

The Impact of the Plan to Renegotiate the Power Purchase Agreement (PPA) by PT PLN



The Directorate General's Letter has met with controversy from the IPP entrepreneurs, the electricity business observers in Indonesia, and the Coordinating Ministry for the Ministry of Marine Affairs of the Republic of Indonesia to the World Bank, consider that the signed PPA may create confusion among investors and would not be good for the investment climate in Indonesia, which is pursuing an electric generation target of 35,000 MW.

In relation to the Directorate General's Letter, the following are matters that must be considered by PLN and the legal impact if the planned PPA evaluation is to be carried out by PLN.

Obstacles in Accelerating the Development of Electricity Infrastructure

In order to increase the fulfillment of the electric power needs of the people in a fair and equitable manner as well as encourage economic growth, the government has used every possible method to accelerate the infrastructure development of electricity including the construction of power stations amounting to 35,000 MW, one of which was to assign PLN to implement electricity infrastructure development in accordance with the Presidential Regulation of the Republic of Indonesia No. 4 of 2016 concerning Acceleration of Development of Electricity Infrastructure as amended by Presidential Regulation of the Republic of Indonesia No. 14 of 2017 ("**Perpres 4/2016**").

The Directorate General of Electricity of the Ministry of Energy, Resources, and Mineral ("Directorate General") issued letter No. 3043/23/DJL.3/2017 concerning the Review of PPA IPP ("Directorate General's Letter") on 3 November 2017, addressed to the President Director of PT Perusahaan Listrik Negara ("PLN"). In the letter, the Directorate General recommends that PLN should conduct a review of the Power Purchase Agreements ("PPA") for the large-scales power plants of the private sector ("IPP") located in Java which have yet to enter the stage of construction or has not received a Business Viability Guarantee from the Ministry of Finance. One of the main points of review is that the selling price of the power plant should be at the most 85% of the cost of generation in the local electricity system.

Perpres 4/2016 regulates that electricity infrastructure development of PLN can be implemented through cooperation with IPP, especially in cases with the following conditions:

- a. construction requiring large-scale funding;
- b. very high construction risks, especially for new locations requiring land acquisition processes;
- c. very risky supply of fuel or an existing uncertainty in gas supply and/or its infrastructure;
- d. power Stations from new and renewable energy sources;
- e. expansion of existing IPP power plants; and/or
- f. several IPPs are developing the power plants in a particular area.

With regard to the conditions for cooperation aforementioned, the government in addition to providing a guarantee to the IPP on the viability of PLN's business for its financial obligations under the power purchase agreement also assigns **PLN to make every effort to complete the construction of electricity infrastructure and obliges PLN to take steps to solve obstacles and issues faced to accelerate the implementation of the infrastructure development in accordance with its authority, including efforts to resolve the implementation of the contract.**

The steps to be taken by PLN with regards to the Directorate General Letter's must consider what the President mandates to PLN in Perpres 4/2016 aforementioned.

If the PPA, which have already been signed are evaluated, then in addition to impeding the implementation of electricity infrastructure development, PLN will also not be performing the duties and obligations mandated by the President in **Perpres 4/2016**. Additionally, it will give rise to an impression of intervention by the Ministry of Energy and Mineral Resources ("ESDM") through the Directorate General, in a B2B private agreement between the IPP and PLN as signed hitherto, which will affect the investment climate in Indonesia.

In reference to the Directorate General Letter, one of the steps that PLN should take in accordance with Perpres 4/2016 for the construction of a project which has not been implemented (for example due to the need for additional funding) is to request the Finance and Development Supervisory Agency to calculate the amount of additional fees and adjust it to the PPA so that the obstacles and problems facing IPP can be resolved, **instead of conducting a review of the selling price of electricity which will ultimately add to burden IPP.**

Furthermore, PLN should note the contents of the Directorate General's Letter have the potential to incur losses for the public through the evaluation of the PPA, **the finalization of the electricity development construction will be delayed and as a result, the public will not be able to benefit from the supply of electricity any time soon.** Pursuant to Perpres 4/2016, members of the public who feel that they have been harmed may make a report and/or complaints to the Minister of Energy and Mineral Resources or the Minister of State Owned Enterprises (depending on the complaint). The relevant Minister will be obliged to immediately resolve the issue in accordance with a timeframe regulated under Perpres 4/2016 (no later than 2 months from the report).

