

LEGAL STATUS OF FUEL AND ENERGY COMPLEX ENTITIES

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**CRITERIA FOR HEAT NETWORK COMPANIES:
LEGAL CAPACITY ISSUES****Khamidullin M.T.**

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Abstract. Amendments to the heat supply laws came into force over a year ago, providing criteria for acquiring the status of a heat network company. The purpose of these innovations was to bring order to the heat market and maintain competent professional players. It aimed at consolidating network assets in the last resort heat supplier, the unified heat distribution company, and depriving enterprises that lack the necessary material, labor, and technical resources for proper maintenance and repair of heat networks of the status of a heat network company. The intermediate results of the reform suggest now that the legislator's expectations were not fully met. While disclosing the historical peculiarities of heat industry development in the pre-reform period, this article examines the factors that first led to the emergence of multiple heat network companies in the heat supply market and then prompted the legislator to take measures to optimize the number of regulated organizations. To simulate the potential effects of legal regulation, the author examines the electric power industry, which is related to heat supply. The legislator had already established criteria for local grid organizations in this industry several years before the reform of heat network companies. However, the legal position of the Constitutional Court of the Russian Federation prevented the legislator's efforts from being fully implemented. To address the problem at hand, the author suggests transitioning from quantitative to qualitative criteria for evaluating an entity's compliance with the status of a heat network company. This approach will prioritize the reliability of heat supply over using compliance as a formal basis for depriving bona fide enterprises of the status of a professional player in the heat market.

Keywords: energy law, unified heat distribution company, heat distribution company, heat network company, criteria for heat network companies.

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**КРИТЕРИИ ТЕПЛОСЕТЕВЫХ ОРГАНИЗАЦИЙ:
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Аннотация. Более года назад вступили в силу изменения в законодательство в сфере теплоснабжения, предусматривающие установление критериев для приобретения статуса теплосетевой организации. Нововведения были призваны навести порядок на рынке тепловой энергии для сохранения на нем компетентных профессиональных игроков. Предусматривалось лишение предприятий, не обладающих необходимыми материальными, трудовыми и техническими ресурсами для надлежащего

содержания и ремонта тепловых сетей, статуса теплосетевой организации и консолидация сетевых активов у гарантирующего поставщика тепла — единой теплоснабжающей организации. Уже сейчас можно подвести промежуточные итоги реформы и констатировать, что ожидания законодателя оправдались не в полной мере. Раскрывая исторические особенности развития теплоэнергетики в дореформенный период, в статье рассматриваются факторы, которые сначала привели к появлению на рынке теплоснабжения множества теплосетевых организаций, а потом побудили законодателя предпринять меры для оптимизации числа регулируемых организаций. Для моделирования возможных последствий правового регулирования автор обращается к смежной для теплоснабжения электроэнергетической отрасли, где за несколько лет до проведенной реформы теплосетевых компаний законодатель уже вводил критерии территориальных сетевых организаций. Однако в связи с правовой позицией Конституционного Суда РФ усилия законодателя не получили полной реализации. Для решения существующей проблемы автор предлагает перейти от количественных к качественным критериям при оценке соответствия организации статусу теплосетевой компании, которые позволят обеспечить надежность теплоснабжения, а не будут использованы в качестве формального основания для лишения добросовестных предприятий статуса профессионального участника рынка тепловой энергии.

Ключевые слова: энергетическое право, единая теплоснабжающая организация, теплоснабжающая организация, теплосетевая организация, критерии теплосетевых организаций.

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The activity of business entities in the heat supply sector is based on the expertise of professional players in the heat market, heat supply and heat network companies.

The first principle of organizing relations in the heat supply sector, as stated in Art. 3 of Federal Law No. 190-FZ on Heat Supply dated July 27, 2010 (hereinafter referred to as the Heat Supply Law) [1], is to ensure the reliability of heat supply in accordance with technical regulations requirements.

