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*Ex officio*

Case No. 265/2017

## **REPORT WITH RECOMMENDATIONS**

**Of the Ombudsperson of Republic of Kosovo**

Related to

*Billing of electricity costs consumed in four northern municipalities of Republic of Kosovo*

**Addressed to:**

- **Mr. Arsim Janova, acting Presider of the Energy Regulatory Office**
- **Mr. Luan Morina, Head of the Department for Energy, the Ministry of Economic Development**
- **Mr. Nijazi Shala, Head of Consumer Protection Department, Ministry of Trade and Industry**

Prishtinë, 13 June 2017

# PËRMBAJTJA

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## PURPOSE OF THE REPORT

1. A sum of 8 million euros of the electricity consumed in four northern municipalities of the Republic of Kosovo, precisely in Leposaviq, Northern Mitrovica, Zubin Potok and Zvečan, is invoiced to consumers of other parts of Republic of Kosovo per year. Energy Regulatory Office (hereinafter: “ERO”) and the Department of Energy of the Ministry of Economic Development (hereinafter: “Department of Energy”), in cross-institutional communications with the Ombudsperson, claimed that this invoicing practice is in compliance with the Laws at effect on regulation of the field of the Energy, specifically with the Law no. 05/L-084 on Energy Regulator and the Law no. 05/L-085 on Electricity.

This Report has three main goals:

- (1) To assess whether this form of invoicing practice fully complies with the legislation stated by the ERO and the Department of Energy ;
- (2) To assess whether this invoicing practice signifies violation of human rights, respectively property rights, the right not to be discriminated and customers rights; and
- (3) To provide competent institutions with specific and tangible recommendations regarding actions to be undertaken to fully comply with laws at force and human rights.

## LEGAL BASE

2. According to Law No. 05/L-019 on Ombudsperson, among others, the following competencies and responsibilities rests with the Ombudsperson:
  - “to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them (Article 18, par. 1, subparagraph 1);
  - “to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases (Article 18, par. 1, subparagraph 2);
  - “to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination” (Article 18, par. 1, subparagraph 5);
  - “to publish notifications, opinions, recommendations, proposals and his/her own reports” (Article 18, par. 1, subpar. 6);
  - “to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo” (Article 18, par. 1, subpar. 8);
3. By delivering this Report to responsible institutions as well as its publishing, the Ombudsperson aims to accomplish the following legal responsibilities.

## FACTS GATHERING

4. The Ombudsperson based on Article 16.4, of the Law on Ombudsperson, no. 05/L-019, on 7 April 2017, has initiated *ex-officio* investigations based on article published by daily press “Zëri”, of 7 April 2017, with the title: “*KEDS charges us with 8 million euros per year for the electricity consumed by Serbs in northern part of Kosovo.*”
5. On 28 of April 2017, the Ombudsperson addressed a letter to the Energy Regulatory Office (ERO) through which he has requested the following information:
  - (1) If the value of consumed energy in the northern part of Kosovo is 8 million euros per year and that this amount is disseminated on invoices of citizens Kosovo wide, as has been disclosed in newspaper’s article “Zëri”;
  - (2) Which are legal provisions that determine which are "reasonable losses that are beyond operator’s influence" and if these provisions permit billing of electricity to other customers who are regular customers; and
  - (3) If apart laws at effect, any decision of ERO, Ministry of Economic Development or of the Government of Republic of Kosovo is at place, through which the issue of invoicing of the electricity consumed in the northern part of Kosovo, has been regulated.
6. On 18 May 2017, the Ombudsperson has received a response by ERO through which it has provided the Ombudsperson with the responses on the following questions:
  - (1) ERO has informed that according to licensed operators the energy which has not been invoiced in 2016 in the northern part of Kosovo- 252 GWh, which comprises approximately 5.24% of the distribution request, and that total value of the invoiced consumed energy in the northern part of the country, is approximately 8 million euros. Additionally, ERO claimed that having in consideration that this amount is not covered by Kosovo institutions and having no other alternative left to keep fully functional the electro-energetic system, ERO has been coerced to disseminate to all customers costs to cover the losses, including the losses endured in the northern part of Kosovo.
  - (2) As per the second question raised, ERO refers to Article 48 [Approval of Tariffs], para 3, point 3.3, of the Law on Energy Regulator no.05/L-084 and the Article 28 [Responsibilities and Rights of the Distribution System Operation], para 1, point from 1.21 up to 1.25 of the Law no. 05/L-085 on Energy. According to ERO, Article 48, para 3, point 3.3 determines that ERO, in the course of approval or fixing tariffs, will ensure that licensees are permitted to recover all reasonable costs, including apart others costs of reasonable levels of energy losses in the transmission and distribution system. Further, ERO has pointed out that supplying all customers with the electricity is a legal obligation; therefore, during the approval of tariffs, ERO takes in consideration a reasonable level of losses, which are treated equally throughout the territory of Kosovo. ERO stressed also that the Distribution System Operator (DSO) has no access in the northern part of the country and that the losses occurred there by DSO are considered as "political losses" which are out of DSO control and that DSO cannot accomplish its functions due to the high cost of these losses, which would imperil regular supply with electricity across the whole country.
  - (3) In the third question raised by the Ombudsperson, ERO replied that it is in a

