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# Quasi-Divisional Regulatory Legal Acts in Energy Law

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## Аннотация

In this article, the author reviews the existing views of legal theoreticians on internal acts of legal entities that have been lately acknowledged by legal publications as independent law sources. The paper singles out the main attribute that gives local acts of legal entities the statutory regulation quality, being the delegation of statutory regulation issuance powers to the company by the law or sanctioning by means of approval by a competent state authority. The author suggests that legal acts of legal entities issued without the delegation right or approval by the state but having statutory qualities should be reviewed on a standalone basis, as a separate law source. The article notes that a characteristic feature of such acts is their issuance by subjects of natural monopolies created as a result of market economic reforms held in Russia in the late 20th century based on branch ministries governing separate national economy sectors (electrical energy industry, gas and oil transportation system). It is the first case in legal publications when the author that makes an attempt at understanding the nature of these acts concludes that they differ from corporate and departmental acts. Due to the fact that law making by subjects of natural monopolies was actually replacing regulatory activities of ministries and other state departments, the author suggests naming the documents they issue quasi-divisional legal acts. Based on the obtained results, the author words the concept of quasi-divisional legal acts in the energy law as one of law sources.

**Ключевые слова:** energy law, law sources, statutory regulation, local acts

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<sup>1</sup> Legal publications single out such law sources as documents adopted by management bodies of legal entities. Legal scientists justify belonging of such documents to regulations by provisions of Clause 5, Article 52 of the Civil Code of the Russian Federation [1] that stipulate the right of legal entity members to approve corporate by-laws and other internal corporate documents governing corporate relations [2, p. 42–45; 3, p. 45–52].

<sup>2</sup> That said, some corporate local acts can be referred not only to statutory acts but also to legal acts.

<sup>3</sup> The general law theory proceeds on the basis that the concepts of rule making and law making are not absolutely identical. Rule making is a broader concept that includes not only law making activities of the state but also the process of the establishment of all social rules in the society. This activity results in such statutory regulators as: customs, morale, corporate rules, law. Law making is a variation of rule making and means the process of creation of universally binding rules aimed at streamlining public relations and their official documentation in the form of statutory legal documents adopted by the state [4, p. 46].

<sup>4</sup> An act of law making adopted by a legal entity is universally binding not only within the corporation but also for third parties. The main feature that allows referring local acts of legal entities to law sources is their issuance as a result of delegation of the issuance powers to the company by the state.

<sup>5</sup> As an example of such local act, V.V. Romanova mentions a procurement policy [6] adopted in accordance with Article 2 of the Federal Law On Procurements of Goods, Works, Services by Certain Types of Legal Entities [5]. Part 1, Article 2 of this law states that a procurement policy is a legal act.

<sup>6</sup> However, the Russian legal field has a great number of acts of legal entities that have qualities of a legal act but are adopted without the delegation of any issuance powers by the state.

<sup>7</sup> The USSR granted companies the right to adopt corporate standards on the manufactured products, technological processes and rendered services for the purposes of application of official standards [7]. Modern Russia established the opportunity to issue corporate standards in accordance with the Federal Law On Technical Regulation [8].

<sup>8</sup> Today, development of corporate standards is regulated by the Federal Law On Standardization in the Russian Federation [9]. According to Clause 13, Article 2 of this law, a corporate standard is a standardization document approved by a legal entity or individual entrepreneur to improve production and maintain high quality of products, performed works, rendered services.

<sup>9</sup> It was initially assumed that such standards of companies and organizations would be geared towards the internal user and applied in respect of third parties only upon their voluntary consent [10].

<sup>10</sup> However, detailed development of technical issues of organization and management of production processes, requirements for quality of goods, works and services in corporate standards resulted in some of them claiming to be legal regulators applicable beyond one separate company. This was triggered by respective political and socioeconomic prerequisites.

