

STUDY CASE: LEASE OF COASTAL ZONE FOR UNDERSEA CABLE PROJECT



Planned route of the undersea cable

Introduction: In early February 2010 in Rome, Montenegro and the Italian Republic signed an agreement on the construction of the undersea electricity interconnection between transmission networks of the two countries. In early July of

the same year, the Parliament of Montenegro ratified this Agreement by adopting the Law that regulates this area.¹ On 25 January 2011, the State of Montenegro, the Italian company "Terna" and Crnogorski Elektroprenosni Sistem AD concluded the Project Coordination Agreement,² which will cost about €800 million, out of which over €600 million is allocated to the actual construction of the undersea cable and converter station on the Montenegrin coast, while at least €100 million is allocated to the construction of the 400kV transmission line corridor from the Montenegrin coast to Pljevlja.

In early 2015, the Public Company for Coastal Zone Management, in coordination with the government, prepared the Agreement on Use of Coastal Zone for Implementation of Undersea Cable Construction Project. The study will show that the agreed fees are in the interest of the Italian company "Terna" and that the State of Montenegro have given up multimillion revenues.

II: PREPARATORY ACTIVITIES: In March 2013, the government of Montenegro approved the proposal of the Agreement on Use of Coastal Zone for Preparatory Activities concerning the construction of the undersea cable to the Public Company for Coastal Zone Management (JP Morsko dobro), which was to be concluded with the company "Terna Crna Gora" from Podgorica, a Montenegro-based subsidiary company of the Italian company "Terna". The government requested from "JP Morsko dobro" to simultaneously align the text of the Agreement on Use of Coastal Zone for Implementation of Undersea Cable Construction Project.³ Special emphasis had to be placed on environmental protection, possible risks, termination of the agreement, assignment of the rights under the Agreement by "Terna Montenegro" and offered fees for the use of coastal zone.

At the end of March 2013, the Agreement on Use of Coastal Zone for Preparatory Activities was concluded between "JP Morsko dobro" and the company "Terna Montenegro", which was granted the right to use the coastal zone in the underwater of the territorial waters of Montenegro and the Montenegro's coastal region (with special emphasis on Rt Jaz), for the implementation of preparatory activities for the realization of the whole project.⁴

¹ Law on Ratification of the Agreement between Montenegro and the Italian Republic, No. 01-292/6 dated 9 July 2010.

² Project Coordination Agreement between the State of Montenegro, Terna Rete Elettrica Nazionale S.p.A and Crnogorski Elektroprenosni Sistem AD Podgorica, on 25 January 2011.

³ Conclusion 06-15/3 adopted by the Government of Montenegro on 21 March 2013.

⁴ Agreement on the Use of Coastal Zone for Preparatory Activities on 27 March 2013.

1. PREDMET UGOVORA

1.1. U skladu sa gore navedenim preliminarnim podmorskim premjerom, DPP-om, pismom br. TCG/P029-2011 od 14. novembra 2011. i pismom br. 01-140/128 od 2. decembra 2011., ovim Ugovorom JP Morsko dobro daje Terni CG pravo korišćenja za pripremne aktivnosti morskog dobra koje se nalazi na podmorju teritorijalnih voda Crne Gore i zemljišta probalnog područja Crne Gore, (sa posebnim osvrtom na Rt Jaz), kao što je prikazano u Aneksu 1 - preko preliminarnog koridora morskog dobra, katastarske parcele br. 542/34, 542/35 list nepokretnosti br. 118 i 543/5 list nepokretnosti br. 117, Katastarska opština Višnjevo, opština Kotor, i registrovano u nadležnom katastru nepokretnosti kao državna svojina morsko dobro, sa teretom „morsko dobro“ („preliminarni koridor morskog dobra“), a Terna CG prihvata dato pravo korišćenja. Ugovorne strane potvrđuju da pripremne aktivnosti, definisane ispod u članu 1.2, mogu biti vršene od strane Terna CG, ili od strane njenih podizvođača, konsultanata, ili od strane trećih lica.

Excerpt from the Agreement on the Use of Coastal Zone for Preparatory Activities

The Agreement was concluded for a period of 24 months, whereas in case the company "Terna Montenegro" did not obtain all the necessary approvals and construction permits, it would have the right to unilaterally terminate the Agreement. The agreed fee for use of the coastal zone was €20,000.

III: POSSIBLE FEE RANGES FROM €5.5 MILLION TO EVEN €69 MILLION: In mid-2013, "JP Morsko dobro" entered into negotiations with "Terna Montenegro" concerning defining the conditions for a final agreement on the use of the coastal zone. For this purpose, it requested a report on determining the market value of the fee the Italian company is obliged to pay for use of the coastal zone.

In November 2014, "JP Morsko dobro" received the Assessment of the market value of the fee for the investment of the undersea cable and the proposal for the negotiation platform.⁵ The document specified that the cable comes out of the sea at Rt Jaz and the undersea interconnection project covers a total area of 55,000 square meters of the seabed, of which 43,000 square meters is for installing the undersea cable and 12,000 square meters for electrodes placement. In addition to the water area, the project includes an additional land area of 1,463 square meters in the coastal zone.

