

# Legal issues and peculiarities of risk minimisation in recovery of civil damages incurred by a consumer subsequent to the supply of electricity of improper quality

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**Abstract.** The legislation concerning Electric Power Industry does not directly stipulate for statement of obligations or liability of the supplier for the delivered electric utility of inadequate quality. At the same time, it does not limit the application of civil law regulations, including the regulation on the buyer's right to demand a proportionate reduction in the purchase price of goods purchased of improper quality, enshrined in paragraph 1 of Article 475 of the Civil Code of the Russian Federation. **Keywords:** electric power quality, proportionate reduction of purchase price, damages, energy supply agreement.

## 1 Introduction

In the modern world, it is difficult to imagine life without electric energy. Society is trying to switch to this eco-friendly type of energy resource in all areas of human activity. And this, in addition to household and industrial consumption, is also electric vehicles, and even robotics. Thus, electricity consumption is growing every year, and the quality of electricity is falling. It is increasingly difficult for consumers to protect their rights and interests in the event of receiving substandard electricity. The requirements for the properties of electricity in international legal practice are determined by regulatory documents - standards, laws, technical specifications. In the Russian Federation, the requirements regarding the quality of electricity are established by laws in the field of electric power, GOST 13109-97 (State Standards) and contracts between the supplier and the consumer. But there is no algorithm for collecting losses or compensating losses in the event that a consumer receives a low-quality energy resource in regulatory legal acts. This article suggests possible alternative legal ways to protect the rights of electricity consumers.

According to the Paragraph 2 of Article 3 of the Federal Law of 03.26.2003 No. 35-FL "On Electric Power Industry" (hereinafter referred to as the Law on Electric Power Sector), the electric power industry is a branch of economy of the Russian Federation, which includes a complex of economic intercourse arising during production, transmission of electricity,

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operational dispatching management system in the electric power industry, sales function and consumption of electric power using production facilities and other items of properties.

From the legal analysis of statutory and regulatory enactments in the field of electric power industry that electric power (capacity) refers to "goods" produced at electric power generation facilities, transmitted through electric grid facilities by means of rendering of service on electric power transmission, on power receiver of consumers of electric power. Thus, electrical power in its legal essence is goods. But electrical power is special goods due to its physical characteristics.

Nevertheless, in the civil legislation of the Russian Federation there is no gradation of characteristics and properties of goods that would come within the status of "special". Consequently, there is no individual legal regulation of special goods. Therefore, electrical power as a good is subject to the statutory regulations on the quality of goods [1].

Accordingly, ultimate consumers purchasing electricity have a right to receive it of proper quality. As general rules of Russian Legislation, if the goods (electric power) are supplied to the consumer of improper quality, the last has the right to protect the violated right.

One of the ways to protect the violated right is compensation of losses. But, in the first place, it is necessary to determine who will be the proper defendant in these jural relations, i.e. who should incur liable and recompense losses to the consumer.

According to article 3 of the Federal Law "On Electric Power Industry" No. 35-FL dated 26.03.2003 (hereinafter - the Law on Electric Power Industry), jural relations between the supplier and the ultimate consumer are regulated by the electricity (capacity) purchase and sale agreement. The legislator has defined an electricity purchase and sale agreement as an agreement under which the supplier undertakes to supply the buyer with electricity thereof mandatory requirements, in a certain quantity and of a certain quality, and the buyer undertakes to accept and pay for the electricity on the terms and conditions of the contract concluded in accordance with the wholesale market rules and the contract's basic provisions of retail markets [2].

At the same time, electric power transmission services are independent and civil law obligations, carried out through a set of organisationally and technologically related actions (including operational and technological management), which ensure the electric power transmission through technical devices of electric networks (power grid facilities - power transmission lines, transformer and other substations, distribution centres and other facilities designed to ensure electric communications and embodiment of electric power transmission).

Concurrently, according with paragraph 28 of the Basic Provisions for the Functioning of Retail Electricity Markets approved by Government Decree No. 442 dated 05.04.2012 (hereinafter referred to as the Basic Provisions), under the energy supply agreement, the guaranteeing supplier undertakes to sell electric power (capacity), as well as to provide, independently or through engaged third parties, services for the electric power transmission and services, the provision of which is an integral part of the process of supplying electric power to consumers, and the consumer (buyer) undertakes to pay for the purchased electric power (capacity) and rendered services [3]. Now therefore, an energy supply agreement is a mixed contract (purchase and sale agreement = service agreement).

In the Electricity Act, there are also "concurrent" properties of the goods, specifically, "quantity" and "quality".

From the above analysis, it follows that it is the electricity supplier, i.e. the power supply company, that should pay for losses for low-quality goods (electric power). In the modern court practice on consideration of disputes on compensation of losses for electricity supply of inadequate quality, there is an established opinion that it is the power supply company that is liable to the consumer for low-quality electricity supply. While the network organisation directly engaged in the electric power transmission.

## **2 Recovery of losses as a mechanism for the settlement of disputes by the parties of legal relations**

The institution of recovery of civil damages is a complex instrument of redress for rights violations. This is compounded by the fact that the quality of electric power as a special good is very difficult to prove in court.