possession of Decision of 6 February 2012, no. V\_399\_2012 through which the reduction level of losses in distribution is determined. According to ERO this Decision for reduction of losses determines the reduction level of all losses in electro-energetic system including losses occurred in the north of Kosovo.

7. The Ombudsperson on 22 May 2017 met with ERO representatives with intention to obtain information related to ERO response details, especially about technical details concerning invoicing of the electricity consumed in the north. ERO representatives explained that exists two types of energy losses:
  - Technical losses that is incurred during electricity distribution through distribution network and which comprise ordinary losses; and
  - Commercial losses that is incurred from unauthorized consumption of electricity.
8. ERO explained that the energy consumed in the north of Kosovo is considered as commercial losses and that it was necessary that these losses are covered by invoicing them to citizens within the whole Kosovo territory. This, according to ERO, was a must due to the fact that KEDS would not have endured energy losses and would have caused huge losses to the company, the fact that would jeopardize supply of Kosovo citizens with electricity.
9. The Ombudsperson on 22 May 2017 addressed a letter to the Ministry of Trade and Industry (MTI), Customer Protection Department in order to gain information on the stand of the Ministry related to alleged violations of customers' rights with invoicing of the electricity consumed in north to citizens of others parts of Kosovo. Department of Customer Protection of MTI on 29 May 2017 delivered a response on Ombudsperson's request where emphasized that the Law on Customer Protection does not regulate specific fields of public operators' quality infrastructure, as is the case with electricity.
10. Furthermore, on 22 May 2017, the Ombudsperson addressed a letter to the Ministry of Economic Development (MED), Department of Energy, in order to be acquainted with the stand of this Ministry concerning invoicing of the electricity consumed in northern part of Kosovo to citizens of others parts of Kosovo. MED Department of Energy on 29 May 2017 delivered a response to Ombudsperson request, where among others has acknowledged that KEDS and KESKO's inability to have access is linked with the big political problem of integration of four northern Kosovo municipalities and that establishment of conditions for invoicing of energy in this part of Kosovo was in the past as well as remains to be great concern for the Kosovo government. MED has emphasized that customer supply with electricity is legal responsibility and that ERO is an independent body and that in the course of tariffs approving or fixing, permits licensees to recover all reasonable costs, including apart others costs of reasonable levels of energy losses in the transmission and distribution system.

## **ARGUMENT**

### **A. Legitimacy**

11. For the purpose of lawfulness of invoicing of electricity consumed in the northern part of Kosovo, legal provisions have been analyzed, to which ERO has been referred to:  
Law Nr.05/L-084 on Energy Regulator

Article 48 [Approval of Tariffs], para 3, point 3.3:

*3. In approving or fixing tariffs, the Regulator shall ensure that licensees are permitted to recover all reasonable costs, including:*

*3.3. the costs of reasonable levels of energy losses in the transmission and distribution systems.*

Law No. 05/L-085 on Electricity

12. Article 28 [Responsibilities and Rights of the Distribution System Operation], para 1, point from 1.21 up to 1.25:

*1. Responsibilities and rights of the Distribution System Operator are:*

*1.21. provide electricity for covering losses in the distribution system and for ancillary services in the distribution network, in accordance with the principles of electricity market, transparency and non-discrimination;*