The report emphasizes the possible environmental consequences, or so-called non-monetary costs, considering that laying fiber-optic and electrical cables has a huge impact on the marine environment, and there is no certainty that the cables can be properly buried all the way. Due to the cables laying, navigation of primarily fishing vessels will be affected, marine organisms and habitat will also be harmed, and the quality of the sea water may also be impaired. The document sets out that while determining the fee, the issues of possible abandonment of the project or the cable removal after or before the set time limit, as well as financial penalties if the cable is not removed in the prescribed manner, must be taken into account.

The document presents several comparative methods for calculating the fee for the use of the coastal zone while installing electric cables in the seabed. The first is described as so-called "Spanish model," under which the annual lease is calculated as the sum of the fee for the use of water and land area and the investment value. If the inputs from this model were applied to the undersea cable project in Montenegro, the fee for the land area of the coastal zone would be €17,500 and for the marine part €330, and based on the investment (projected at €85 million) it would amount to less than €1.3 million, so the total annual income would be nearly €1.4 million, and in 50 years it would reach the sum of €68.9 million.

⁵ Analysis of Rental Value/Fee regarding Investment of Undersea Cable Running through Coastal Zone on November 2014.

Another model is from the American practice based on the study "Fair Market Value Analysis for Fiber Optic Cable Permit and National Marine Sanctuaries" by experts from the Institute "Schmalensee" and the reviews of the report given by the experts in the field of coastal zone management (California Coastal Commission). The report covers two versions from the American practice that start from the calculation of a fee based on per mile price, and according to the first version "JP Morsko dobro" would earn €5.9 million for 50-year lease of the seabed area, and according to the second version, it would generate revenues of €8.4 million. The calculation did not include the fee for the land which would additionally increase the income.

The conclusions of the report indicate that "JP Morsko dobro" could seek the fee ranging from minimum €5.5 million to maximum €69 million for a 50-year period. The document recommends that the model for calculating the fee should be a percent of the investment, from 0.5 to one percent, and that the middle ground between Italian and above calculation models, could be the fee of over €6.3 million for the given period.

- v. Prethodni primjeri pokazuju da bi crnogorska strana, odnosno JP Morsko Dobro, kao naknadu za korišćenje morskog dna i dio na kopnu trebala da traži naknadu u rasponu od minimalno 5,5 miliona do čak maksimalno 69.000.000 eura kao ukupnu naknadu za period od 50 godina.

Morsko dobro could have earned between €5.5 million and €69 million from the undersea cable

However, the report recommends that the fee level stays between 5.5 million to 6.4 million for the period of 50 years, since a high fee may lead to abandonment of the project of national interest. It is also suggested to agree upon the fee for a 25-year period, because fees for installing cables rapidly change.

IV: ITALIAN COMPANY DETERMINS FEE: While the report on market analysis of the fee for the use of coastal zone was underway, the company “Terna Crna Gora” carried out its own analysis of the fee which is to be paid to “JP Morsko dobro.”

3) Da je TERNA CG u skladu sa italijanskom normativom prvobitno ponudila ukupnu naknadu u visini od 1,3 miliona EURA za period od 50 godina (ili 0,80 EURA po m²).

TERNA CG je procjenu naknade za korišćenje morskog dobra opredijelila na osnovu "javnog interesa" projekta MONITA koji se realizuje na osnovu Sporazuma između Crne Gore i Italije kojim se pored ostalog Crnoj Gori dodjeljuje 20% kapaciteta elektroprenosne konekcije i prihoda od zagašenja. Primijenjeno je umanjenje naknade/plaćanja od 50% koje se u Italiji primjenjuje za projekte od "javnog interesa".

TERNA CG je uradila uporednu analizu legislative drugih zemalja koje predviđaju značajne ekonomske olakšice za investicione projekte od "javnog interesa" kao što je Albanija (sa simboličnom naknadom od 1 EURA ukoliko investicija prelazi 10 miliona EURA) i Grčka (u praksi nije predviđeno plaćanje zakupa za podmorske kablove koje ulaze u satav nacionalne elektroprenosne mreže).

Usklađena vrijednost cjelokupnog iznosa naknade za korišćenje morskog dobra (podmorja i obale) za realizaciji projekta MONITA za period od 50 godina prema predlogu TERNE može varirati između 1,5 i 2,5 miliona EURA.


Terna made its own assessment

In its calculation, the Italian company estimated that the project should be categorized as the project in the "public interest", which according to Italian regulations means 50 per cent lower fee for the use of the coastal zone. In this sense, the Italian company acknowledged that 20 per cent of the submarine cable would belong to Montenegro, and in calculating the fee for the period of 50 years it was estimated that it may vary between €1.5 and €2.5 million.

