

PROBLEM ASPECTS OF LEGAL SUPPORT OF ANTI-TERRORIST PROTECTION OF THE FUEL AND ENERGY FACILITIES

DOI 10.18572/2410-4390-2018-4-78-84



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To date, there are practically no legal studies on the problems of legal regulation of public relations arising upon ensuring safety and anti-terrorist protection of the fuel and energy facilities. The author studies the definitions and legal content of such concepts set forth in the laws on anti-terrorist protection of the fuel and energy facilities as the subject of the Fuel and Energy Complex, the head of the subject of the Fuel and Energy Complex, the system of physical protection, and the engineering and technical means of protection. The current content of the legal support of measures for categorization and provision of the fuel and energy facility with the system of physical protection is considered. The author dwells upon the main problems arising upon implementation by the subjects of the Fuel and Energy Complex of the said measures. The judicial practice on disputes related to determination of the proper subject of the Fuel and Energy Complex and invalidation of security service contracts concluded with the improper subject is analyzed. Based on the analysis of the current regulatory legal acts and judicial practice, proposals were stated for introduction of amendments to certain regulatory legal acts in the field of safety and anti-terrorist protection of the fuel and energy facilities.

Keywords: energy law, energy security, anti-terrorist protection, fuel and energy facilities, subjects of the Fuel and Energy Complex.

The current state of the world economy imposes special requirements on all sectors of the Russian industry, and above all on one of the most important industries: the Fuel and Energy Complex.

The country's Fuel and Energy Complex determines its economic potential and stability, and due to the specific nature of social relations as well as importance for the socio-economic development of the country, it requires the use of not only the most advanced production technologies, but also the most serious measures

aimed at safety and security of the facilities of the Fuel and Energy Complex (hereinafter referred to as the FEC).

At the same time, it should be noted that for quite a long time, protection of the fuel and energy facilities has not been regulated by any special law, but only by general regulatory legal acts being common to all sectors of the economy (the Civil Code of the Russian Federation, the Criminal Code of the Russian Federation, Federal Laws No. 116-Φ3 dated July 21, 1997, *On Industrial Safety of Hazardous Production*

Facilities, and No. 35-Φ3 dated March 6, 2006, *On Counteracting Terrorism*, etc.).

However, the above regulatory legal acts did not take into account the specific nature of ensuring the safe operation of the fuel and energy facilities.

N.A. Petruseva and V.Yu. Korzhov mention the accident at the Sayano-Shushenskaya HPP in August 2009 as one of the catalysts for adoption of a special law that establishes requirements to safety and security of the FEC facilities. At that moment, there was an urgent need to adopt a special regulatory legal act to create the basis ensuring sustainable and safe operation of the fuel and energy facilities, protection of interests of the individual, the society, and the state in the FEC against unlawful interference. [1]

One cannot but agree with this. At the same time, it seems that such a need arose at a deeper level, maybe, due to the reforms in the energy sector, the fact that small business entities own FEC infrastructure facilities that are important for the heat supply of entire cities, and accidents at the international level (accident at Fukushima-1 NPP in March 2011).

In the middle of 2011, in order to form the basis for sustainable and safe operation of the fuel and energy facilities, to protect interests of the individual, the society, and the state in the FEC against unlawful interference, Federal Law No. 256-Φ3 dated July 21, 2011, *On Safety of the Fuel and Energy Facilities* was adopted (hereinafter referred to as Federal Law No. 256-Φ3). This law defines the organizational and legal framework in the field of ensuring safety of the fuel and energy facilities in the Russian Federation.

This Federal Law shall apply to the facilities of the electric power industry, the oil producing, oil refining, petrochemical, gas, coal, shale, and peat industries as well as the petroleum products, heat, and gas supply facilities.

Herewith, it should be noted that the requirements of this Federal Law do not apply to the nuclear power facilities.

Ensuring safety of the nuclear power facilities is regulated by special regulatory legal acts (Federal Law No. 170-Φ3 dated November 21, 1995, *On the Use of Nuclear Energy*, Resolution

of the Government of the Russian Federation No. 749 dated June 26, 2017, *On Approval of the Rules for Determining the Safety Zone with the Special Legal Regime of the Object of Nuclear Energy Use, and the Rules for Provision of the Special Legal Regime of the Safety Zone with the Special Legal Regime of the Object of Nuclear Energy Use*, etc.).

