

PROVING AND EVIDENCE IN DISPUTES ARISING OUT OF ENERGY LAW RELATIONS

DOI 10.18572/2410-4396-2019-4-72-75



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V.V. Romanova justly notes that legal support of the balance of interests of energy market participants is one of the key tasks of energy law and underlines that the fundamental principles of energy law can be implemented only with a relevant legal support in place offering an efficient protection of participant's rights and property interests. Public and non-public jurisdictional bodies offer protection of rights violated in the energy sector. Among public jurisdictional bodies, one can distinguish regular courts, considering cases in civil and administrative legal proceedings, and commercial arbitration courts considering cases using the Arbitration Procedure Code of the Russian Federation (APC RF). The non-public dispute resolution bodies include arbitration courts and international commercial arbitration bodies. The article analyses the use of certain means of proving in particular dispute categories in the sphere of energy and characterizes generally identifying the subject of proving, distribution of the burden of proving, and evidence required in such disputes. The study takes into account the judicial practice of energy dispute resolution.

Keywords: energy law; energy disputes; legal support of protection of interests of energy market participants; proving and evidence.

The subject of legal regulation of energy law includes a range of public law and private law relations in the sphere of energy arising, in particular, in connection with energy resources production, supply, transportation, and energy facilities construction [1]. Considering issues of legal support of protection of interests of energy market participants, V.V. Romanova distinguishes disputes arising out of private law relations due to controversies between parties of these relations in the course of energy resources search, extraction, supply, transportation, transfer, and storage, the technological connection of energy

receivers to energy networks, and energy facilities construction, as well as disputes within public law relations dealing mainly with controversies with competent authorities related to application of rules of antimonopoly laws, tariff regulation, industrial safety ensuring, and laws on subsoil use [2].

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protection of participant's rights and property interests. [3]. Public and non-public jurisdictional bodies offer protection of rights violated in the energy sector. Among public jurisdictional bodies, one can distinguish regular courts, considering cases in civil and administrative legal proceedings, and commercial arbitration courts considering cases using the Arbitration Procedure Code of the Russian Federation (APC RF). The non-public dispute resolution bodies include arbitration courts and the international commercial arbitration bodies. Depending of the jurisdictional body used for the protection of a right, proving and evidence are governed by: Article 6 of the Civil Procedure Code of the Russian Federation (CPC RF), Article 7 of the APC RF, Articles 25–30 of the Law On Commercial Arbitration (Arbitration Proceedings) in the Russian Federation, and Articles 23–27 of the Law On International Commercial Arbitration.

In energy disputes, explanations by the parties of the dispute, third parties, and other persons involved in the case, written evidence and exhibits, professional advice in arbitration proceedings, and expert opinions are the most often used means of proving.

Explanations by persons involved in a case

The said persons may give their explanations to the court orally or in writing. M.K. Treshnikov points out that parties' explanations are structured in a certain way and "in addition to giving information and facts (i.e. evidence) can contain expressions of will, motives, and arguments used by either party to interpret the actual circumstances to their benefit, as well as expression of emotions, moods, and judgements regarding the legal category of the legal relations" [4]. While information on facts only has value as evidence. The court takes into account the consistency, coherence, clarity, and reasonableness of the explanations, and they are evaluated together with other evidence in entirety. The recognition of a circumstance should comply with law and should not infringe the rights of other persons [5]. The legal procedure regarding explanations by the persons involved in a case is established by Articles 68, 174 of the CPC RF, Articles 81, 162 of the APC RF, and Articles 68, 159 of the

Code of Administrative Court Procedure of the Russian Federation (CACP RF). Some categories of energy disputes require the court to make the award only based on the entirety of the explanations by the parties and other persons involved in the case, as well as the written evidence; such categories include, for example, administrative cases on challenging regulations in the sphere of energy. Ruling on Appeal No. АПJI17-44 of the Appeal Collegium of the Supreme Court of the Russian Federation dd. April 6, 2017 can serve as an example.

Written evidence in energy disputes

Procedure codes define written evidence in the form of a list, which includes various statements containing information on the facts of the subject of proving and executed according to the statutory procedure allowing verification of the document's reliability. Within the meaning of the current legislation and judicial practice, electronic evidence belongs to written evidence. The legal procedure regarding written evidence is established in Article 71, 72, 181–182 of the CPC RF, Article 75, 78 of the APC RF, and Articles 70, 71, 74 of the CACP RF.

