



АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ
РЕПУБЛИКЕ СРБИЈЕ

APPEAL PROCEDURE

common reasons why decisions are revoked, obligations of the first instance authority

June 2009

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INTRODUCTION

Over 430 appeals received from June 2005 to June 2009

Decisions at second instance – mainly cancelled, over 10 appeals rejected

Reasons for cancellation – all according to APA*:

- misrepresented factual circumstances by inaccuracy and omission

- misapplication of substantive law

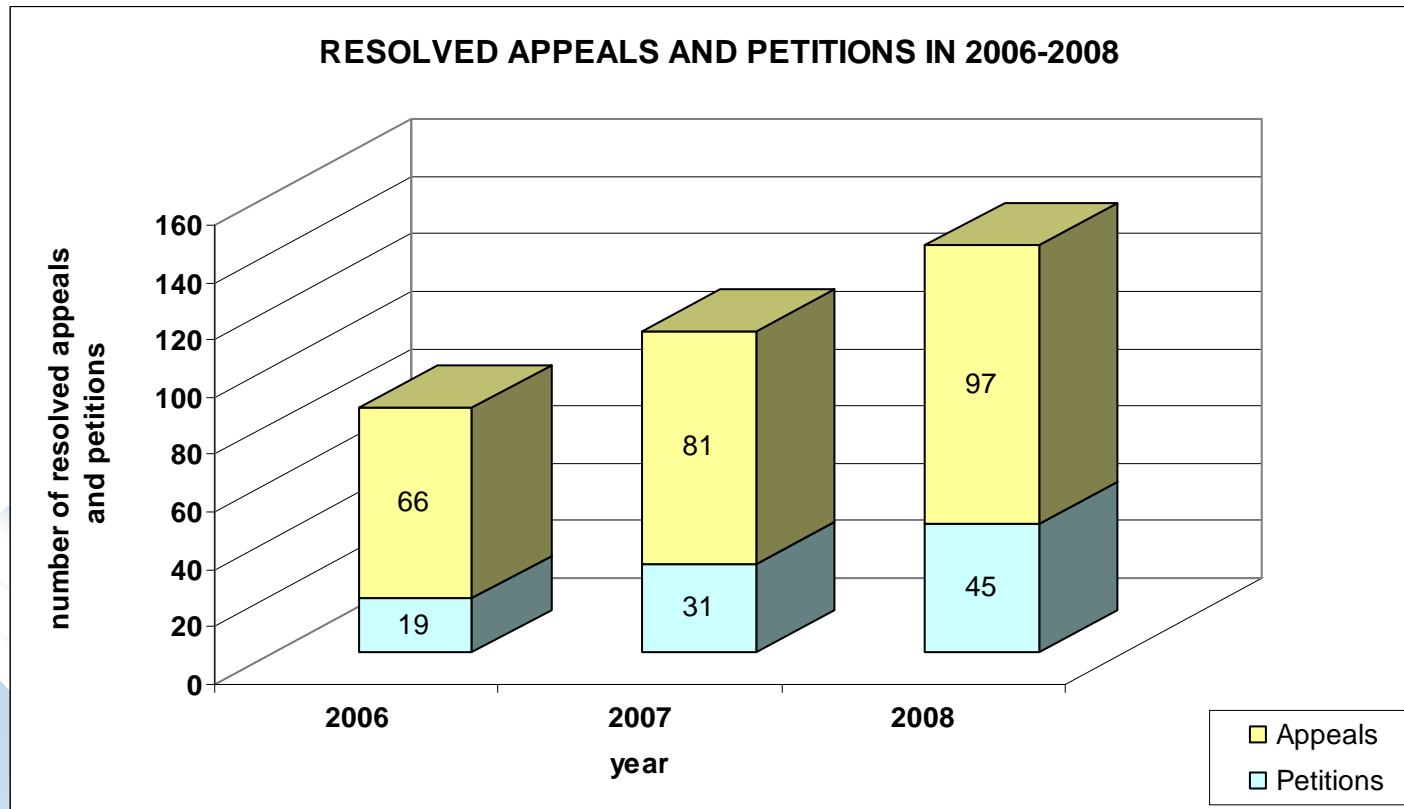
- serious violations of procedure rules

Violations of procedure rules were identified in most of the cases, whereby a number of poor process decisions are also a result of deficient fact-finding, or incorrect implementation of the substantive law.

* Administrative Procedure Act

INTRODUCTION

Overview of Resolved Appeals 2006 - 2009



INTRODUCTION

Overview of Appeals Received

01.01-01.06.2009.