Upon adoption of Federal Law No. 256-Φ3, the subjects of the FEC were obliged to arrange for measures aimed at ensuring safety of the fuel and energy facilities.

While determining a set of persons on whom these obligations are imposed, one should refer to Article 2 of Federal Law No. 256-Φ3, which gives the legal definition of the subject of the FEC.

Thus, the subject of the FEC means an individual or a legal entity that owns the fuel and energy facilities under the right of ownership or another legal right.

Therefore, the fact that the subject of the FEC has a legal right (ownership, lease, economic control, operational management, etc.) to the fuel and energy facility shall be deemed a qualifying feature making it possible to identify such a subject.

At the same time, it appears that if an entity performs operation and/or maintenance of the facility (for example, by virtue of a contract for operation and/or maintenance of the facility), or if the lease agreement provides only for the powers to use (according to Article 606 of the Civil Code of the Russian Federation) under the lease (property lease) agreement, the lessor (landlord) undertakes to provide the lessee (tenant) with property for a fee for temporary possession and use or temporary use, then this entity shall not be deemed the subject of the FEC.

In practice, this clause raises a number of questions, and the most important of them is who will bear the costs relating to equipment of the fuel and energy facilities in accordance with the requirements of Federal Law No. 256-Φ3 and the subordinate acts adopted on its basis.

Analysis of judicial practice shows that upon consideration of issues of this kind, the courts assess mainly two circumstances: the legal nature of the concluded contract and its terms and conditions, which make it possible to determine

who will ensure safety and maintain the good conditions of the property as well as ensure compliance with all legal requirements, including the requirements to anti-terrorist protection of the fuel and energy facility. Examples: Appellate Resolution of the Moscow City Court dated December 8, 2016, in case No. 33-16550/16, decision of the Leninskiy District Court of Saratov No. 12A-111/2015 dated November 10, 2015. [2, 3]

Categorization of the Fuel and Energy Facility

One of the innovations of Federal Law No. 256-ФЗ, which later started to be applied in the areas of ensuring the anti-terrorist protection of other facilities, is performance of the procedure for categorizing the fuel and energy facilities in order to establish differentiated safety requirements for these facilities taking into account the hazard of potential unlawful interference and its possible consequences. The categorization procedure is established, for example, in Resolution of the Government of the Russian Federation No. 447 dated April 14, 2017, *On Approval of the Requirements to the Anti-terrorist Protection of Hotels and Other Accommodation Facilities, and the Form of the Safety Data Sheet of These Facilities*.

The starting point for categorization of the fuel and energy facilities is listing by the authorized executive body of a constituent entity of the Russian Federation of the facilities to be categorized.

General approaches to preparation of the list of the fuel and energy facilities to be categorized are defined in the Guidelines for Inclusion of the Fuel and Energy Facilities into the List of Facilities to Be Categorized approved by Order No. 48 of the Ministry of Energy of the Russian Federation dated February 10, 2012.

In particular, these guidelines set out the conditions for inclusion of the fuel and energy facilities into the list of the facilities to be categorized.

Upon approval of the specified list by the top executive official of the constituent entity of the Russian Federation, the fuel and energy facilities shall be notified of the inclusion of the facility into this list, and the timing of the facility categorization shall be specified.

The initial data for the facility categorization and its procedure are regulated by Resolution of the Government of the Russian Federation No. 459 dated May 5, 2012, *On Approval of the Regulations on Initial Data for Categorization of the Fuel and Energy Facility, its Procedure, and Categorization Criteria* (hereinafter referred to as the Regulations).

In accordance with clause 3 of the Regulations, the fuel and energy facilities shall be categorized on the basis of categorization criteria, which are determined on the basis of the values of emergency area indicators that may be observed as a result of unlawful interference, the possible number of victims and the amount of material damage.

The values specified in Resolution of the Government of the Russian Federation No. 304 dated May 21, 2007, *On Classification of Natural and Man-Made Emergencies* shall be used as the values of indicators of the categorization criteria for the fuel and energy facilities.

Taking into account whether the fuel and energy facility is critically important, and depending on the potential hazard of the fuel and energy facility, the legislator establishes the following differentiation of the facilities of the Fuel and Energy Complex: facilities of the low hazard category; facilities of the medium hazard category; and facilities of the high hazard category.

It should be noted that the Regulations do not disclose the categorization procedure in detail; therefore, the subject of the FEC shall determine the stages of categorization for itself at its own discretion.