According to Art. 20 of the Heat Supply Law, this principle means, first of all, that heat supply and heat network enterprises are obliged to ensure accident-free operation of heat supply facilities. This requires proper technical operation, repair, and quality maintenance, which in turn necessitates the availability of qualified personnel, basic infrastructure, and sufficient financial resources.

However, it is not always possible to fully realize this principle because not all heat supply facilities participating in the process flow of heat energy resources receive the necessary maintenance to ensure uninterrupted operation.

This is due to several factors.

During the transition from state monopolism in the economy, including in the energy sector, the absence of legal regulation of market relations in heat supply (from 1991 to 2010) and the emergence of the institution of private ownership led to the

“patchwork quilt” problem in utility networks. This refers to the presence of multiple private owners of networks in a certain area, which required consideration of their interests [2].

The absence of legislative mechanisms to require heat distribution companies to construct networks to consumers’ facilities was a significant contributing factor. During this period, consumer connections were performed without technological connection contracts, based on technical specifications issued to the consumer, which included requirements for the consumer to lay pipelines themselves [3]. Consequently, many heat networks were on the books of consumers outside the operational responsibility areas of energy supply organizations.

To address this issue, the legislator had to change the rules of the game and specify that the “last mile” (the network connection to the consumer’s facility) during connection is to be constructed by the heat distribution company at the applicant’s expense [4]. In line with this concept, other legal provisions were established to prevent network facilities from appearing on consumers’ books. Clause 8 of the Rules for the Maintenance of Common Property in an Apartment Block, approved by Resolution of the Government of the Russian Federation No. 491 dated August 13, 2006 [5], states that the outer boundary of heat supply networks, which are part of the common property in an apartment block, is the outer boundary of the building wall.

However, at that time, developers had already built a significant number of networks based on technical specifications. Additionally, the legislator demonstrated inconsistency by requiring the construction of the “last mile” to the wall of the object to be connected for residential buildings, while imposing the obligation to lay networks on the consumer within their land plot when connecting other facilities (non-residential buildings) [6].

All this led to the fact that the operation of heat network facilities was either carried out by consumers themselves or transferred to the management of heat network companies. This led to the emergence of ownerless heat networks, which has become a fairly common phenomenon. This created numerous problems for the accident-free operation of local energy systems.

However, it was later discovered that consumers were unable to properly operate their heat network assets because network operation was not their core activity. Additionally, the majority of heat network companies were also unable to operate their assets due to insufficient basic infrastructure. The status of a heat network company was merely formal. To obtain the relevant legal capacity, network owners only needed to demonstrate to tariff regulation authorities that their network assets were involved in the process flow of heat transmission and required maintenance.

Deputy A.G. Sidyakin, who later authored the relevant draft law, explained the issue with heat distribution companies as follows: “...the existing federal laws do not clearly define the concept of a ‘heat network company’. As a result, any owner of a heat network can formally become such an organization, even if its length is only one meter... Many small and rather formal heat network companies that lack the necessary equipment to promptly address possible emergencies in their heat networks emerge as a result of guaranteed sources of financing. ...substantial investments for repair... which such small companies may not have... lead to their bankruptcy resulting in a shift of responsibility for heat supply to consumers from such suppliers to the unified heat supply company” [7].

To solve this problem, the legislator opted to consolidate heat network facilities with the most professional player in the local heat supply market, the unified heat distribution company.

Starting from September 1, 2022, an organization can only obtain the status of a heat network company if it meets specific requirements.

Federal Law No. 84-FZ [8] dated April 1, 2020 amended the Heat Supply Law. The new wording of clause 16 of Art. 2 of the Law requires organizations to meet the criteria for classifying owners or other legal possessors of heat networks as heat network companies approved by the Government of the Russian Federation in order to be recognized as a heat network company, in addition to providing heat transportation services.