*1.22. execute agreements with distribution system users on provision of ancillary services, with the view of providing ancillary services in the distribution network in an economical and efficient manner;*

*1.23. maintain a register of metering points for all respective parties for imbalance in the delivery points in the distribution network;*

*1.24. analyze losses in the distribution network on annual basis, including assessment of technical losses and unauthorized electricity consumption and, if necessary, development and implementation of measures for loss reduction;;*

*1.25. prepare within any current year the annual plan of distribution losses for the forthcoming year, and submit it for approval to the Regulatory. The annual plan of losses shall include an assessment of technical losses and unauthorized electricity consumption;*

Decision of ERO V 399 2012, of 6 February 2012

13. The decision deals with loss reduction in distribution which aim is reduction of losses in distribution for 3% in three first years and for 2.5% in three subsequent years. In justification of this Decision it is stated that:

*“On 24 January 2012, ERO received a note from Government’s Transaction Advisors for KEDS regarding ERO’s indicative values. In their note, according to Transaction Advisors, which was drafted at the behest of the Minister of Economic Development, they emphasizes that indicative values as set by the Regulator are not sufficient to ensure investments in KEDS, in line with the Energy Strategy endorsed by the Parliament of the Republic of Kosovo.”*

14. Based on above stated legal norms, the Ombudsperson cannot agree with the method how the electricity consumed in the northern part of the country is been invoiced to citizens’ of other parts of Kosovo, due to the following reasons:

15. Law on Energy Regulator, Article 48, para. 3, point 3 determines that “...*Regulatory shall ensure that licensees are permitted to recover all reasonable costs, including*”...*costs of reasonable level of energy losses in the transmission and distribution system.*”
16. The Ombudsperson raised the question of “reasonable losses” and gained the information from ERO, during the meeting on 22 of May 2017, that, according to their official interpretation, reasonable losses are of two types: technical losses which occur in distribution network and commercial losses which comprise unauthorized use of electricity (stealing of electricity). These reasonable losses, according to ERO, ought to be turned to licensed operators.
17. But in ERO written response, electricity losses in the northern part of Kosovo by Distribution System Operator is considered as “political loss”. Actually as understood, these losses that the operator considers as political losses according to ERO interpretation are invoiced as commercial losses and citizens of other parts of Kosovo are burden with.
18. As cited previously, the Law on Electricity, Article 48, par. 3, point 3 ensures recovery “*costs of reasonable level of energy losses in the transmission and distribution system*”. Accordingly, the Ombudsperson considers that the current case deals with a practice that is not in compliance with this provision, since this provision covers losses of entirely technical nature, respectively those related to technical irregularities in the transmission and distribution system which, in no way, should not pass a "reasonable level". The Ombudsperson reiterates that the loss of 8 million euros per each year cannot be considered as a loss of reasonable level as required by the Law.
19. Law on Electricity, Article 28, par. 1, point 25 stipulates that: Responsibilities and Rights of the Distribution System Operation are: . . . *prepare within any current year the annual plan of distribution losses for the forthcoming year, and submit it for approval to the Regulatory. The annual plan of losses shall include an assessment of technical losses and unauthorized electricity consumption.*
20. Consumed electricity in the north cannot be qualified as commercial loss or unauthorized consumption, because Operator of Distribution System as well as relevant state authorities are notified since the period after the war that citizens of northern part of Kosovo consume electricity. Therefore, the use of the electricity grid in the north of the country is fully authorized.
21. Provisions cited by ERO itself of the Law on Electricity, Article 28, paragraph 1, point 21 reads that one of responsibilities of the Operator of Distribution System is: “*provide electricity for covering losses in the distribution system and for ancillary services in the distribution network, in accordance with the principles of electricity market, transparency and non-discrimination*”.
22. The Law on Electricity, by virtue of any of its provisions, does not entitle the Distribution System Operator that consumption of electricity that is consumed in an authorized way, with operator's knowledge, be charged to citizens who are regular customers, without their knowledge. Therefore, the Ombudsperson considers that such a way of invoicing of consumed electricity in north Kosovo is discriminatory and non-transparent and opposite by the Law on Electricity.