<sup>11</sup> Upon the start of market economic reforms in the late 20th century, Russia liquidated sectoral ministries and departments in charge of legal regulation in the established area along with administrative management of economic complexes in specific economic spheres. As a result of transformation of the state monopolistic regulation of the economy, administration of separate national economy branches was transferred to created natural monopoly subjects with a holding structure. There appeared such large monopolists as, e.g., Unified Energy System of Russia Russian Joint-Stock Company, Gazprom Russian Joint-Stock Company, Transneft, Open Joint-Stock Company. However, it was impossible to manage complicated technological complexes across the country just through directives issued by parent companies to subsidiaries and other related companies. Efficient administration and solution of systemic tasks in the respective economic sectors required active involvement of monopolies in law making.

<sup>12</sup> Thus, before 1991, the electric power industry was governed by the Ministry of Energy and Electrification of the USSR. The ministry was not only in charge of rule making, but also solved economic issues including construction and operation of thermal power stations and electric grids, managed all territorial energy companies. After the collapse of the USSR, administration of the electric and heat power industries was transferred to the successor, the Ministry of Fuel and Energy of RSFSR, and shortly after, to Unified Energy System of Russia Russian Joint-Stock Company established in 1992. However, the renamed Ministry of Fuel and Energy of the Russian Federation retained the regulatory authorities including adoption of legal acts in the indicated sphere.

<sup>13</sup> During the period of its activities, Unified Energy System of Russia Russian Joint-Stock Company issued a great number of technical standards (“TS”) regulating the matters associated with operation and maintenance of electric grid and heat supply facilities. TS were corporate standards by their content and were adopted mainly in the form of regulatory documents (“RD”). 1,277 TS had been issued by the date of restructuring of Unified Energy System of Russia Russian Joint-Stock Company and establishment of territorial energy companies. In view of the adoption of the Federal Law On Technical Regulation, 44 TS were revised and approved by the Ministry of Energy of Russia and other ministries and departments. Other TS were intended to be used as recommendation documents [11].

<sup>14</sup> Although Unified Energy System of Russia Russian Joint-Stock Company was liquidated, many TS are still applied in electric power and heat supply by regional energy companies established by Unified Energy System of Russia Russian Joint-Stock

Company, although these acts were not re-adopted on the departmental level and are not national standards.

<sup>15</sup> It is worth mentioning that some TS were rights from the beginning developed to be applied outside the energy holding. Thus, as follows from RD 34.20.581-96 Methods of Evaluation of the Technical Condition of Steam Turbine Plants before, after and between Repairs [12], it is mandatory for organizations and companies operating and repairing steam turbine equipment, and SO 34.20.202-200. Standard Provision on the Procedure for Documentation of Decommissioning of Worn-out Generating Equipment of Electric Power Stations Being Part of the Unified Energy System of Russia [13] directly indicates that it is applicable, *inter alia*, to generating equipment connected to the unified energy system of electric power plants of other owners irrespective of the forms of ownership.

<sup>16</sup> However, solution of the issue of the legal force of TS is ambiguous, including in the judicial practice. The courts indicated in some cases that TS were just of an advisory nature, i.e., were not statutory regulations [14; 15]. However, in other cases, the courts apply TS of Unified Energy System of Russia Russian Joint-Stock Company as obligatory rules and justify their judgments by reference to those TS irrespective of the objections of parties to a dispute and their indications of the advisory nature of such acts [16; 17]. As a rule, the courts apply TS on a subsidiary basis, if they do not contradict any statutory acts on the higher legal regulation level, or to fill in the legal gaps.

<sup>17</sup> Assignment of the statutory regulation quality to internal corporate documents by the law enforcement practice is characteristic not only of TS of Unified Energy System of Russia Russian Joint-Stock Company but also of acts of other natural monopoly subjects. Thus, Gazprom, PSJC, and Transneft, PSJC, are also performing legal regulation of operation of technological infrastructure facilities for extraction and transportation of natural resources. Some TS they issued also fall beyond the scope of the holding structures of these energy giants and are applied by third parties as statutory regulations [18; 19; 20].