“JP Morsko dobro” and „Terna Crna Gora“ concluded a Memorandum of Understanding which stated that the text of the agreement on long-term lease of the coastal zone had been aligned during the cooperation with competent institutions, but notwithstanding the lengthy negotiations, parties to the Agreement have not agreed upon the fee for the use of coastal zone.⁶

Na osnovu prethodno navedenog, evidentno je da je realizacija projekta izgradnje podmorskog kabla između Republike Italije i Crne Gore od javnog interesa. Polazeći od nesumljivog javnog interesa da se projekat realizuje, smatramo da, shodno zaključku Vlade Crne Gore broj:08-4/14-14 od 15.01.2015. godine, u najkraćem roku treba nastaviti i završiti pregovore sa Ternom Crna Gora u cilju postizanja dogovora oko visine zakupa morskog dobra, što bi dovelo i do potpisivanja ugovora o zakupu morskog dobra.

S poštovanjem,



Terna offers the fee of €1.3 million for the undersea cable

⁶ Memorandum of Understanding between “Terna Crna Gora” and Public Company for Coastal Zone Management.

In December 2014, “JP Morsko dobro” submitted the Information on negotiations with the company “Terna Crna Gora” to the Ministry of Sustainable Development and Tourism, stating that this company did not determine the public interest of the entire project and its value quantification,⁷ thus leaving the competent Ministry to decide whether this parameter should be taken into consideration when determining the fee for the use of the coastal zone.

The Ministry assessed the project as one of the high-priority development projects, which makes the project of constructing the undersea cable a matter of public interest, and gave the "green light" to resuming final negotiations, i.e. to making a concession to the Italian company,⁸ which is what “JP Morsko dobro” did.⁹

V: HARMFUL AGREEMENT: Concessions that Montenegro has made to the Italian company were implemented in the working text of the Agreement on Use of Coastal Zone for Implementation and Construction of Infrastructure. The document states that "Terna Montenegro" is entitled to use the coastal zone's land and water area, all for the purpose of construction, operation and maintenance of energy facilities, within Montenegrin territory and waters, and related infrastructure.¹⁰ The Agreement is concluded for a period of 50 years, with the possibility of a maximum 40-year extension of time under the same conditions.

The full fee "Terna Montenegro" will pay for the use of the coastal zone is calculated on the basis of €0.8 per square meter, multiplied by the square meter of the surface of the coastal zone of 55,000 square meters, minus the sum of €20,000 which was paid for the use of the coastal zone's preliminary corridor. The first installment amounting to €260,700 will be paid within 30 days after obtaining the permit, whereas the second and last installment, which amounts to over one million, will be paid at the end of the construction of the energy facility. Thus, the full amount that the Italian company will pay for the use of the coastal zone over the period of 50 years will be €1.3 million, which is also determined by the Methodology for Establishing Economic Conditions for Long-Term Use of Coastal Zone for Implementation and Operation of Infrastructure.¹¹

In case “Terna Crna Gora” fails to obtain all necessary permits, approvals and powers from authorities in charge of implementation of the Montenegrin part of the project by the end of 2014, the Agreement will be immediately terminated, while other termination clauses remain the same as in the Agreement on Preparatory Activities. In the event of termination of the Agreement, "Terna Montenegro" remains the owner of the energy facilities, and they will not be considered a part of the coastal zone, and the said company will have the right to remove them. In the event of premature termination of the Agreement, “JP Morsko dobro” undertakes to reimburse the Italian partner for a part of the fee paid for the use of coastal zone.

“JP Morsko dobro” grants unconditional right to the company "Terna Montenegro" to, without any further consent or permission, register the Agreement in the Cadaster of Immovable Property, as well as to transfer to related parties rights and obligations arising from the Agreement. In addition, “JP Morsko Dobro” undertakes to mark the territory for the future project, which means restricted access for fishing and other vessels to the marked area.

Spanish model	American model	Italian model
€68.9 million	€8.4 million	€1.3 million

Table 1: Possible Revenues from Use of Coastal Zone

⁷ Information on negotiations No. 0201-450/34 on 16 December 2014.

⁸ Official Letter 01-303/41-2014 on 2 February 2015.

⁹ Conclusion No. 0203-561/7 on 14 February 2015.

¹⁰ Working Text of Agreement on Use of Coastal Zone for Implementation and Construction of Infrastructure

¹¹ Methodology for Establishing Economic Conditions for Long-Term Use of Coastal Zone for Implementation and Operation of Infrastructure.

In July 2015, the NGO MANS filed a criminal complaint against Rajko Barovic, director of the Public Company for Coastal Zone Management and Branimir Gvozdenovic, Minister of Sustainable Development and Tourism on the basis of the founded suspicion that they had committed a criminal act of abuse of their official positions and negligently performed duties in determining the amount of the fee for the use of the coastal zone for constructing the undersea cable to the advantage of the company "Terna Montenegro", and at the expense of the state budget.

Author: MANS Investigation Center
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