23. Apart above stated Laws, the Ombudsperson draws attention on Article 23 of the Rule on General Conditions of Energy Supply, promulgated by ERO in August 2011, which stipulates that:

*“The supplier is obliged to ensure that customers are billed for the consumed energy and other charges in accordance with the appropriate tariff type agreed with customer (if applicable).”*

24. Since billing of electricity consumed in the north is not supported by the law, the Ombudsperson analyzed also the Decision of ERO V\_399\_2012 of 6 February 2012, which according to ERO, comprises the basis for electricity billing in the north of the country. As can be understood from it, the decision deals with increase of investments in KEDS in order to evade losses which are determined by law. Furthermore, it can be seen that the Decision is issued on 6 February 2012, while Operator of Distribution System (KEDS) and the Public Supply Company (KESKO) undertook function of distribution and supply in May 2013.<sup>1</sup> It can be noticed that the relevant authorities of Republic of Kosovo previously have set convenient circumstances for KEDS and KESKO by guaranteeing to them investments to cover those losses that are determined by law. Decision ERO V\_399\_2012, of 6 February 2012 is still at force. ERO's reasoning that the value of 8 million euros is unaffordable for KEDS does not stand. Related to this justification, the Ombudsperson, during the meeting with ERO on May 22, 2017, wanted to be informed about the sum of KEDS annual profits. ERO representatives were not in possession of this information. In the absence of this crucial information, the Ombudsperson refuses to accept for granted the allegations that the above stated losses are unsustainable for KEDS. Unsustainable are as well allegations that consumption of consumed energy in the north is reasonable lost which should be covered by citizens of other parts of Kosovo while at the same time to be justified that these expenses have high costs to be bared by the Distribution System Operator since it is really unknown if those are losses of reasonable level or losses with unaffordable costs. This is due to the fact that KEDS is a profitable company, annual profits of which are unknown.

25. The Ombudsperson considers that claims of ERO and the MED, Department of Energy that citizens' supply with electricity is a legal obligation should be clear and grounded. The Law on Electricity, Article 1, stipulates that the purpose of the law is ". . . guaranteeing secure supply . . . **with affordable prices**. . ." (Emphasis added). When it comes to the "universal supply service", the law links this concept with the fixing of "affordable prices" (ibid. Article 3, paragraph 1, subsection 72). These provisions imply that guaranteeing with supply of electricity is not free of charge.

## **B. The right not to be discriminated**

26. The right not to be discriminated is guaranteed by the Constitution and the laws. The Constitution stipulates that: "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status" (Article 24, par. 2).

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<sup>1</sup> Information obtained from Department of Energy of the MED reply delivered to the Ombudsperson on 29 of May 2017.



27. Furthermore the Law No. 05/L-021 on Protection from Discrimination, emphasizes that: “The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law” (Article 3, par. 1), where in the list of “determined ground” open category is included “ or any other ground ” (Article 1, par. 1).
28. The concept of “discrimination” used in the Constitution is the same with that used in the Law on Protection from Discrimination. For interpretation of constitutional concept of discrimination, article 53 of the Constitution should be taken in consideration, which stipulates that “[Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights” (hereinafter “ECtHR”). According to ECtHR Court decisions “[the write . . . not to be discriminated . . . is violated when the states treats unequally its citizens in different situations without providing an objective and reasonable reasoning” (*Thlimmenos v. Greece*, Application No. 34369/97, ECtHR, 6 April 2000, par. 44). In order that such justification be “objective and reasonable” for the inequality stated and (2) ought to exist “a reasonable relation of proportionality between the means used and the purpose intended” (“*Relating to Certain Aspects of the Laës on the Use of Languages in Education in Belgium*” v. *Belgium*, Application No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ECtHR, 23 July 1968, par. 10; see also *Case of X and Others v. Austria*, Application No. 19010/07, ECtHR, 19 February 2013, par. 98).
29. Additionally, the Law on Protection from Discrimination determines that: "Discrimination is any distinction, exclusion, restriction or preference on any grounds set out in Article 1 of this Law, which aims or intends to invalidate or impair recognition, enjoyment or exercise, at the same manner as others, of fundamental rights and freedoms recognized by the Constitution and other applicable laws in the Republic of Kosovo "(Article 3, paragraph 2). Just like ECtHR decisions, the law states that an unequal treatment can be justified if there is "a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the targeted aim." (ibid. Article 6).
30. It is worth mentioning that the Law on Energy Regulator and the Law on Electricity constantly rely upon principles of equal treatment and non-discrimination. See, e. g. the Law on Energy Regulator, Article 15, para. 1, sub. 1.4 (The Regulator has the responsibility "to secure transparent and non-discriminatory performance of energy activities which are subject to public service obligations ... and to provide non-discriminatory access to transmission, distribution and interconnection systems"); and Law on Electricity, Article 5, para. 9 ("the Regulatory shall determine the division of costs for public service obligations established ....among final customers, in a non-discriminatory and transparent manner.”).
31. Summarizing the abovementioned criteria on discrimination, the billing practice of electricity consumed in the North of the Republic to other customers, should be assessed based on the analytical steps as follows:
- (1) Does this practice of billing represents unequal treatment between people in similar situations, based on a personal status determined in the Constitution or the Law on

