

# Quo Vadis of State Control Over Electricity and its Relation to Constitutional Court Decision Number 39/PUU-XXI/2023

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As mandated by Law Number 30 of 2009 concerning Electricity (“**Law 30/2009**”) lastly amended by Law Number 6 of 2023 concerning Enactment of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into a Law (“**Job Creation Enactment Law**”), electricity plays a pivotal and strategic role in materializing the national development goals so the supply of electricity needs to be controlled by the state.<sup>1</sup> Therefore, electricity is categorized as one of the production sectors that is important for the state and vital for the livelihood of the people at large so it is controlled by the state, as mandated in the 1945 Constitution of the Republic of Indonesia (“**The 1945 Constitution**”).<sup>2</sup>

To meet the demands of electricity, it is supplied through generation, transmission, and distribution of electricity, all of which are regulated under the General Plan for National Energy (*Rencana Umum Ketenagalistrikan Nasional/RUKN*). In line with the mandate of the Law stating that the supply of electricity is controlled by the state, Article 7 paragraph (1) of Law 30/2009 states that RUKN shall be formulated according to the national energy policy and established by the Government in consultation with the House of Representatives of the Republic of Indonesia (*Dewan Perwakilan Rakyat Republik Indonesia/DPR RI*).<sup>3</sup> The supply of electricity for public interest through generation, transmission, and/or distribution (and/or also sale of electricity) can be conducted on an integrated basis by a business entity within one (1) working area it controls.<sup>4</sup>

As we all know, the Job Creation Enactment Law had previously amended the provision of Article 7 paragraph (1) of Law 30/2009, whereby “*in consultation with the House of Representatives*” was removed. It had caused complaints from labor unions in the energy sector such as electricity and mining sectors. As a result, a petition for judicial review under Case Number 39/PUU-XXI/2023 was filed in order to review, among others, Article 7 paragraph (1) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law, regarding the formulation of RUKN, and Article 10 paragraph (2) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law, regarding supply of electricity for public interest.

On 29 November 2024, the Constitutional Court (*Mahkamah Konstitusi/MK*) partially granted the petitioners’ claim under Case Number 39/PUU-XXI/2023. This is deemed as a government action in response to the issue on state control over electricity that had been stirring discussions from time to time between the stakeholders and business actors in the electricity sector in Indonesia.

## Petitioners’ Grounds and the Verdicts for Case Number 39/PUU-XXI/2023

The petitioners filed for a judicial review of Article 7 paragraph (1) and Article 10 paragraph (2) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law on the following grounds<sup>5</sup>:

- a. The Law regulated (again) that the supply of electricity for public interest should not be conducted on an integrated basis/should be conducted as unbundling and eliminated the role of the state in controlling the electricity business for public interest; and

<sup>1</sup> In the consideration section letter b of Law 30/2009.

<sup>2</sup> Article 33 paragraph (2) of the 1945 Constitution

<sup>3</sup> Article 7 paragraph (1) of Law 30/2009

<sup>4</sup> Article 10 of Law 30/2009

<sup>5</sup> Pages 63 to 64 of Constitutional Court Decision Number 39/PU-XXI/2023

b. They dismissed public supervision through the role of DPR RI to be involved in the formulation of RUKN.

Based on the arguments of the petition, Constitutional Court rendered its verdicts for Article 7 paragraph (1) and Article 10 paragraph (2) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law in Constitutional Court Decision Number 39/PUU-XXI/2023 as can be seen in the table below for the history of application of the provisions of Article 7 paragraph (1) and Article 10 paragraph (2) of Law 30/2009:

	Law 30/2009	Constitutional Court Decision Number 111/PUU-XIII/2015	Job Creation Enactment Law	Constitutional Court Decision Number 39/PUU-XXI/2023 <sup>6</sup>
<b>Article 7 paragraph (1)</b>	RUKN is formulated according to the national energy policy and established by the Government in consultation with the House of Representatives of the Republic of Indonesia.	-	RUKN is formulated according to the national energy policy and established by the Central Government.	Article 7 paragraph (1) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law <u>conflicts with the 1945 Constitution and does not have binding legal effect</u> , insofar as it is not interpreted as “RUKN is formulated according to the national energy policy and established by the Government <u>after obtaining the consideration from DPR RI</u> ” (the “ <b>Verdict on Article 7 paragraph (1)</b> ”).
<p><b>Note:</b></p> <p>RUKN is governed by Minister of Energy and Mineral Resources Regulation 8/2021 (“<b>MEMR 8/2021</b>”), in which it is defined as a plan for developing a system for supply of electricity comprising the areas of generation, transmission, and distribution of electricity needed to meet the national demand for electricity<sup>7</sup>. In short, RUKN should at least contain the key points of National Energy Policy, conditions of national electricity supply, national electricity demand and supply projections, and plan for developing a system for national electricity supply.<sup>8</sup></p>				
<b>Article 10 paragraph (2)</b>	Electricity supply business for public interest as referred to in paragraph (1) can be conducted on an integrated basis.	Stating that Article 10 paragraph (2) conditionally conflicts with the 1945 Constitution and does not have binding legal effect if the formulation in Article 10 paragraph (2) is interpreted as the justification of the <u>unbundling</u> practice in electricity supply business for public interest in such a manner that it <u>dismisses the state’s control under the “control by the state” principle</u> .	Electricity supply business for public interest as referred to in paragraph (1) can be conducted on an integrated basis.	The word “can” in the norm of Article 10 paragraph (2) in Article 42 point 6 of the Appendix to the Job Creation Enactment Law <u>conflicts with the 1945 Constitution and does not have binding legal effect</u> (the “ <b>Verdict on Article 10 paragraph (2)</b> ”).

<sup>6</sup> Page 587 of Constitutional Court Decision Number 39/PUU-XXI/2023

<sup>7</sup> Article 1 point 2 of MEMR 8/2021

<sup>8</sup> Article 5 of MEMR 8/2021

## Analysis of and Perspective on Constitutional Court Decision Number 39/PU-XXI/2023

With regards to the Verdict on Article 7 paragraph (1) in Constitutional Court Decision Number 39/PU-XXI/2023, it can be interpreted that the formulation of RUKN needs to obtain consideration from DPR RI. In relation to the foregoing, we are of a different view that if the formulation of RUKN does not take into consideration the opinions of DPR RI, it does not necessarily mean that it eliminates the public role in the formulation of RUKN, in consideration of the following:

- a. Regardless the consideration of DPR RI, the formulation of RUKN under Article 7 paragraph (1) of the Electricity Law will also be established by the Government, so the element of supervision by the state is maintained. Moreover, Article 7 paragraph (2) of the Electricity Law also provides that RUKN needs to be formulated by involving regional governments.
- b. MEMR 8/2021 provides that the formulation of RUKN should be based on the National Energy Policy<sup>9</sup>. Furthermore, the regulation regarding National Energy Policy, i.e., Government Regulation Number 79 of 2014 concerning National Energy Policy (“**GR 79/2014**”), states that the draft of National Energy Policy shall obtain approval of DPR RI<sup>10</sup>. It indicates that although it is not directly involved, DPR RI would also contribute to the formulation of RUKN through the approval of National Energy Policy which serves as the basis for the formulation of RUKN.
- c. RUKN is subject to annual evaluation and updated every 5 years.<sup>11</sup> We understand that when the Government conducts annual evaluation of RUKN, the evaluation will also consider aspirations and input from the public and the relevant stakeholders, given that there is an element of “other conditions” in Article 10 paragraph (2) letter d of MEMR 8/2021 for the government to update the RUKN.
- d. The Job Creation Enactment Law was also approved by DPR RI and so, in this matter, the removal of the provision regarding the involvement of DPR RI in the formulation of RUKN as in Article 7 paragraph (1) in Article 42 point 5 of the Appendix to the Job Creation Enactment Law was approved also by DPR RI.