The Rules for Heat Distribution Companies in the Russian Federation [10] were amended by Resolution of the Government of the Russian Federation No. 2033, dated November 25, 2021 [9]. The amendment established specific criteria for heat network companies.

The legislator prioritized quantitative values, and the main indicator for obtaining the status of a heat network company is a certain length of heat networks. For example, for cities with a million-plus population, the uninterrupted length of heat networks owned by an organization should be at least 7 kilometers in a two-pipe calculation.

The idea of establishing criteria for network organizations is not new and was first implemented in the electric power industry. Resolution of the Government of the Russian Federation No. 184 dated February 28, 2015, approved the Criteria for Referring Owners of Power Grid Facilities to Local Grid Companies [11].

In one of his interviews, former Minister of Energy of the Russian Federation A.V. Novak stated that the state plans to reduce the number of local grid companies by defining their criteria. The Minister explained that “in fact, certification will be carried out. Not in formal terms, but in terms of receiving a tariff from the Regional Energy Commission (REC). Local grid companies that do not meet the criteria in terms of size, staff qualifications, and fixed assets will not receive a tariff. They will be forced either to merge or scale back” [12].

According to the authors of the draft law on the criteria for local grid companies, former grid companies which fail to receive a tariff for electricity transmission will be forced to transfer their grid facilities to organizations that have retained the status of a grid company to avoid paying for energy losses that arise due to its transfer to end consumers.

However, not all former local grid companies agree with this proposal. The Constitutional Court of the Russian Federation reviewed a dispute from a company having lost its status as a grid company due to non-compliance with the criteria regarding the obligation to pay for electricity losses.

The Constitutional Court of the Russian Federation confirmed in its Ruling No. 19-P dated April 25, 2019 [13], that an organization which no longer meets the established criteria for a local grid company is transferred to the category of ordinary consumers of electric power. After losing their status as a local grid company, owners of power grid facilities are obligated to continue operating their facilities as consumers of electric power. They have no right to prevent the flow of electric power through their facilities to other consumers and demand payment for it. Owners of power grid facilities shall bear the necessary costs to provide power flow to consumers whose power receivers are indirectly connected to the power grids of a local grid company through the power grid facilities of such owners. The law requires them to pay for losses incurred from the operation of power grid facilities they own, including the cost of electricity losses in power grid facilities they own resulting from the flow of electricity to other consumers.

At the same time, the Constitutional Court of the Russian Federation has recognized the right of grid owners who have lost their status as a grid company to receive compensation for the costs of electricity flow. This applies in cases where power receivers of other consumers are indirectly connected to their power grids under technological connection contracts concluded before the grid owner lost its status as a local grid company.

To implement this Ruling of the Constitutional Court of the Russian Federation, the legislator had to promptly amend the legal regulations to include compensation for expenses related to electricity flow through the grids of former grid companies [14].

However, the criteria for heat distribution companies were established without taking into account the legal position of the Constitutional Court of the Russian Federation despite that fact that the electric power industry follows similar regulatory principles as the heat supply industry. Even before the entry into force of the rules on the criteria for heat network companies became effective, D.O. Pasyukov said that measures similar to those taken in the electric power industry could be implemented in the heat power industry, based on the consideration

of the issue in question by the Constitutional Court of the Russian Federation [15].

Judicial disputes arose quickly.

The originators of the heat network company reform intended to force owners of heat networks that do not meet the criteria and have not received a tariff for heat transmission to transfer their networks to the unified heat distribution company or municipality for free or at knockdown price due to the burden of paying for energy losses during the transfer. However, some courts [16, 17] refuse to recover payment for heat losses from former heat network companies. They argue that the costs of compensation for losses-related costs should be borne by entities with the status of heat network companies as consideration for claims for payment for heat transmission services.

Thus, the attempt to consolidate network assets by incentivizing former network companies through the obligation to pay for losses did not achieve the effectiveness originally intended by the legislator. The former network companies adapted to the changes and are successfully defending their right to exist through the institution of judicial defense.