## Protection from Discrimination?

- (2) If yes, does there exist an objective and reasonable justification for this unequal treatment? Or otherwise:
- (a) Does this billing practice have legitimate purpose?
- (b) If yes, does there exist a reasonable relation of proportionality between this purpose and the above given billing practice?
32. At the first stage of the analysis, it is obvious that the billing practice at question constitutes an unequal treatment between persons in similar situations. Namely, some electricity customers do not pay for the amount of energy they consume, while other customers pay not only for their consumption but also pay for the electricity consumed by those who do not pay electricity bills. In this way KEDS with ERO authorization, does not treat all customers of electricity grid with the same standard.
33. The Ombudsperson considers that despite potential public perception that inequality is based on *ethnicity*, the Ombudsperson deems that here we deal with inequality not based on *ethnicity* but based on *settlement*: Residents of the northern part of Kosovo Republic are not obliged to pay bills for consumed energy while citizens of other part of Kosovo are obliged to pay their bills for consumed energy as well as pay for the electricity consumed by residents of the northern part of the country. This cannot be qualified as inequality based on ethnicity, since in the northern part of the country resides not only Serbian community and also in the other part of the country resides people that are not of Albanian Community.
34. It is true that neither in Constitution nor in the Law, “settlement” is not recognized as a possible base for discrimination. Although, it doesn’t mean that the current practice of billing cannot be qualified as discrimination. As noticed above, Constitution and the Law determine that discrimination can be based on “other personal status” (Constitution, Article 24, paragraph 2) or “any other base” (Law on Protection from Discrimination, Article 1, par. 1) that is not explicitly cited with the Constitution or the Law. Settlement can be considered as such base, in full compliance with ECtHR judicial decisions. *See, e.g., Carson and Others v. The United Kingdom*, Application No. 42184/05, ECtHR, 16 March 2010, § 70 (“term ‘other status’ . . . has been given broad meaning to include . . . a difference **based on settlement**”, emphases added). Thus, even though “settlement” is not explicitly stated in the Constitution or in Law as a possible base of discrimination, unequal liability to pay for the energy consumed, based on the settlement, can be considered anyway as a discriminatory practice, depending from other analyses’ steps accomplishment.
35. At the second step of analyses a question should be raised in case there is a justified and reasonable objective for the current billing practice. As noticed above, in order to exist a justified and reasonable objective for the current billing practice, two further criteria ought to be fulfilled: (1) the current practice of billing ought to have a legitimate purpose and (2) a reasonable relationship of proportionality between the means employed and the targeted aim should be at place.
36. The Ombudsperson deliberates that the current billing practice has a legitimate aim.

According to ERO's submission, the fact that Operator of Distribution System (ODS) has no access in the northern part of the Republic, which means that it cannot invoice the residents of that part of the country and, consequently it should find another way to be reimbursed for the energy consumed in this part of the country. According to ERO, "[in case these losses are not covered at that case ODS cannot perform its functions due to high costs of these losses, which will risk regular supply with electricity customers of entire Kosovo" (ERO's submission, p. 3). According to this allegation, the purpose of other customers' billing for the energy consumed in the northern part of Kosovo is done with the intention not to imperil supply with energy of the whole country. This purpose is obviously a legitimate aim.

