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Case No: 61803
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EFTA SURVEILLANCE AUTHORITY

Norwegian Ministry of Petroleum and Energy
P.O. Box 8148 Dep
NO 0033 Oslo

Dear Sir/Madam,

Subject: Proposed amendments to lease contracts for power stations

Reference is made to a request from the Ministry of Oil and Energy as to whether a certain amendment in contracts for leasing of hydropower plants may be compatible with the EEA Agreement. The request concerns three long-term contracts according to which the power company Statkraft, which is wholly owned by the State (lessor), leases three different water courses and installed power stations to three different companies, respectively, Tyssefaldene AS, AS Saudefallene and Elkem (Svelgen) (lessees). In accordance with the wishes of the Norwegian Authorities, the request has not been considered as a formal notification under Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

The contracts were originally concluded after the Authority decided (see Decision no 142/00/COL of 26 July 2000) not to raise objections to plans to allocate power to certain power intensive industries based on the proposal of the Government to the Storting, St.prp. no 52 (1998 – 1999) and St.prp. no. 78 (1999 – 2000). The Authority made an assessment of whether the conditions as proposed in these documents would amount to State aid. It could not conclude that the proposed conditions deviated from market conditions at the time, and consequently it could not see that State aid was involved.

According to the three contracts in question, the lessees shall pay a price per kWh calculated on the basis of the following main elements:

- A long-term price fixed in real terms, i.e. adjusted for consumer price inflation. The annual rent is set equal to a price of around 17 øre/kWh multiplied by the average annual production for the period 1931 – 1990, i.e., not on actual production, which vary considerably from one year to another based on changes in precipitation;
- A limited possibility to alter this price in 2011 by 2 øre/kWh if market prices for electricity would have changed; and
- A clause providing that the companies have to pay the spot market price on the Nord Pool power exchange, if the spot market price for seven consecutive days exceeds 0.30 NOK/kWh.

(All prices are expressed in real 1999 prices)

Although the contracts were entered into in 2000, the first contract started running on 1 January 2007. The two other contracts only start running in 2010/2011.

The Ministry has informed the Authority that the general price level for electricity has increased since 1999/2000, and that the forward electricity price at Nord Pool is higher

than the price level in 1999/2000. The price established under the contracts is thus, considerably below the market price as well as the foreseen market price in the future based upon current estimates. For the same reason, the abovementioned clause which links the contract price to the spot market price is likely to be triggered more frequently than foreseen by the parties at the time the contracts were concluded. However, the Authority notes that since the regular contract price at around 17 øre/kWh is substantially lower than a spot market price exceeding 30 øre/kWh, the average price payable under the contract can never exceed any such spot price.

In light of the possibility that the clause governing situations where the spot market price exceeds 30 øre/kWh is likely to be triggered more often, the request concerns the possibility to amend this clause by raising the threshold. The result of thus amending the threshold would be that the average price payable under the contracts would be even more advantageous compared to the market price than what is currently the case. Nevertheless, the Ministry argues that the development of the electricity market, entailing that the special threshold will be triggered far more often than originally foreseen, gives the private parties a claim to a revision of the threshold based on the doctrine of failed contractual assumptions and/or contract interpretation under Norwegian contract law.

The Competition and State Aid Directorate of the Authority (hereinafter "CSA") has assessed the request and takes the view that such an amendment would amount to State aid within the meaning of the EEA Agreement.

As a starting point, CSA holds that the proposed amendment would fall to be considered as a voluntary arrangement between the parties. As such, it would fall to be considered as a new contract not covered by the Authority's original decision. Consequently, it would have to be assessed whether the amended price conditions deviated from the current market price. The justification presented for the amendment of the contract is the observed and expected increase in the general prices for electricity. The result of the proposal would be that the average price paid by the lessees would be even lower in relation to the market price than what is the case as the contracts now stand. CSA therefore takes the view that, in the absence of convincing arguments to the contrary, the amended contracts would involve the granting of State aid.

As regards the argument based on the doctrine of failed contractual assumptions and/or contract interpretation, the Norwegian authorities claim that the disputed clause was intended to be active in dry years only. This is based, *inter alia*, on statements in St.prp. no. 52 (1998 – 1999). However, it should be recalled that the clause has also been described as "*a way to share the risk of high elspot prices and scarcity of supply in the future between Statkraft and the industry*", which indicates a wider scope of application.[1] Without taking a view on what the situation would have been if a legal claim to revision of the clause had been established by an independent court of law, CSA also notes that the threshold for applying the doctrine on failed contractual assumptions appears to be very high in relation to contracts entered into by professional parties. Against this background, CSA doubts that the private parties would be entitled to a revision of the clause on this basis.

Moreover, even if a claim for raising the threshold should be held to be well-founded on the basis of national contract law, it does not automatically follow that the revised contract would not involve State aid within the meaning of the EEA Agreement. In decision no

[1] Letter from the Ministry of Petroleum and Energy of 11 October 1999 to the Authority.

142/00/COL, the Authority found that the price conditions proposed in the official documents did not deviate from market conditions and, consequently, that it could not conclude that the envisaged contracts would contain State aid. However, although the background documents invoked by the parties were also known to the Authority, the Authority could not reasonably have been expected to assess all the *underlying assumptions and considerations* described in those documents. Thus, the Authority's approval of the original proposals that were presented in the context of Decision no 142/00/COL cannot be held to imply that contractual revisions designed to ensure the protection of such common assumptions would thereafter automatically be acceptable from a state aid point of view.

On the basis of the above considerations, CSA finds that the arguments advanced by the Norwegian authorities cannot prevent the finding that the proposed amendments involve State aid within the meaning of Article 61(1) EEA.

CSA also notes that the aid in question would constitute operating aid. It therefore cannot be approved as compatible with the functioning of the EEA Agreement under Article 61(3) EEA.

Yours faithfully,

Amund Utne
Director
Competition and State Aid Directorate