According to the legal proposition of the courts the compensable amount of losses should be established with a reasonable degree of credibility, whereby the intrinsic problems of proving the losses and its amount, as well as the causal connection between the actions and caused losses should not reduce the level of legal security of the participants of legal relations. A creditor cannot be denied compensation for losses caused by failure to perform or improper performance of obligations based solely on the fact that the amount of losses cannot be established with reasonable degree of credibility.

However, under all circumstances by implication of Articles 15 and 393 of the Civil Code of the Russian Federation (hereinafter referred to as CCFR), the creditor, defending his right, should confirm the existence of losses, as well as substantiate with a reasonable degree of credibility their amount and the causal connection between failure to perform or improper performance of obligation by the debtor and the named losses.

However, there is always a nuance, how to prove the amount of losses (to establish a reasonable degree of credibility of its amount) and the causal connection between failure to perform or improper performance of obligation by the debtor and the named losses? For example, substandard electricity was consumed and there was no direct damage in the form of a burnt-out power receiver or defective products following the receipt of substandard energy. Then a reasonable degree of the amount of losses will depend on some way of calculating the damage done, arising today, but finally materializing, perhaps, in the future and incidental, for example, abridged period of accident-free work of the energy device (equipment) compared to the period of operation under quality electric power supply or the return of defective products due to shortage arises within the warranty period.

Court practice shows that even the calculation of such possible damage liquidated by specialists or experts depends on many subjective aspects and may not respond to the very reasonable degree of the amount of damages described in the above position of the Supreme Courts in Russia.

After all the legislation on the electric power industry does not directly provide for the calculation of obligations or liability of the supplier for electrical supplied energy of inadequate quality. At which time, it does not limit the application of civil law regulations, including the regulation on the buyer's right to demand a coherent reduction in the purchase price of purchased goods of improper quality, according to Para. 1 of Art. 475 of the Civil Code of the Russian Federation.

Para. 1 of Art. 475 of the CCRF specifies the consequences of the transfer of goods of inadequate quality, namely:

- to reduce the purchase price commensurately;
- to rectify the defects of the goods within a reasonable time period free of charge;
- to indemnify for the expenses incurred for the defect correction of the goods.

If the requirements for the goods quality are significantly violated, the buyer may refuse from performance of purchase and sale agreement and demand to return the amount paid for the goods or demand to replace the goods of improper quality with goods in conformity with the treaty [4].

A breach of requirements is considered to be material if the buyer has discovered fatal defects; defects that cannot be eliminated without disproportionate costs or time outlays, or are repeatedly detected or appear again after their elimination, and other similar defects.

Also, the Civil Code provides the buyer's right to submit a request for the elimination of defects or replacement of goods specified in Paras. 1 and 2 of Art. 475 of the Civil Code of the Russian Federation, unless otherwise stay in the character of the goods or the nature of obligation (Para. 3 of Art. 475 of the Civil Code of the Russian Federation).

Consequences of delivery of goods of improper quality under supply contracts are established in Art.518 of the CCRF. The buyer (recipient) of such goods should have the right to make demands on the supplier described by Art. 475 of the CCRF. Exemption: the supplier, having been notified by the buyer of defects in the goods delivered without delay replaced the goods delivered with goods of adequate quality.

The peculiarity of electric power (capacity) as a special good excludes the possibility to demand defect correction or replacement of the goods.

At the same time, the requirement to reduce the purchase price commensurately remains as the most possible under the condition of supply and consumption of electric power of inadequate quality.

The seller (electricity supplier) is liable for defects in the goods if the buyer proves that they occurred before the goods were delivered to the buyer or for reasons emerged up until that time (Para. 1 Art. 476 CCRF). At the same time if the goods are not established warranty period or expiry date, claims related to the shortage of goods, the buyer may make claims, provided that he discovered the shortage of the sold goods within a reasonable period of time, but within two years from the date of delivery of the goods to the buyer or within a longer period of time, when such a period is established by law or purchase and sale agreement. [4]

Taking into consideration that the physical characteristics of electric power (capacity), it is impossible to establish a warranty period for this product.

The Electric Act introduced the concept of "electric power quality". Electricity quality is the degree of conformity of the electricity characteristic at a certain point of electric network to a set of controlled parameter established by regulatory legal acts of federal government agency empowered by the Government of the Russian Federation.

Under the terms and conditions of Para. 2 of the substantive provisions, the quality of electric power is the degree of conformity of the electric power characteristics at a certain point of the electric network with a set of controlled parameter established by regulatory legal acts of federal government agency empowered by the Government of the Russian Federation.

Also, the substantive provisions state that the place of performance of obligations under the for the purchase and sale agreement of electric power is the supply points determined by the contract and documents on technological connection.

Now therefore, the fact of purchase and sale of low-quality electric power should be recorded exactly at the supply points indicated according to the contract with the electricity supplier, at the edge of balance and operational responsibility. Only in this case, the consumer will receive evidence of improper quality electric power supply to the boundary of the location area of his power receiver (facilities).