Industrial companies	Petition	Appeal	total
Jugoistok Niš	7	14	21
Elektrosrbija Kraljevo	10	35	45
Elektrovojvodina Novi Sad	3	13	16
Centar Kragujevac	0	3	3
Elektrodistribucija Beograd	3	10	13
TOTAL	23	75	95

Serious Violations of Procedure Rules

Common violations of procedure rules in practice are as follows:

- Violation of the hearing principle – Article 9 of APA*
- Misapplication of provisions of Articles 134-138 of APA
- Misapplication of provisions of Article 58, para. 2, of APA
- Misapplication of provisions of Article 127, para. 3, associated with Article 58, para. 2, of APA
- Misapplication of provisions of Articles 121-123 of APA
- Acting contrary to APA provisions specifying the time frame for actions of the authority in charge of issuing decision
- Acting contrary to provision of Article 232, para. 2, of APA
- Acting contrary to provisions 64-68 of APA
- Confirmation of receipt is missing from applicant's case files

* Administrative Procedure Act

Serious violations of procedure rules

- Violation of the hearing principle – Article 9, in connection with Article 133 of the Administrative Procedure Act. Connection approval cannot be granted under expedited procedure (Article 131 of APA), but a separate inquiry procedure shall be carried out (Article 132 of APA). As the nature of legal matters requires on-site inspection for applications for connection, a time shall also be set for oral arguments in accordance with Article 139 of APA.

Serious violations of procedure rules

- Misapplication of provisions of Articles 134-138 of APA. A decision to suspend the procedure is issued without meeting requirements for termination because there is no previous issue in terms of APA (connection construction contract, servicing debt for electricity consumed, construction of an energy facility as a precondition for connection, are not considered previous issues within the meaning of APA);

Serious violations of procedure rules

- Misapplication of provisions of Article 58, para. 2 of APA (application is denied due to lack of information and without documented proof that the applicant was requested to submit the missing documentation, or if requested to do so, the applicant was not warned about the consequences of not meeting the deadline for submission);

Serious violations of procedure rules

- Misapplication of provisions of Article 127, para. 3 of APA. (application is denied without documented proof of requesting the applicant to submit the missing documentation; or, if submission of missing documentation was requested, without warning the applicant about the consequences of failing to meet the deadline for submission; or, submission of documentation was requested but was unfounded in the context of substantive law provisions.

Serious violations of procedure rules

- Misapplication of provision of Article 121-123 of APA (the procedure is stopped regardless of the fact that the applicant has not withdrawn his application);



Serious violations of procedure rules

- Acting contrary to provisions 64-68 of APA – contents and method of making written records of significant actions during the procedure – record on oral arguments, record on inspection (the record is unclear, illegible, does not contain all the mandatory parts and facts significant for deciding an application);

Serious violations of procedure rules

- Confirmations of receipt of administrative decision and other submissions under procedure are missing from case files (mandatory submission in person – Article 77 of APA);

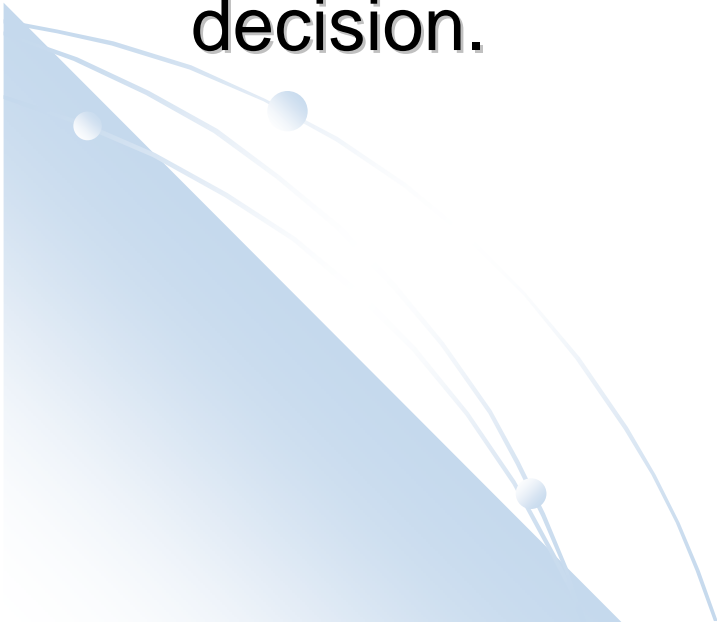


Misrepresented factual circumstance by omission or inaccuracy

- Any facts and circumstances significant for issuing a legal and proper decision (decision-making facts) must be determined in a correct and complete manner during preliminaries to deciding the application— Article 8 of APA – the truth principle

Misrepresented factual circumstance by omission or inaccuracy

- Considering the contents of the decision concerning connection (Article 53 of the Energy Law and 10 of the Decree on Conditions of Electricity Delivery), the relevant facts are facts which form the prescribed content of the decision.



