

Energy and Mineral Resources

Versi Bahasa Indonesia

Enforcement Date

14 December 2016

Related ILB

- Determination and Countermeasures for Energy Crises and Energy Emergencies
- PBB Deduction for Geothermal Activity
- Procedures for the Provision and Stipulation of Coal Prices for Mine-Mouth Power Plants Amended
- New Procedures for the Granting of Government Guarantees for the Acceleration of Electrical Infrastructure Development
- Electrical Support-Service Activity Undertaken by Incorporated Business Entities Regulated

Constitutional Court Emphasizes the State-Control Principle for Electricity Businesses

The Constitutional Court (“**Court**”) rendered Decision No. 111/PUU-XIII/2015 (“**Decision**”) on 14 December 2016. Through this Decision, the Court has redefined several provisions which relate to the management of the nation’s electrical power, as set out in Law [No. 30 of 2009](#) on Electricity (“**Electricity Law**”). These provisions address: the unbundling of electricity management, electricity procurement by private business entities, electricity tariffs and supporting electricity-business activity.¹

Petition

On 20 August 2015, two employees of the State Power Company (“**PT PLN**”), namely Mr. Adri, who also serves as the chairman of the PT PLN Labor Union (“**PLN-Union**”) and Mr. Eko Sumantri, who is also the general secretary of the PLN Labor Union (“**Petitioner**”) submitted a petition to the Court requesting a judicial review of numerous articles originally set out under the Electricity Law.² In detail, the requested review articles were:³

1. Article 10 (2) and Article 56 (2), which open up the possibility of unbundled practice as regards the management of electrical power (“**Vertical-Unbundling Issue**”);
2. Article 11 (1), which allows Regionally Owned Enterprises (“**BUMD**”), members of the private sector, cooperatives and civil organizations to become involved in the procurement of electricity (“**State-Control Principle Issue**”);
3. Article 16 (1), which allows PT PLN to establish branch offices or cooperates in conjunction with other parties in order to carry out supporting electricity activities (“**Supporting-Activities Issue**”); and

¹ For further information, see ILB on the [Electricity Bill](#) and ILD on the [Electricity Bill](#).

² Page 22 [point 21], Decision.

³ Page 98 [3.8], Decision.

Energy and Mineral Resources

4. Article 33 (1) and Article 34 (5), which allow for electricity tariffs to be determined through a consideration of fair competition and for said tariffs to thus differ between one area and another (“Tariffs Issue”).

Vertical-Unbundling Issue

Article 10 (2) of the Electricity Law stipulates that the management of electrical power, as well as its transmission, distribution and retail sales may be undertaken in an integrated manner. This thus opens up the possibility for nonintegrated or unbundled practices. The Petitioner argued that the possibility of unbundled practices will result in the State becoming highly dependent on the involvement of the private sector.

In its judgment, the Court cited Decision No. 149/PUU-VII/2009 (“**Decision 149/2009**”), which declared that Article 10 (2) of the Electricity Law was not in contradiction with the 1945 Constitution, as it does not expressly mandate that the supply of electrical power to the public can be undertaken through a Vertical-Unbundling scheme.⁴

However, the Court also stressed its awareness of the Petitioner’s assertion that Article 10 (2) could potentially reduce the role of the State as regards matters concerning the country’s electricity supply. Therefore, the Court emphasized that Article 10 (2) of the Electricity Law would only be considered to be in contradiction with the 1945 Constitution if any Vertical Unbundling was practically implemented.⁵

Meanwhile, the Court rejected the Petitioner’s argument that Article 56 (2) of the Electricity Law was not in line with the 1945 Constitution. The Court asserted that the Petitioner had not offered any reasonable argument as regards this assertion.

State-Control Principle Issue

As regards the involvement of BUMD, the private sector, cooperatives and civic organizations in the procurement of electricity, as described in Article 11 (1) of the Electricity Law, the Petitioner claimed that this provision would deprive the State via the relevant State-Owned Enterprise (“**BUMN**”) of control over the country’s electrical-power supply.

In responding to this claim, the Court determined that the private sector was not prohibited from involving itself in activities relating to electricity, provided that the government still retained possession of the right to control any such involvement. Consequently, if the involvement of private sector is ultimately allowed, then there are no valid grounds upon which cooperatives and civic organizations can be prohibited from becoming involved in the procurement of electricity.⁶

⁴ Page 11 and 107, Decision.

⁵ Page 108, Decision.

⁶ Page 111, Decision.