Due to the absence of the obligation to pay for losses, enterprises that have lost their status as heat network companies may no longer be motivated to transfer their network assets to large network organizations. Furthermore, the reform may have the opposite effect. Without sources for financing network maintenance which came from payment for heat transmission services, former network companies are not interested in investing their own funds in maintaining networks in good condition. This creates a real threat of increasing accident rates in the heat supply system.

In this situation, it is recommended to consider the following proposals for solving the problem.

First, it is important to note that the very idea of one-step deprivation of property from thousands of business entities engaged in legitimate activities, creating jobs, and timely paying taxes is an example of an uncivilized form of relations between the state and society. The state could not offer anything better to organizations that lost their status as heat network companies than the gratuitous transfer of heat network assets into the ownership of municipalities [18]. Such “defarming” may negatively impact the trust of the business community in the state.

In this respect, regarding former public sector heat network companies, the turnaround is unambiguous. Realizing that the introduced criteria exclude state institutions owning small networks that lack sources of funding from tariff regulation, the legislator made exceptions for them, allowing them to retain the status of heat network companies retroactively (from September 1, 2022), regardless of non-compliance with the established criteria [19].

The quantitative criteria (uninterrupted length of heat networks) for acquiring the status of a heat network company cannot be objectively justified: it is unclear why such lengths are determined. The research conducted has shown that most heat network companies can meet the criteria in case of considering the total length of their networks without the mandatory compliance with the uninterrupted length criterion. The introduction of the continuity criterion can lead to the exclusion of up to 95% of heat network companies from the market, potentially resulting in their bankruptcy [20, p. 876–877].

The qualitative criterion should replace the quantitative one. The objective of regulation should be achieved, which is not to completely liquidate small network companies, but to eliminate those inefficient network organizations that are unable to ensure the required level of heat supply reliability from the market. It is necessary to establish criteria for determining the quality of preparation of the regulated entity for the heating season and the availability of engineering and technical staff and necessary basic infrastructure. Currently, these requirements are not included in the list of criteria established by the Government of the Russian Federation.

Article 35 of the Constitution of the Russian Federation [21] states that no one can be deprived of their property except by court decision. Forced alienation of property for state needs is only permitted with preliminary and equivalent compensation.

Civil laws provide a mechanism for the court to deprive an owner of their property as a liability measure in case of abuse of their rights.

Article 287.7 of the Civil Code of the Russian Federation (hereinafter referred to as the RF CC) [22] states that a real estate item can be sold at public auction by court decision based on the competent authority's claim if the owner uses it for a purpose other than its intended one, systematically violates the rights and interests of neighbors, or mismanages it. Similar rules are established for the use

of land plots (Art. 285 of the Civil Code of the Russian Federation) and cultural property (Art. 240 of the Civil Code of the Russian Federation) when they are used in violation of the law.

Similar to the mechanism for the sale of ownerless real estate, heat network facilities may be transferred to municipal ownership or to the assets of the unified heat distribution company, which can be initiated by the unified heat distribution company or a local self-government body by court decision, with compensation provided to the former owner for the value thereof.

To address the problem that has led to the proliferation of heat network companies, it is essential to eliminate the root cause, the emergence of thousands of small unattended networks. This requires amending the current rules for connecting to heat supply systems [23]. It is necessary to formalize the obligation of the heat supply company to construct the "last mile" to facilities of all consumers, including non-residential buildings. At the same time, paid easements should not be established for the maintenance of heat networks constructed in this manner on land plots of consumers. Heat supply (heat network) companies should have unimpeded and free access to operate networks and use of a portion of a consumer's land plot for this purpose.

These changes will create opportunities for transition from quantitative to qualitative regulation. The priority will be to ensure the reliability of heat supply by enterprises with the necessary basic infrastructure for this purpose, rather than striving to meet formal quantitative indicators.

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