Misrepresented factual circumstance by omission or inaccuracy

With a view to fact-finding, it is necessary to :

- carry out on-site inspection and inspect the state of the distribution network nearest to the applicant's facility
- Provide for protection of applicants' rights and legal interests – familiarize them with fact-findings and enable them to participate in deriving evidence (Article 125 of APA)

Misrepresented factual circumstance by omission or inaccuracy

Negligence of authorities with regard to fact-finding forms the basis for revoking decisions within the meaning of Article 232 of APA.

Misapplication of substantive law

- Energy Law (“Official Gazette of the Republic of Serbia” No. 84/04)
- Law on Planning and Construction (“Official Gazette of the Republic of Serbia” No. 47/03 and 34/06)
- Decree on Conditions of Electricity Delivery (“Official Gazette of the Republic of Serbia” No. 107/2005)
- Electricity Transmission and Distribution Connection Charging Methodology (“Official Gazette of the Republic of Serbia” No. 60/06, 79/06, 114/06,14/07 and 9/09)
- Technical Codes.
- Other regulations on a case-by-case basis (mainly when assessing active legal capacity) – Law on Foundations of Property Legal Relations, Law on Residential Buildings Maintenance etc.
- VAT Law (“Official Gazette of the Republic of Serbia” No. 84/2004, 86/2004, 61/2005 и 61/2007).

Misapplication of substantive law

Value added tax is calculated according to the VAT Law as a revenue in the budget of the Republic of Serbia, and expressed in the invoice in accordance with Article 42 of the same law.

Determining VAT in the decision on connection is against the VAT Law and provision of Article 53, and in connection with Article 55 of the Energy Law (VAT is not a connection charge within the meaning of the Methodology)

Decision on connection

Decision components (Article 196, para. 3 of APA)

MANDATORY COMPONENTS:

- Introduction (Article 197 of APA)
- Dispositive / statement of decision (Article 198)
- Statement of reasons (Article 199)
- Instruction on legal remedy (Article 200)
- Name of the authority issuing decision, date and number of decision, signature of the person in charge and stamp, or facsimile only (Article 196, para. 3 of APA)

Where a prescribed component is missing from the decision, it is considered a serious violation of procedure rules, forming the basis in the context of Article 232, para. 2 of APA to revoke the decision under appeal procedure, which the second instance authority shall deal with.

Decision on Connection

1. Introduction to decision (Article 197 of APA)

Introduction content:

- Name of the authority in charge of deciding
- Regulation on remit of the authority in charge
- Name of the applicant and the applicant's attorney or representative (if any)
- Case of procedure – short designation of the matter in question: administrative matter on issuing an approval for connection
- Indication of the act authorizing the officer to conduct an administrative procedure and to issue a decision.

Decision on Connection

1. Introduction to decision (Article 197 of APA)

- Common mistakes in the introduction to the decision:
- Reference to Methodologies, Law on Electricity Industry, Law on Planning and Construction, failing to indicate the act authorizing the person signed to conduct the procedure and issue decision

Decision on Connection

Introduction to decision on application for connection (1)

- Only articles of the law specifying the remit of the first instance authority to issue decision shall be indicated in the introduction of the Decision approving connection, e.g.:
 - article **51-52** of the Energy Law (always)
 - and
 - adequate Article of the General Administrative Procedure Act.

Decision on Connection

Introduction to decision deciding application for connection (2)

- The decision shall be issued on the basis of the following Articles of APA:
- Article **192 of APA**, where the first instance authority issues the decision on approving connection, also where it rejects the application for connection because, e.g., energy/technical conditions have not been met, or owing to other reasons preventing an application for connection from being accepted
- Articles **225-227** of APA where the first instance authority assesses by examining the submitted appeal that the appeal statement is well-founded and reissues decision which replaces the decision invalidated by appeal.

Decision on Connection

Decision on rejecting the application – Introduction

(2)

- **In the Decision rejecting the application, apart from Article 51-52 of the Energy Law, the relevant Article of APA shall also be indicated, as follows:**
- **Article 115, para. 1 of APA** – assumptions are not in place to initialize the procedure (e.g., the applicant has no active legal capacity to submit an application for connection)
- **Article 127, para. 3, in connection with Article 58, para. 2 of APA** – where the applicant fails to complement the connection application by submitting the requested proof in the subsequently specified time frame. Preconditions for issuing this decision are: the applicant was warned about the consequences of failing to meet the subsequent deadline indicated in the request, and the authority has the prescribed confirmation that the request for correction of application submissions was received by the applicant.