Therefore, taking into consideration the above, **in order to anticipate the existence of reports and/or complaints from the public which will undoubtedly affect the image of PLN and the related Ministries, PLN should not implement what is recommended by the Directorate General. Moreover, the Director General's letter addressed to the President Director of PLN actually does not have a binding legal force as the Directorate General's Letter is merely a suggestion and not a regulatory product.**

Contravention of Minister of Energy and Mineral Resources Regulation No. 19 of 2017 and Principles of Good Corporate Governance

Article 15 of the Minister of Energy and Mineral Resources Regulation No. 19 of 2017 concerning the Use of Coal Power Plant and Purchase of Excess Power ("ESDM Regulation 19/2017") as follows:

"At the time this Ministerial Regulation becomes effective, the process for the purchase and price of the electrical power of a Business Entity Engaged in Electric Power Generation which: a. has taken part in a tender process and submitted a bid price; b. has been declared the tender winner; c. has signed the letter of intent; or d. has signed a PJBL, shall be in compliance with the provision in the laws and regulations in effect prior to the promulgation of this Ministerial Regulation."

Given this provision and also taking into account that the signing of the PPA whose evaluation has been requested, had been signed by the IPP and PLN, it is clear that the **purchase and price of electricity must refer to the regulations applicable prior to ESDM Regulation 19/2017 coming into affect (effective February 17, 2017), since the ministerial regulation does not say that the price of electricity can be evaluated the signing of the PPA. The PLN's actions in evaluating the PPAs that have already been signed is not in accordance with the provisions in the ESDM Regulation 19/2017.**

From the view of the good corporate governance of PLN, every provision including the price of electricity agreed by PLN as contained in PPA should have been through PLN's internal corporate evaluation that should have considered various aspects before any decisions was made by PLN, including the laws and regulations applicable at that time. **PLN's actions in evaluating their previous decisions will raise questions about the company's internal processes that have been previously implemented. And if there is a discrepancy, then the internal parties of PLN who participated in the decision-making process must also be held responsible for the decisions implemented, among others, each shareholder of PLN, including the Government of the Republic of Indonesia as the main shareholder.**

It is not impossible that in any detriment to the financial condition of the state, the Audit Board of the Republic of Indonesia and the Corruption Eradication Commission could participate in the inspection of PLN.

Renegotiation of PPA from the Perspective of Civil Law

In the context of civil law, a PPA which has been signed is valid as a law for the party making it. This is in accordance with Article 1338 paragraph 1 of the Indonesian Civil Code ("**Civil Code**"), which in paragraph 2 further explains that the agreement cannot be withdrawn other than by agreement of the parties making it.

Therefore, in accordance with the provisions of the Civil Code mentioned above, what has been agreed upon in the PPA should act like a law for the authors

so that the parties in it must submit to and honor the agreement, and the price of electricity already agreed cannot be changed in the absence of an agreement of the parties.

If any matter is to be changed, the mechanism to be applied according to civil law in Indonesia must be in accordance with the agreement of the parties in their contract (ie through an addendum), and so **PLN in this case, despite the advice received from the Directorate General to make an evaluation cannot unilaterally amend, among other things, the agreed purchase price of electricity in a PPA without the approval of the relevant IPP. In addition, the change in the agreed purchase price of electricity will be contrary to the 19/2017 EMR Regulation and potentially violates the principle of good corporate governance of PLN, as described in point 2 above.**

*The article above was prepared by **Joshua Satyagraha** (Senior Associate) and **Hendra Ong** (Partner).*

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