In order to assess the electricity quality, it is necessary to use special equipment that allows the received information to be recorded and stored in electronic format every second. In that case, the received and recorded information can be used in evidence to prove the fact of supplying substandard energy. But, sadly this is not enough for estimation of damage.

### **3 The complexity of the burden of proof of damages in court**

The rights and obligations of the parties (suppliers and consumers) in relation thereto the energy quality (including electricity) are described in Art. 542 of the CCRF. The quality of supplied energy must comply with the requirements established in accordance with the legislation of the Russian Federation, including obligatory rules, or stipulated by the energy supply agreement.

At the same time, if the power supply organization violates the requirements for the energy quality, the requester (consumer) has the right to refuse to pay for such energy. Nevertheless, the power supply organization in its turn may demand from the requester to compensate the value of what he has unmaintainable saved due to the use of this energy (Para. 2 of Art. 1105 of the CCRF).

The consumer right to refuse to pay for improper quality of electricity is legally provided. But as a practical matter it is unrealisable.

The fact is that in the Electric Power Industry, the ultimate price of goods (electric power) consists of three components: the non-regulated prices of electricity, the cost of transmission services and the sales mark-ups. If the requester has consumed low-quality electricity, in fact this regulation does not protect the consumer in any way, because the consumer will be charged unjust enrichment in the same amount as the cost of electricity supplied under the contract.

In addition, the power supply company has a right to charge the consumer interest for the use of another's money under Art. 395 of the CCRF. In addition, there will be risks of uncontracted consumption if the power supply company use its lawful right to abrogate an agreement unilaterally whereas payment default by the consumer.

The Electricity Act provided reassurance of reliable supply of electric power to consumers: electric power industry entities supplying electric power to electric power consumers, including energy sales organizations, guaranteeing suppliers and local grid company (within the limits of its responsibility), are responsible to electric power consumers for the reliability of supplying them with electric power and its quality in accordance as specified by technical regulations and other obligatory requirements. [5].

The Electricity Act does not contain any norms legitimating the types, methods and procedure for determination of the amount of liability of the above-mentioned electric power engineering entities for non-compliance with the power quality of supplied to end consumers.

The Basic Provisions stipulate that electric power engineering entities supplying electric power to consumers, including guaranteeing suppliers, power sales (power supply) organizations, grid operator, system operator and switchgear operator in technologically isolated territorial electric power systems, as well as electric power (capacity) producers, in the process of fulfilling their obligations under contracts concluded by them in the wholesale market and retail markets of consumers supply and electricity quality by joint efforts. Reliability requirements of electric power supply and electricity quality are established in accordance with the legislation of the Russian Federation.

Grounds and the extent of liability of electric power engineering entities to consumers for actions (omissions) resulting in adverse consequences shall be determined in accordance with the civil legislation of the Russian Federation and the laws of the Russian Federation on the Electric Power Industry. As mentioned above, the law does not provide for any special types of liability for low-quality electricity. Also, the word "adverse consequences" does not mean the certainty principles of the legislation and leaves room for appeal of electric power engineering entities to a limited interpretation of its obligations and responsibilities [6].

Therefore, it is difficult to prove the fact of supplying electricity of inadequate quality in court.

Furthermore, regarding obligations under tort law relations examination must be performed. All this greatly delays the process of recovery of damages, and companies in the accounting primary documents are complete uncertain for a long time. That's all reflects adversely on business.

Consequently, an alternative solution to this situation is needed.

## **4 Contractual method of protecting the rights of electricity consumers**

The legal essence of the alternative approach to consumer rights protection is the implementation in the terms of the electricity supply contract of the consumer's right to demand a proportionate reduction in the purchase price of electricity.

This approach shall be provided in the contract as a way of protection of the violated right in case of inadequate electricity consumption.

This alternative approach to protecting the consumer rights constantly receiving electricity of inadequate quality does not carry significant financial risks and it limited only by the need to carefully preparation of the legal position based on established court practice.

The electricity legislation does not explicitly provide for the calculation of obligations or liability of the supplier for electricity supplied of inadequate quality. At which time, it does not limit the application of the civil law regulations, including the norms on the buyer's right to demand a commensurate reduction in the purchase price of acquired goods of inadequate quality, enshrined in paragraph 1 of Art. 475 of the CCRF.

The implementation of this alternative approach in the special legislation in the field of electric energy industry will allow to form a reliable tool for the protection of consumers' rights in case of electric power supply inconsistent with requirements established by the current legislation.

## **5 Conclusion**

The issues of electricity quality are becoming an important problem point, both for professional subjects of the electricity market and for end users. The necessary and sufficient level of evidence in court, the introduction of relevant mandatory regulatory norms in the legislation on the electric power industry and in contracts for the supply of electricity is not only a condition for the safe operation of energy infrastructure systems, but also an essential requirement for the development of the industry as a whole. Preventive measures to reduce the purchase price of electricity necessary to mitigate risks and protect consumer rights are possible and necessary.

The implementation of an alternative approach, such as the possibility of reducing the purchase price of electricity in special legislation in the field of electric power industry, will allow us to form a reliable tool for protecting the rights of consumers in the supply of electricity that does not meet the quality requirements established by current legislation.

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