Energy and Mineral Resources

The Court did, however, assert that Article 11 (1) of the Electricity Law did not offer any clear explanation of whether such parties would ultimately fall under the control of the government. The Court thus eventually declared Article 11 (1) of the Electricity Law to be in contradiction with the 1945 Constitution only if it was implemented or constructed in a way which ultimately resulted in the State losing its control rights.⁷

In clarifying the concept of “State-control rights”, the Court also cited Decision [No. 001-021-022/PUU-I/2003](#). Under this decision, the State is considered to have control rights if it possesses the ability to undertake the following actions:⁸

1. Set policy and administrative requirements (e.g. the issuing of licenses and concessions, and so forth);
2. Issue regulations (e.g. laws and regulations);
3. Assert control over management (e.g. shareholding); and
4. Fulfill a supervisory role.

Supporting-Activities Issue

Article 16 (1) of the Electricity Law sets out 11 types of supporting electricity-business activity, including installation consultations, electrical maintenance and services, testing laboratories, equipment-certification services, etc. However, the Petitioners argued that, prior to the Electricity Law coming into force, the various business activities in question were classified as core activities of PT PLN. Moreover, none of the 11 business activities in question ultimately satisfy the definition of “supporting activity” as set out in Law [No. 13 of 2003 on Employment](#).

However, the Court argued there was no constitutional issue as regards the classification of “supporting” and “core” activities.⁹ Thus, the Court rejected the Petitioner’s demand to annul Article 16 (1) of the Electricity Law.

⁷ Page 112, Decision.

⁸ Page 103, Decision.

⁹ Page 118-119, Electricity Law.

Energy and Mineral Resources

Electricity Tariffs

The Petitioners raised two main issues as regards the electricity tariffs which are set out under Article 33 (1) and Article 34 (5) of the Electricity Law. Firstly, Article 33 (1) allows for electricity tariffs to be determined based on the fair-competition principle, which may lead to an uncontrolled liberalization of electricity tariffs. Secondly, Article 34 (5) allows for the regionalization of electricity tariffs, which could lead to tariff disparities emerging between different regions (so-called “horizontal unbundling”).¹⁰

However, the Court asserted that the elucidation of Article 33 of the Electricity Law provided sufficient clarification as regards the variables which have to be taken into account when determining any electricity tariffs.¹¹ Furthermore, the Court also declared that the tariff disparities addressed by Article 34 (5) of the Electricity Law were important in order to ensure fairness to the general public. The court thus decreed that enforcing a single electricity tariff for both developed and less-developed areas would be an unfair and unjust move. Therefore, the Court rejected the Petitioner’s claim as regards Articles 33 (1) and 34 (5) of the Electricity Law.¹²

The Decision was rendered on 14 December 2016.^{AP2}

¹⁰ Page 12, Decision.

¹¹ Page 114, Decision.

¹² Page 115-116, Decision.

Energy and Mineral Resources

RECENTLY PUBLISHED ILB

- Govt. Simplifies Requirements for the Securing of Freight-Forwarding Licenses
- Personal-Data Protection under the ITE Framework
- Provisions on Debtor-Information System Amended
- PBB Deduction for Geothermal Activity

• RECENT REGULATION

- Head of the National Food and Drug Supervisory Agency (BPOM) Regulation [No. 25 of 2016](#) on Amendment to Head of BPOM Regulation [No. 12 of 2015](#) on the Oversight of Food-and-Drug Importation
- Head of the National Food and Drug Supervisory Agency (BPOM) Regulation [No. 26 of 2016](#) on Amendment to Head of BPOM Regulation [No. 13 of 2015](#) on the Oversight of Food-and-Drug Ingredients Importation
- Director General of Custom and Excise (Director General) Regulation [No. PER-40/BC/2016](#) on Second Amendment to Director General Regulation [No. PER-40/BC/2014](#) on Procedures for the Determination of Tobacco-Product Excise Tariffs.

Indonesian Legal Brief is a service of PT Justika Siar Publika owner and operator of www.hukumonline.com, www.hukumpedia.com, and en.hukumonline.com
Puri Imperium Office Plaza G-7 Kuningan, Jakarta 12980
to subscribe, call 62-21-83701827 or fax to 62-21 83701826 or email layanan@hukumonline.com
for feedback email english@hukumonline.com

Editor-In-Chief: **Robert Sidauruk** | Editors: **Simon Pitchforth**; **Christina Desy Butarbutar**
Analyst: **Ari Pramudya**; **Aditiya Putra** | Researcher: **Marcell Sihombing**
Librarian and Data Coordinator: **Dedi Rosyadi**

Disclaimer: All data and information contain in this service is compiled from various reliable sources. We have taken every effort to ensure the accuracy and completeness of data and information in these services; however, we are not responsible for any errors or omissions as well as translation mistakes from the source language. Hukumonline English may change, modify, add or remove any errors or omissions on Hukumonline English website without notification. These services are not intended and should not be taken as legal advice or opinion.
No action should be taken in reliance of information contained in these services without first seeking professional services.