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The association for own consumption - or how the return to basic power supply succeeds

A few months ago, the Swiss Federal Electricity Commission (ElCom) had to deal with the question of whether the formation of an association for own consumption (*Zusammenschluss zum Eigenverbrauch* or ZEV) would allow a return to the basic supply for the purchase of electricity, or whether it would be an abuse of rights (*rechtsmissbräuchlich*). A ZEV is about the self-consumption of electricity that is produced and consumed on site, i.e. at the location of the production plant. Self-consumption in a ZEV takes place jointly, which means that several landowners, tenants or leaseholders consume the electricity at the place of production, but are jointly regarded as one end consumer. In addition, the production output must be significant in relation to the connected load at the metering point (Article 16 et seq. Energy Act, EnG).

Initial situation

On 13 December 2022, ElCom issued an ordinance (Ref. 223-00005) on the question raised as to whether a return to the basic power supply is possible by means of a ZEV. In the case to be assessed by ElCom, a landowner and the tenant of the operational property located on the landowner's lot, as well as the subtenant, had applied for a ZEV. The landowner was not an end consumer on any of the parcels of land affected by the ZEV application. The tenant and its wholly owned subsidiary (as subtenant) were intended to be the end consumers for joint own consumption. The distribution network operator objected to the application in question and requested ElCom to determine that the ZEV applied for did not fulfil the legal requirements of Art. 17 of the Energy Act (EnG), and that the ZEV in question would therefore not lead to a single new end consumer.

The distribution network operator objected to the fact that the tenant, as an end consumer, had made use of its right of access to the grid (opt-out option) and since then had procured the electricity it required for its business ac-

tivities at the operating site on the free market. This precluded the tenant from returning to the basic supply. It was obvious, therefore, that by applying for a ZEV, the end consumers, together with the landowner, were trying to get around the expensive prices on the electricity market and benefit from the regulated basic supply prices.

The distribution network operator further argued that in the case of the planned ZEV, the landowner itself did not consume electricity for its own purposes on the lots of the planned ZEV and was therefore not an end consumer as required by the provisions of the Energy Act. Therefore, according to the distribution network operator, there is no common end use between the landowner, the tenant and the subtenant. In addition, the tenant as parent company and the subtenant as economically dependent subsidiary are not two different end users at the same connection point.

In the opinion of the distribution network operator, such a ZEV should therefore not lead to a return to the basic supply. The introduction of a ZEV in this constellation would be an abuse of rights and would contradict the legal principle of "once free, always free" ("*einmal frei, immer frei*").

Conclusions of ElCom

ElCom concluded that, pursuant to Article 17 para. 2 EnG, landowners may also provide for joint own consumption at the place of production for end consumers who have a tenancy or lease relationship with them.

According to Article 14 para. 1 of the Energy Ordinance (EnV), the place of production is the land on which the production plant is located, as well as contiguous land, at least one of which borders on the land on which the production plant is located.

ElCom considered the conditions for the formation of a ZEV in accordance with Article 17 para. 2 EnG to be fulfilled, since energy for own consumption was produced

at the production site itself and, in addition, the production output of the plant was significant in relation to the connected load at the metering point (Article 18 para. 1 EnG), namely at least 10 percent of the connected load (Article 15 para. 1 EnV) of the ZEV.

ElCom stated that it was not a legal prerequisite for the formation of a ZEV that the landowner be an end consumer at the place of production. It was clear from the legislative history that in practice it is particularly those persons or entities who are in a certain geographical proximity to the generation plant who wish to benefit from its electricity production. It was entirely in keeping with the spirit and purpose that tenants could benefit from a landowner's generation plant, even if the landowner did not have any consumption of its own at the site of production.

ElCom stated further that the end consumer could be a natural or legal person or a trading company, and that the fact that one company controlled another (parent company and subsidiary) was irrelevant. The fact that the entire site has only one connection point to the distribution network does not mean that there is only one end consumer behind it. Tenants in an area network also fall within the legal definition of end consumers, insofar as they have their own place of consumption.

ElCom concluded that from the time of the formation of the ZEV, the network operator had a supply obligation under Article 6 para. 1 of the Electricity Supply Act (StromVG). In addition, in this specific case, ElCom considered the project not to be an obvious abuse of rights within the meaning of Article 2 para. 2 of the Swiss Civil Code (CC). The ZEV applied for was in line with the purpose of promoting renewable energies and own consumption pursuant to the Energy Act (EnG), and no improper use of a legal institution was to be assumed. The legal consequence of the proposed ZEV would lead to the advantage of being in the basic supply as an end consumer. However, this advantage may be used and this finding did not lead to a "blatant injustice" (*krasses Unrecht*) that would have to be corrected via Article 2 para. 2 CC.

ElCom also referred to the new Art. 11 para. 2^{bis} of the Electricity Supply Ordinance (StromVV), which has been in force since 1 January 2023: "If a consumption site, for

which the right to network access has already been exercised once, participates in an existing or newly established association for own consumption (ZEV), this does not exclude the supply obligation of the distribution network operator towards the ZEV. If the ZEV claims this obligation to supply, the entitlement to network access for the consumption site in question may be exercised again at the earliest after seven years have elapsed since its participation in the ZEV."

This amendment to the Electricity Supply Ordinance thus enables a return to the basic supply. The distribution system operator must supply the ZEV from the basic supply, even if it contains a consumption site that was already on the free market. However, this consumption site is then bound for 7 years. A consumption site is deemed to be an establishment of an end consumer that forms an economic and local unit and has its own actual annual consumption, irrespective of whether it has one or more entry or exit points (Art. 11 para. 1 StromVV).

ElCom's ruling of 13 December 2022 has, in the meantime, become legally binding.

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