When considering energy disputes, acceptable written evidence include: effective judicial acts ascertaining the prejudicialness of certain circumstances [6], energy supply agreements and other agreements, for example, technological connection ones [7]; disagreement reconciliation memorandums, VAT-invoices, detailed electricity consumption statements, electricity cost calculations (recalculations) [8], requests for technological connection to power grids [9], etc. Thus, when considering a case, the lower-instance "courts failed to verify whether the defendant's calculations were lawful. Particularly, the company argued that the power grid company when calculating the cost of the services provided to the claimant used the stated power instead of the actual one. The defendant did not disprove that circumstance". The said circumstances lead to the reversal of the judicial acts [10].

Exhibits in energy disputes

Procedure codes define exhibits as objects having the signs making them acceptable as

the means for establishing the facts which are the subject of proving. The legal procedure regarding exhibits is established in Article 73–76, Article 183–184 of the CPC RF, Article 76–80 of the APC RF, and Article 72–75 CACP RF. In energy disputes, exhibits have the value of proving because they are the object of expert research. When considering energy disputes, acceptable exhibits include: measuring instruments (for example, electricity metering units), power receivers [11], overhead power lines, standalone backup power sources, integral unit substations, transformers, switching centers, cables, buses, switchboard devices, voltage apparatuses, earthing [12], etc. Due to their structural specifics, many exhibits are bulky and not subject to provision to court, but can be inspected at site with a protocol executed as a separate procedural action, involving experts and professionals recording relevant evidentiary information, and with notifying the persons involved in the case. The legal procedure regarding the professional advice is established in Article 55.1, 87.1 of the APC RF; only that code deems the professional advice as a valid means of proving, while other procedure codes vest professionals with auxiliary functions only.

Expert opinion in energy disputes

The Law on Public Forensic Expert Testimony in the Russian Federation regulates the definition of the forensic expert examination. The legal procedure regarding the expert opinion is established in Article 55, 79–87, 187 of the CPC RF, Article 82–87 of the APC RF, and Article 49, 77–83 CACP RF. Forensic energy expert examination (electric energy, heat energy) is one of the main examination types used to establish the actual reasonableness of the invoices issued for energy resources consumed, compliance of the metering units' operation with statutory requirements and conditions, correctness of the measuring instruments' layout in accordance with design documentation, needs in energy resources and standard consumption rates, actual service provision with due quality, etc. Thus, a forensic energy expert examination was ordered in a case to establish the amount of losses (lost income) incurred by the claimant in aggregate in all segments of

the electric power and capacity wholesale market due to the power generating equipment's downtime [13]. When establishing legally relevant circumstances of a case, the court prescribes, inter alia, economic forensic expert examinations [14], electrotechnical expert examinations, state environmental expert examinations, and other state expert examinations in the fuel and energy sector [15].

For each particular case, the court identifies the subject of proving individually taking into account the substantive law's rules applicable to the legal relations in dispute, as well as the parties' claims and objections. Thus, when hearing the case on a grid company's claim against Dizazh M Limited Liability Company for recovery of the debt for the electricity transmission services and penalties for the breach of the due service payment terms, the lower-instance courts failed to establish the circumstances relevant for the dispute consideration and related to the calculation of the amount being recovered, due to which fact the awarded judicial acts were reversed [16]. The procedure codes define the following general rule for the distribution of the burden of proving: the parties are obliged to prove the grounds for their claims and objections. Thus, the courts proceeded from that the defendant used to be paid for its services based on the tariff established for it with its validity not disproved, that is why the stated claims were not subject to satisfaction (Ruling of the Supreme Court of the Russian Federation No. 307-ЭС15-6816 in Case No. A05-7141/2014 dd. June 30, 2015). Presumptive evidence, procedural fictions, special rules for the distribution of the burden of proving are referred to particular rules for the distribution of the burden of proving. Thus, the presumption of the invalidity and unreasonableness of the consumed resource amount measured by a metering unit is refutable. The consumer bears the burden of disproving such presumption and proving the validity and reasonableness of the consumed electricity amount as measured by the metering unit (article 65 of the APC RF). Necessary evidence requisite in energy disputes for resolution of the case on the merits is determined by law or referred to in the interpretation and explanation acts of the supreme court body's judicial practice. ■

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