To begin with, the subject of the FEC shall initiate a relevant procedure for the facility categorization. As a rule, such a decision is documented in the form of a local regulatory act on establishment of an interdepartmental commission for categorization of the fuel and energy facility (hereinafter referred to as the commission).

The composition of the commission is defined in clause 8 of the Regulations and, in general, it can be divided into 2 groups of persons:

1. The head of the subject of the FEC and the employees of the facility (specialists in the

field of technological equipment, industrial and fire safety, engineering and technical means of protection, and information protection, etc.).

2. The invited persons: representatives of the Ministry of Energy of the Russian Federation, the Federal National Guard Troops Service, and other concerned executive authorities at all levels (as agreed).

In the course of work, the commission for facility categorization analyzes information on the facility based on the study of the initial data about the facility, a poll of specialists and an inspection of the facility; detects potentially hazardous areas of the facility, critical elements of the facility, presence of vulnerable places of the facility; and assesses the socio-economic consequences of a terrorist act for each critical element of the facility and the facility as a whole.

Following the results of work, the commission shall prepare:

- a certificate of inspection of the fuel and energy facility, which shall specify the basic information on the facility, presence of potentially hazardous areas and critical elements thereof, and the status of protection of the facility.

- a certificate of categorization of the fuel and energy facility, which contains the conclusions on assigning of the relevant hazard category to the facility and which shall serve as the basis for entering data on referring the facility to the relevant hazard category by the subject of the FEC into the draft safety data sheet of the facility.

The safety data sheet of the fuel and energy facility is a final document that contains information on the status of the anti-terrorist protection of the facility of the FEC and an action plan to ensure its anti-terrorist protection.

The safety data sheet of the fuel and energy facility shall be approved by the head of the fuel and energy facility (legal entity) as agreed upon with a collegiate body on counteracting terrorism formed in the constituent entity of the Russian Federation.

At the same time, the issue concerning interpretation of the concept of “the head of the subject of the FEC”, which shall approve the safety data sheet of the fuel and energy facility, remains open: whether it should be the sole

executive body of the legal entity only (Director General, head of the entity exercising the powers of the sole executive body of other entities, and other persons authorized to act on behalf of the legal entity without a power of attorney) or it may be another person acting on the basis of a power of attorney.

In our opinion, this question and, accordingly, the answer to it should be somewhat broader and concern not only the right to sign the safety data sheet, but also compliance with the requirements to safety and anti-terrorist protection of the fuel and energy facilities (Article 12 of Federal Law No. 256-Φ3) as well as the liability for violation thereof (Article 20.30 of the Administrative Offence Code of the Russian Federation).

It seems that in handling this problem, the most appropriate approach shall be as follows: the sole executive body of the legal entity is entitled to delegate its right to sign the safety data sheets, to comply with the requirements to ensure safety and anti-terrorist protection of the fuel and energy facilities to another person by issuing appropriate local regulatory acts and issuing a power of attorney with similar powers.

Herewith, subsequent delegation of the above powers by the superior officer to the inferior one is also possible only if this person performs organizational and administrative or administrative functions in the organization, that is, the person shall have ability and methods to perform the duties imposed on it.

The question whether it is necessary to re-categorize the fuel and energy facility upon change of the individual or the legal entity that owns the facility of the FEC under the right of ownership or another legal right deserves separate discussion.

The current laws do not give a clear answer.

Pursuant to Article 8 of Federal Law No. 256-Φ3, the subjects of the FEC shall prepare the safety data sheets for the fuel and energy facilities.

The safety data sheet of the fuel and energy facility is prepared on the basis on the results of categorization of this facility depending on the potential hazard as well as on the basis of assessment of adequacy of the engineering and technical measures, measures for physical protection and security of the facility in case of terrorist threats

in accordance with the requirements specified by the Government of the Russian Federation pursuant to Article 7 of Federal Law No. 256-Φ3.

Under these circumstances, it can be concluded that upon change of the subject of the FEC, the new subject of the FEC has the obligation to categorize the facility and prepare a new safety data sheet of the fuel and energy facility in accordance with Articles 7 and 8 of Federal Law No. 256-Φ3.

Herewith, the regulatory (supervisory) bodies may have a different view of this issue. Judicial practice on such disputes has not yet been formed.