Decision on Connection

Decision on dismissing or discontinuing procedure

- Introduction (3)

1. The introductory part of the **Decision to dismiss the procedure**
 - **at the request of the applicant** – Article 121, para.2, or 122, para. 3 of the General Administration Procedure Law, it may be issued only at the request of the applicant
 - Where the applicant fails to supply the authority with proof of having initiated a procedure to **resolve the previous issue** before other competent authority or court, within the specified time frame, a decision to dismiss the procedure is issued on the basis of Article **137, para. 3** of APA– it shall be deemed the applicant has waived the application
2. Article 134, para. 1 of APA is mentioned in the introductory part of the Decision to suspend the procedure indicates (namely, there is an issue which is an independent legal issue that shall be decided first as a precondition for further action and which is in the domain of a court or other authority).

Decision on connection

2. Decision dispositive (Article 53 of the Energy Law and Article 198 of APA)

The Decision dispositive states the subject of the procedure (the application is accepted or rejected). Where the application is accepted, the decision dispositive shall include:

- Data on the premises to be connected (premises of the customer, or producer), approved power, peak load, type of metering devices, fuse power/electricity etc.
- **Important:** manner of and technical conditions for connection, and **location of connection**, i.e. the point of connection to the distribution system is to be indicated (power line, pole-mounted transformers, transformer stations placed in prefabricated concrete housing, location of facility in relation to the facility of the applicant...) in order to clearly visualize which facilities will form the “connection”, i.e. what payments incurred by approving a particular connection are to be born by the applicant.
- Point and method of metering (significant for determining parties' scope of responsibility for delivered energy)
- Connection charge and other components prescribed by the Law and Decree

Decision on connection

Connection charge as part of the dispositive

Common mistakes stated in the Decision dispositive

- The total connection charge determined in the decision includes VAT, which is contrary to the VAT Law (instead of indicating the VAT on the invoice)
- It has been decided that the level of connection charges shall be determined in the Contract No., dated.....

Decision on connection

Decision's statement of reasons

(Article 199 APA)

- In practice, a great number of decisions does not include the statement of reasons stating all components prescribed in Article 199, para. 2 of APA, thus preventing assessment of whether all legal requirements have been met, seriously violating the procedure rules and resulting in such decisions being cancelled, with which the second instance authority must deal in accordance with its official duties.
- Clearly and completely indicated references to facts determined in the course of the procedure, as well as to regulations and reasons which guided the first instance authority in issuing decisions as stated in the dispositive, will reduce the possibility that an applicant lodges appeal to the second instance authority because of unclear reasons and regulations based on which it had been decided as in the Decision dispositive.

Decision on connection

Decision's statement of reasons

(Article 199 of APA)

Among others, a decision may be deemed to be in accordance with the law only if the statement of reasons of the Decision includes, apart from the description of the application content, also the following components:

- Description of fact-finding and reasons significant for the assessment of evidence
- Statement of reasons why a particular application was not accepted
- Legal regulations and reasons which, considering the fact-finding, refer to the decision as stated in the dispositive
- Explanation of the connection charging method, whereby the following shall be separately explained:
 - (1) Individual connection charges by items as indicated in the Methodology
 - (2) **Adjustment of connection charges** of works, materials, equipment and services for connection construction born by the user, which are separately indicated in connection charging by items,
 - (3) Adjustment (deduction) of semi-deep connection charges where the applicant participated in financing the construction of energy facilities of voltage level higher than the one to which he is to be connected.

Decision on connection

Instruction on legal remedy (Article 200 of APA)

- Clear reference to which authority an appeal may be lodged, the time frame for lodging an appeal after the date of submission, in how many copies, the fee amount and to which authority to submit the appeal.

Submission of Decision

- By submitting the Decision to the applicant, the Decision within the meaning of APA comes into effect
- First instance authorities very often do not have adequate proof confirming that the decision was received by applicants

Obligations of first instance authority under appeal procedure

- Acting contrary to provisions of APA prescribing time frames for actions of the authority in charge of issuing decision (Article 208, para. 1 of APA – deadline for issuing a decision, Article 228, para. 1 of APA – submission of appeal with applicant's case files to the second instance authority);

Obligations of first instance authority under appeal procedure

- Acting contrary to provision of Article 232, para. 2 of APA (the first instance authority shall act in accordance with the second instance decision);





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