<sup>18</sup> Leading corporate law theoreticians agree that the scope of a local (corporate) legal act is limited to the range of persons being members of the respective company (members are understood as founders and employees) [21, p. 272; 22, p. 10; 23, p. 9–10]. In some cases, local acts may be in effect in respect of third parties that are not company members, but to the extent stipulated by such third parties. For example, A.B. Kozyreva notes that “a documented consent for submission to corporate rules must be obtained from third parties” [24, p. 169].

<sup>19</sup> However, inclusion of behavior of third parties to the sphere of regulation of some TS irrespective of whether they acknowledge the legal force of such acts, does not enable us to ascertain that they can be referred to purely corporate regulations.

<sup>20</sup> There is no main feature for reference of TS to departmental regulations, which is the fact of being adopted by executive authorities [25, p. 22]. When natural monopoly subjects adopted TS, they were not government authorities and had no governmental powers, so the documents they issue cannot be formally referred to substatutory (departmental) regulations.

<sup>21</sup> Legal publications suggest referring TS adopted based on the Federal Law On Technical Regulation to law sources, however, not all of them, but just the ones sanctioned by the state (approved by substatutory departmental acts) [26, p. 5–9]. Being sanctioned by the state, i.e., adopted by government authorities is one of the attributes of statutory regulations in the law theory [27, p. 282]. However, an act can also be sanctioned by acknowledgment of its legal force in the law enforcement practice, for example, judicial, that can ensure enforcement of the statutory provisions of such act. Such approach was confirmed in the judicial practice. In Clause 3 of Ruling No. 50 of December 25, 2018 On the Practice of Judicial Review of Cases on Challenging of Statutory Regulations and Acts That Explain Laws and Are of Statutory Character [28], the Plenum of the Supreme Court of the Russian Federation expressed the position that one of the significant attributes of acts of statutory character is their use as universally binding in the law enforcement practice with regards to the public at large.

<sup>22</sup> The fact that the law enforcement practice assigns attributes of a statutory regulation governing relations between third parties without their consent to internal corporate documents enables us to conclude that there is a phenomenon of corporate acts that differ in their nature from departmental and local regulations.

<sup>23</sup> Since legal entities adopting TS were not government authorities but in fact performed legal regulation in the respective sphere and replaced law making activities of special departments (ministries) established for the legal regulation of the respective economic sectors, it is suggested to name the issued TS quasi-divisional regulatory legal acts.

<sup>24</sup> Thus, instead of departmental regulation by ministries and other executive government authorities, regulation of separate issues mainly technical ones in the energy sphere is performed based on quasi-divisional legal acts to be understood as acts of natural monopoly subjects established in the course of market economic reforms in Russia, governing relations in the respective economic branches, issued without official delegation of law making powers by the state.

<sup>25</sup> The indicated legal acts can be included in the number of energy law sources in view of their broad application in regulation of relations in the energy sphere.

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## Abstract

In this article, the author reviews the existing views of legal theoreticians on internal acts of legal entities that have been lately acknowledged by legal publications as independent law sources. The paper singles out the main attribute that gives local acts of legal entities the statutory regulation quality, being the delegation of statutory regulation issuance powers to the company by the law or sanctioning by means of approval by a competent state authority. The author suggests that legal acts of legal entities issued without the delegation right or approval by the state but having statutory qualities should be reviewed on a standalone basis, as a separate law source. The article notes that a characteristic feature of such acts is their issuance by subjects of natural monopolies created as a result of market economic reforms held in Russia in the late 20th century based on branch ministries governing separate national economy sectors (electrical energy industry, gas and oil transportation system). It is the first case in legal publications when the author that makes an attempt at understanding the nature of these acts concludes that they differ from corporate and departmental acts. Due to the fact that law making by subjects of natural monopolies was actually replacing regulatory activities of ministries and other state departments, the author suggests naming the documents they issue quasi-divisional legal acts. Based on the obtained results, the author words the concept of quasi-divisional legal acts in the energy law as one of law sources.

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