Arrangements for Physical Protection System at the Fuel and Energy Facility

The system of physical protection of the fuel and energy facilities is a set of organizational, administrative and legal measures, the engineering and technical means of protection, and actions of security units that have civil, service weapons and special means at their disposal aimed at prevention of unlawful interference (Part 1, Article 9 of Federal Law No. 256-Φ3).

Taking into account the legal definition specified in Part 1, Article 9 of Federal Law No. 256-Φ3, it can be concluded that the main elements of the system of physical protection are: equipment of the fuel and energy facility with the engineering and technical means of protection; ensuring its physical protection by security units.

In accordance with clause 4, Part 1, Article 2 of Federal Law No. 256-Φ3, the engineering and technical means of protection mean technical means of protection (access control system, vibration sensors, surround motion sensors, video surveillance system, warning system, etc.) and engineering and technical protection measures (main perimeter fence, safety fence, check points, anti-collision devices, etc.) at the fuel and energy facility designed to prevent unauthorized access to the fuel and energy facility or to detect unauthorized actions in relation to and the facility of the FEC.

The requirements for ensuring security of the fuel and energy facilities and the requirements to anti-terrorist protection of the fuel and energy facilities, depending on the established hazard category of the facility, are detailed in Resolution

of the Government of the Russian Federation No. 458-ДЦП dated May 5, 2012, *On Approval of the Rules for Safety and Anti-Terrorist Protection of the Fuel and Energy Facilities* (hereinafter referred to as the Safety Rules).

The Safety Rules define the general requirements to the configuration of the engineering and technical means of protection of the fuel and energy facility. Herewith, the fuel and energy facilities of the same category of hazard can considerably vary.

In accordance with the Safety Rules, the commission shall determine the configuration of the engineering and technical means of protection depending on the category of hazard assigned to the fuel and energy facility.

When determining the configuration and the type of the engineering and technical means of protection, the commission should take into account the functional purpose, characteristics of building structures, location, and other parameters of the fuel and energy facility.

The problems associated with the arrangements for the system of physical protection at the fuel and energy facility are quite diverse and numerous. We propose to focus on some of them.

The first problem is that the Safety Rules do not take into account the specific features of equipping the facilities of the FEC located in various constituent entities of the Russian Federation, in megacities, millionaire cities, etc. with the engineering and technical means of protection.

Thus, the range of problems related to compliance with the requirements of the Safety Rules (in terms of equipment and placement of the engineering and technical means of protection) for the categorized fuel and energy facilities, for example, in Moscow results from the urban saturation, high concentration of buildings, structures, and equipment in the area adjacent to the fuel and energy facilities, which excludes the possibility of placing any additional facilities in the territory of these facilities (for example, setting a 2-meter area (strip) of divestiture, construction of safety fences, etc.).

Clause 4 of Appendix 1 to the Safety Rules currently contains a norm that allows non-application of certain engineering and technical

means of protection of the fuel and energy facilities in the absence of such an opportunity due to objective factors, subject to creation of additional security lines by the subject of the FEC.

At the same time, unfortunately, we have to state that this norm is not applied by the regulatory (supervisory) bodies during inspections, which entails the risk of recognition of violations of the law by the actions of the subject of the FEC.

Under these circumstances, it seems that the possible way out of this situation is to specify in the general part of the Safety Rules the mechanisms for compliance with the requirements set by them taking into account the urban saturation, high concentration of buildings, structures and equipment in the area adjacent to the fuel and energy facilities, including expansion of the list of objective factors affecting impossibility of equipping the fuel and energy facility with the engineering and technical means of protection (for example, presence of residential and other buildings, etc.).

Another problem is that most of the fuel and energy facilities are commissioned prior to the effective date of Federal Law No. 256-Φ3 and the Safety Rules. Upon fulfillment of the requirements of the specified regulatory legal acts, problems arise in terms of their practical implementation because a number of requirements can be met only as a result of reconstruction of the existing or construction of new buildings, structures, and facilities included in the property complex of the fuel and energy facility, which entails significant expenses for the subjects of the FEC.

Neither Federal Law No. 256-Φ3, nor the Safety Rules regulate the procedure for fulfillment of these requirements with respect to the fuel and energy facilities that were put into operation prior to their effective date.

In our opinion, this problem has at least two solutions.

The first solution is to specify in these regulatory legal acts the rules governing the right of the commission, which includes representatives of law enforcement bodies, to independently determine adequacy of measures to ensure safety of the fuel and energy facility (including

without reconstructing buildings, structures, and facilities) and to specify conclusions about the sufficiency of these measures in the safety data sheet.