The Constitutional Judge who tried Case Number 39/PU-XXI/2023, M. Guntur Hamzah, also shared the same view on Article 7 paragraph (1) in the explanation of dissenting opinion that if DPR RI’s consideration in the formulation of RUKN is removed, it does not conflict with the 1945 Constitution and is not an issue on constitutional norm because the formulation of RUKN constitutes the implementation of statutory provisions regarding electricity which must be conducted by the government, in this case the executive government.<sup>12</sup>

In connection with the Verdict on Article 10 paragraph (2) in Constitutional Court Decision Number 39/PU-XXI/2023, we understand that the word “can” in Article 10 paragraph (2) can give interpretation that electricity supply business (generation business, transmission business, distribution business and sale of electricity) for public interest can be conducted separately/not integrated and may be integrated, considering the word “can” is not a word that indicates an obligation or a compulsion. Therefore, it is deemed as creating the condition of electricity supply for public interest as being unbundled and removing the element of control of electricity by the state, given that it could indicate that business entities can sell electricity directly to consumers, thus resulting in privatization of electricity business for public interest.

The labor unions demanding the judicial review under Case Number 39/PUU-XXI/2023 also stated that such article could compromise the constitution because it would potentially create different application of tariffs between regions and cause application of electricity tariffs being seen as a profit-making activity, resulting in the inability of fulfilling the need of electricity as a basic necessity.<sup>13</sup>

In relation to the element of control of electricity by the state as being understood through a State-Owned Enterprise (in this case PT PLN (Persero) (“**PLN**”)) which is given the priority in electricity supply business for public interest, we are of the view as follows:

- a. The concept of “control by the state” does not merely refer to control in the meaning of being an executor in supplying electricity to the public but also a regulator through full supervision. In this case, Law 30/2009 already provided the elements of control by the state in the electricity sector, such as establishing national electricity policy; standards, guidelines, and criteria in the electricity sector; determining electricity tariffs for consumers and generators, all of which shall be determined by the Government as set out in Article 5 paragraph (1) of Law 30/2009.

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<sup>9</sup> Article 4 paragraph (1) of MEMR 8/2021

<sup>10</sup> Letter B in the Consideration Section of GR 79/2014

<sup>11</sup> Article 10 paragraph (1) of MEMR 8/2021

<sup>12</sup> Pages 588 to 591 of Constitutional Court Decision Number 39/PU-XXI/2023

<sup>13</sup> <https://nasional.kompas.com/read/2024/11/29/11300921/mk-kembali-kabulkan-gugatan-uu-cipta-kerja-kini-terkait-rencana-umum>, accessed on 10 December 2024.

- b. If a private business enterprise can supply electricity for public interest by selling electricity directly to consumers, it will be able to elevate business in the electricity sector to be more attractive, including to foreign investors. This could lighten PLN's burden in its commitment as the only actor in the supply of electricity for the people in general and resolve the issue on oversupply as the cause of the take-or-pay concept adopted by PLN. The scheme for transmission/distribution network utilization by private business enterprises in the sale of electricity to consumers can be based on the rental scheme with PLN, with due regard to business judgment rule. The transmission cooperation scheme is also based on the mandate in Article 4 paragraph (1) of Government Regulation Number 14 of 2012 concerning Electricity Supply Business Activity and the amendments thereof, stating that the electricity transmission business must open the opportunity to joint utilization of electricity network for public interest.
- c. To avoid potential increase in electricity tariffs when electricity is sold directly to consumers by private business enterprises, the Government needs to take on an important role in determining and supervising the limits on electricity tariffs so that private business enterprises will not sell electricity to consumers at higher tariffs than the regulated tariffs.
- d. PLN as a State-Owned Enterprise in the electricity sector still plays an important role as an extension of the state in managing national electricity system. Pursuant to Regulation of Minister of Energy and Mineral Resources Number 10 of 2017 concerning Principles of Power Purchase Agreements along with the amendments, PLN is the only dispatcher that controls the operational system in accordance with the grid code in Indonesia.
- e. The words "and/or" in Article 10 paragraph (1) of Law 30/2009 can also imply that electricity supply business can be conducted as being unbundling.
- f. As a current topic of discussions among the electricity business actors in Indonesia, the concept of electricity sale directly to consumers by private business enterprises by way of utilization of PLN's transmission networks (power wheeling) is still causing debates on the pros and cons, both for private business enterprises and the state including PLN as a State-Owned Enterprise in the electricity sector. Therefore, if it is to be implemented in the future, it will require study and research as well as adequate regulations so that it will not cause loss to both the stakeholders in the electricity sectors and the people in general as end consumers.

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*The article above was prepared by Dentons HPRP's lawyers*

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