37. Nevertheless, the Ombudsperson deems that the current billing practice fails at the second criteria: there is no ***reasonable linkage of proportionality*** between billing practice and the aim to evade risking of electricity system Kosovo wide.
38. In order to assess the ***proportionality*** of this practice at issue, the Ombudsperson observes firstly that, according to Constitutional Court "proportionality test has reached statutory limitation in Article 55 of the Constitution" (Case No. KO131/12, Dr. Shaip Muja and 11 members of the Parliament of Republic of Kosovo, Judgement, 15 April 2013, par. 127). The Ombudsperson considers that the billing practice, subject of discussion, is opposite with two requests of Article 55 and accordingly, cannot be qualified as proportional measure.
39. Firstly, Article 55, par. 1 stipulates: "Fundamental rights and freedoms guaranteed by this Constitution ***may only be limited by law***" (emphases added). We have also noticed in Part A that the current billing practice does not abide with the Law on Energy Regulator and the Law on Electricity. This means that unequal treatment of residents of the northern part of the country versus residents of other parts of Kosovo is not authorized by law and thus is not proportional measure according to Article 55, paragraph 1.
40. Secondly, Article 55, paragraph 4 of the Constitution stipulates that: "In cases of limitations of human rights or the interpretation of those limitations; all public authorities ... shall pay special attention ... the relation between the limitation and the purpose to be achieved and ***the review of the possibility of achieving the purpose with a lesser limitation*** (emphases added). In the current case, this provision requests that the ERO, as well as all responsible institutions for legal regulation of the field of energy, to review whether intended purpose of the current billing practice (namely, the aim of not risking energetic system in entire Kosovo) can be achieved with equal treatment of population of entire country.
41. As it has been justified in Part A, there is a reason to suspect allegations that 8 million euro loss would be unaffordable for KEDS. But, even if we accept it for granted, for the sake of argument, that it cannot cover such expenses by itself, the Ombudsperson observes that there is no proof that these institutions have reviewed appropriately the issue of losses in the northern part of Kosovo which could have been avoided with any other alternative way, without forcing citizens of other part of the country to pay for the energy which has been consumed by others.
42. In particular, the Ombudsperson considers that one way of avoiding above stated losses

would have been notification of four municipalities in the northern part of the country by the ERO or the Government, in compliance with constitutional and legal norms against discrimination, to enable KEDS access with the purpose of measuring and billing of electricity consumed, is mandatory condition for supply of these four municipalities with electricity as is the case within whole Kosovo territory. The Ombudsperson is not in possession of any evidence that KEDS, Government or ERO, have *reviewed* which steps should have been taken to ensure KEDS access there or either that any single activity has been performed to positively resolve this issue. Such solution will ensure that ERO's intended purpose (to avoid losses at northern part of the country so that entire system functioning is not endangered) to be achieved through treatment of all Kosovo citizens equally. While at least exists this alternative opportunity to achieve the purpose of avoiding the losses in the northern part of the country, and while this alternative achieves the intended purpose with a minor limitation of the right not to be discriminated, then the current billing practice derives to be non-proportional measure in contradiction with Article 55, paragraph 4 of the Constitution. In other words, the current practice fails at the final step of analyses and, due to this, represents infringement of the right not to be discriminated. Response should be given to these two counterarguments.

43. Initially, it can be argumenta that ERO's responsibility is to ensure electricity for the residents of the northern part of the country, even though they do not pay for the services provided. In this direction, ERO's submission claims that "supply with electricity of all customers is legal obligation, thus ERO conform obligations, requests by licensed operators to supply all customers with the electricity. Thus, in the course of tariffs' approving, ERO takes in consideration a considerable level of losses, which are equally treated within the whole Kosovo territory" (ERO Letter , p. 3). Furthermore, Department of Energy claims that: "Based on legislation on Energy, supply of all customers with energy is a legal liability". But, the Ombudsperson observes that ERO does not cite any legal provision in support of its allegations that the supply of all citizens of the country with electricity is legal obligation *as well as for those residents who do not pay for the consumed energy*. Such obligation does not exist, apart in specific cases foreseen by the law such as for example, costumes in need, even though the law determines that even this category "should not be funded from electricity customers" (Law on Electricity, Article 49, par. 2, subpar. 2.4). Apart such specific cases, legal liability for supply of citizens with energy, as reasoned in Part A, is always based in offering a reasonable price for this service. This means that they are not provided with electricity without it being payed. The Ombudsperson requests only that this principle is being applied equally for all residents of Republic of Kosovo, both for inhabitant of the northern part of the country as well as for those of other parts.
44. Secondly, it can be justified that ERO is powerless to seek access for KEDS in northern part of the Republic, while this issue is been regulated by a special agreement that is waiting to be implemented. Submission received from the Department of Energy of the Ministry of Economic Development, claims that: " The Government of Kosovo has addressed the problem of not billing of electricity in the northern part of the country in Brussel Agreement on Electricity", where was "requested from the parties establishing of a new energetic supply company according to Kosovo rules and legal framework". But, "implementation of this agreement is facing difficulties due to obstructions conducted by Serbia".
45. Apart difficulties raised, the Ombudsperson deems that current non-implementation of the