The second solution is to specify in these regulatory legal acts a mechanism for calculation by an independent expert entity of risks of unlawful interference at the fuel and energy facility, which will compensate for the inability to perform measures to reconstruct the existing or to construct new buildings, structures, and facilities included in the property complex of the fuel and energy facility. Similar mechanisms are currently specified in Federal Law No. 116-Φ3 dated July 21, 1997, *On Industrial Safety of Hazardous Production Facilities*, and Federal Law No. 69-Φ3 dated December 21, 1994, *On Fire Safety*.

Ensuring Physical Protection of the Fuel and Energy Facility by Security Units

The physical protection of the fuel and energy facility can be ensured by engaging the security unit of the Ministry of Energy of the Russian Federation or private security entities.

The activities of the security unit of the Ministry of Energy of the Russian Federation are regulated by Federal Law No. 77-Φ3 dated April 14, 1999, *On Security Unit*, Resolution of the Government of the Russian Federation No. 514 dated July 12, 2000, *On the Arrangements for Security*, Resolution of the Government of the Russian Federation No. 160 dated March 11, 2008, *On Approval of the Regulations on the Security Unit of the Ministry of Energy of the Russian Federation*, and Order of the Ministry of Energy of the Russian Federation No. 637 dated July 4, 2016, *On Approval of the List of the Fuel and Energy Facilities Protected by the Security Unit of the Ministry of Energy of the Russian Federation*.

The activities of private security entities are regulated by Law of the Russian Federation No. 2487-1 dated March 11, 1992, *On Private Detective and Security Activities in the Russian Federation*, and Resolution of the Government of the Russian Federation No. 587 dated August 14, 1992, *Issues of Private Detective and Private Security Activities*.

Part 4, Article 9 of Federal Law No. 256-Φ3 regulates the right of the subject of the FEC to select at its own discretion a security unit depending

on the category and in accordance with the safety data sheet of the fuel and energy facility.

At the same time, Order of the Ministry of Energy of the Russian Federation No. 637 dated July 4, 2016, specifies the list of facilities protected by the security units of the Ministry of Energy of the Russian Federation, and Appendix No. 1 to Resolution of the Government of the Russian Federation No. 587 dated August 14, 1992, specifies the list of facilities, to which private security activity shall not apply.

So, in accordance with clause 21 of Appendix No. 1 to Resolution of the Government of the Russian Federation No. 587 dated August 14, 1992, these facilities include electric power facilities, and facilities of the oil and the petrochemical industries, the gas and gas chemical industries classified as the hazardous production facilities.

Therefore, in the current legal regulation, there is a legal conflict between the norms of Federal Law No. 256-Φ3, and the norms of Order of the Ministry of Energy of the Russian Federation No. 637 dated July 4, 2016, and Resolution of the Government of the Russian Federation No. 587 dated August 14, 1992.

Herewith, it should be borne in mind that the security service contract with a private security entity in respect of the facilities, to which private security activity shall not apply, may be invalidated by the court on the basis of Article 168 of the Civil Code of the Russian Federation.

This position is confirmed by judicial practice. [4, 5] Thus, the Supreme Arbitration

Court of the Russian Federation, in its Ruling No. BAC-19397/13 dated January 22, 2014, in case No. A74-5474/2012, concluded that while satisfying the claim for invalidation of contract No. 3 dated October 1, 2012, the court of first instance proceeded from the fact that the facilities specified in Appendix No. 2 to the contract are included in the list of facilities of the Fuel and Energy Complex, for which the organization ensuring their security is legally defined.

It seems that this legal conflict may be resolved by revision of Part 4, Article 9 of Federal Law No. 256-Φ3 through its supplementation with a clause on application of this norm in compliance with the requirements and restrictions established by the applicable law (Order of the Ministry of Energy of the Russian Federation No. 637 dated July 4, 2016, and Resolution of the Government of the Russian Federation No. 587 dated August 14, 1992).

Summing up, it should be noted that the current regulatory framework in the field of safety and anti-terrorist protection of the fuel and energy facilities in general provides the basis for sustainable and safe operation of the fuel and energy facilities, protection of interests of the individual, the society, and the state against unlawful interference.

Nevertheless, certain regulatory legal acts need to be amended since the problem aspects discussed herein create prerequisites for abuse by both the regulatory (supervisory) bodies and the subjects of the FEC. ■

Reference List

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