependence and integration of the Nordic countries, Vattenfall consider this as an issue of Nordic and North European concern and any potential transmission enforcements should be assessed against socioeconomic criteria including impacts for the whole interconnected region. Consequently, the framework for permit granting and regulatory approval should have a cross border perspective and not disqualify 3rd party projects with positive socioeconomic merits.

The Proposal for new energy law will hamper socioeconomic grid expansion

Vattenfall is concerned that the proposed change will imply a too national perspective on the development of the transmission grid that indirectly will hamper the development of socioeconomic beneficial trade and sharing of reserves and flexibility across national borders that is necessary to facilitate the transition towards a sustainable and secure energy supply in Europe.

The primary focus of national transmission system operators is the internal grid, and given the vast planned investments in the internal grids in Norway, 3rd party project developer could provide a meaningful contribution and facilitate cross border development.

3rd Party Projects support the supply system in the same way as a TSO driven project

As was pointed out by the Nordic Energy Regulator in a report from 2010 (“Grid investments in a Nordic perspective - Report 3/2010”) the exemption regime should be seen as a complement to the traditional process:

“The exemption rule aims at complementing TSO built interconnectors and cannot as such be seen as an obstacle to regional cooperation between TSOs to invest in interconnectors, although bilateral or joint venture projects of TSOs may compete directly with merchant lines applying for exemption.” (p 53)

Following that Vattenfall wishes to emphasise two fundamental facts. Firstly, in any case where a 3rd party project has a profitable business case, this should be seen as strong sign of lacking cross border development in the referred region. This is because the business case for the merchant transmission only includes the congestion rent whereas trade have far reaching socioeconomic consequences outside the scope of particular lines. Secondly, 3rd party projects, realised through the exemption regime of Article 17 of Regulation 714/2009 are by no means unregulated. 3rd party projects with open third party access and market coupled capacities should be recognised as a natural complement to conventional transmission development that may contribute to socioeconomic cross border development in the best interest of end users of electricity. Given an adequate assessment in the concession processes a 3rd party developed and financed project will bring the same socioeconomic benefits as would have an identical regulated project.

The Proposal is in breach of article 17 of Regulation 714/2009

Vattenfall does not consider the proposal to be in line with article 17 of Regulation 714/2009 in the Third Energy Package (and Article 7 of Regulation 1228/2003) of the Second Energy Package) which allows merchant (exempted) transmission lines and is set to promote investments which have a positive business case and have social economic value for the EU. With the Proposal, Norway is requiring that before any application for a license / exemption can be made, any merchant interconnector project has to agree to have ownership or at least a decisive influence by Statnett.

Instead of the decision on an exemption being considered on a case-by-case basis by the regulatory authorities concerned, as required by Article 17 including involving ACER or the European Commission, the decision on the license application/exemption for 3rd Party project will depend simply on whether Statnett wants to do it or not.

In practice this means that Statnett has the ability to decide whether or not a private merchant project can or should request a license/exemption. This is contrary to the above mentioned articles of the Third Energy Package.

The Proposal is contrary to competition law

Pursuant to articles 102 and 106 of the Treaty on the Functioning of the European Union in conjunction with articles 54 and 59 there is a duty of EU/EEA Member States not to enact measures which may lead a State-owned undertaking to abuse its dominant position. Mandatory State ownership of interconnectors is not what the EU Regulation is aiming at and the proposed change would strengthen Statnett's dominant position, which is questionable from a public policy perspective.

Statnett is seeking to develop its own interconnector between the UK and Norway. Statnett could appear to have a conflict of interest insofar as the profitability of the 3rd Party projects may undermine its own; It may be claimed that Statnett therefore has a financial interest to deny 3rd Party projects access to the interconnector services market.

Lastly, in our view the Proposal constitutes an unjustified interference with the free movement of capital. A Member State/EEA State's restrictions on free movement of capital must be justified and proportionate. The Proposal does not demonstrate that it is either, nor that ownership control is necessary in order to meet the aims of security of supply or environmental protection. The issuance of a concession for interconnectors ought to sufficiently guarantee the necessary degree of coordination, without putting the State owned TSO in a position with conflicts of interest. In addition, once an interconnector is in operation, there are several possibilities to legally ensure that the national system operator has the means to guarantee the safe operation of the system without having a State owned transmission system.

Best Regards

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Appendix:

- 1. *WilmerHale legal opinion on proposal*