agreement does not represent any obstacle for ERO to request, at least until agreement becomes functional, that four mentioned municipalities enable KEDS billing for the consumed energy by its residents, in order that they pay for the energy consumed by them. For as long as KEDS supplies these municipalities with electricity, they are bound to provide access for measuring and billing purpose of consumed energy. Such solution, not only hinder implementation of the Agreement in the future, but also provides the parties, signatories of this agreement, with even stronger courage to implement provisions of this agreement as promptly as possible.

### C. Property right

46. Article 46, par. 1 of the Constitution of Republic of Kosovo (hereinafter: "Constitution") determines that: "Property right is guaranteed". But, this doesn't mean that expropriation of property is forbidden categorically. On contrary, Constitution explicitly stipulates "The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property" (*ibid*, Article 46, par. 3). However, constitutional authorization of expropriation is not unlimited. Especially, expropriation can be conducted only if "is authorized by the law" (*ibid*, Article 46, par. 3, emphases added).
47. The request that the expropriation is conducted solely in compliance with the law is further supported on two other constitutional sources. Firstly, Article 1 of the First Protocol of the European Convention on Human Rights (hereinafter: "ECHR") stipulates that: "No one can be deprived of his possessions, except. . . ***in conditions foreseen by the law***" (added emphases). The right determined with this provision, the same as all other rights stipulated in the ECHR and its Protocols is, "guaranteed with this Constitution" (Constitution, Article 22). Similarly, we have noticed that Article 55, par. 1, of the Constitution reads that: "Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law" (added emphases).
48. In order to interpret these provisions, we refer again to the ECtHR court decision as is requested by Article 55 of the Constitution. According to ECtHR court decision, vast meaning has been given to concept of "property" and "possession", by including any kind of movable and immovable property as well as a range of economic interests. Specifically, ECtHR has ascertained that: "The tax is in principle, a restriction of the right guaranteed by the first paragraph of Article 1 of the First Protocol [of ECHR], due to the fact that it [taxes] deprives a person from a possession, i.e., ***from the amount of money that should be paid***" (*Burden v. United Kingdom*, Application no. 13378/05, ECtHR, 29 April 2008, § 59, added emphases). Based on this reasoning, each time when the state coerces a person to pay a sum of the money, this is considered a restriction of property right.
49. Consequently, when KEDS, acting with the authorization of ERO, obliges other customers to pay for the amount of electricity consumed by residents of the north of the Republic, this is considered a restriction of the right to property, because invoiced customers are deprived "of a possession, which means they are deprived of the amount of money that should be paid".
50. We have noted that it is Constitution's requirement that any restriction of the right to property ought to be authorized by law. Therefore, the billing practice at issue, as a restriction of the right to property, should be legally authorized. But, above in Part A, it

has been justified that this billing practice is not in compliance with the Law on Energy Regulator and Law on Electricity. Consequently, billing the amount of electricity consumed in the north of the country to customers of the rest of the country does not meet the constitutional requirements and therefore comprises violation of the right to property.

51. Apart constitutional right on property, the Ombudsperson has analyzed the provisions of the Law no. 04 / L-077 on Obligational Relationships, taking into account that billing of electricity creates legal-civil relations that falls upon the scope of this law. In this context, the Ombudsperson observes that the Law defines as follows: “*Any person that without a legal basis becomes enriched to the detriment of another shall be obliged to return that which was received or to otherwise compensate the value of the benefit achieved*”, where [The term enrichment also covers the acquisition of benefit through services.” (Article 194, par. 1 and 2). Based on these provisions, consumers who, without their knowledge, paid for the energy consumed in the northern part of the Republic are entitled on the return of the amount they were obligated to pay. .

#### **D. Consumer’s rights**

52. Consumer rights are regulated by the Law no. 04 / L-121 on Consumer Protection. This Law guarantees basic consumer rights such as is the right to protect consumer's economic interests as well as the right to protect the property (Article 4). According to Law liabilities of the seller are been determined, who is obliged to provide accurate invoice to the customer for the service provided as well as customer’s right to control invoiced amount for the service provided (Article 12). According to this Law, billing of electricity is calculated based on real consumption read on customer’s meter. Related to this the supplier should disclose in the invoice information which enables the customer to control the amount and the value of energy consumed as well as electricity billing to be calculated based on the real consumption, which is measured with calibrated meters (Article 29).
53. Furthermore the Law on Electricity, Article 48, par. 4, point 3, determines that the “Customer is entitled to . . . receive transparent information on applicable prices and tariffs and standard terms and conditions, in relation to access to and use of electricity services”.
54. On this occasion the Ombudsperson wants to draw attention of the Department of Consumer Protection within the Ministry of Trade and Industry, which has confirmed through the response of 29 of May 2017 delivered to the Ombudsperson that the Law on Consumer Protection “in this case it does not regulate specific fields of quality infrastructure and public operators”. This allegation is overruled the Law on Electricity itself, which determines that: “Final customers shall be entitled to protect their rights in compliance with .... the legislation with regulates customer’s protection” (Article 48, par. 1).
55. Accordingly, the Ombudsperson finds that provisions of the Law on Consumer Protection and the Law on Electricity are violated in the present case. More precisely, economic interest and citizens’ property of the Republic of Kosovo has been violated as well as consumer’s right to have an accurate invoice and the possibility to control the invoiced amount for the services provided. Violation has also occur on consumer's right to have energy invoice based on real consumption obtained from customer's meter and control the

amount and the value of energy consumed as well as electricity bill to contain data according to which the consumer can control of the amount and the value on energy consumed.

## **FINDINGS AND RECOMMENDATIONS OF THE OMBUDSPERSON**

### **A. FINDINGS OF THE OMBUDSPERSON**

56. According to the above stated assessment, the Ombudsperson finds that:

- (1) Billing of consumed electricity in four northern municipalities of Republic of Kosovo to customers of other parts of the country represents violation of the Law No. 05/L-084 in Energy Regulator and the Law No. 05/L-085 on Electricity.
- (2) This type of billing represents breach of property right, guaranteed by Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol 1 of the European Convention on Human Rights and brings to ungrounded enrichment according to Article 194 of the Law No. 04/L-077 on Obligational Relationship.
- (3) This billing practice represents violation of the right not to be discriminated, guaranteed by Article 24 of the Constitution of republic of Kosovo and the Law No. 05/L-021 on Protection from Discrimination.
- (4) This billing practice represents violation of customer's rights, guaranteed by the Law No. 04/L-121 on Customer Protection.

### **B. OMBUDSPERSON'S RECOMMENDATIONS**

Based on these findings and in compliance with Article 135, par. 3 of the Constitution of Republic of Kosovo and Article 16, par. 4 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends that:

- (1) ERO urgently to terminate unlawful practice of billing of the consumed electricity in the northern part of the Republic of Kosovo to customers of other parts of the country;
- (2) The Government of Republic of Kosovo, in cooperation with ERO and KEDS to find alternative way to evade losses in the north of the country, by treating all customers equally according to constitutional and legal norms against discrimination.
- (3) ERO, in compliance with the Law No. 05/L-084 on Energy Regulator, to promulgate a decision through which it will approve tariffs' reduction up to that level which will enable customers' reimbursement that unjustly have been invoiced, and continue to be invoiced for the energy consumed in four northern municipalities of the country.

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo ("Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law) and Article 28 of the Law on Ombudsperson No.05/L-019, "Authorities to which the Ombudsperson has addressed

recommendation, request or proposal for undertaking concrete actions,... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), You are kindly asked to inform us on steps to be undertaken in the future by You regarding to this issue.

Respectfully submitted,

Hilmi Jashari  
Ombudsperson