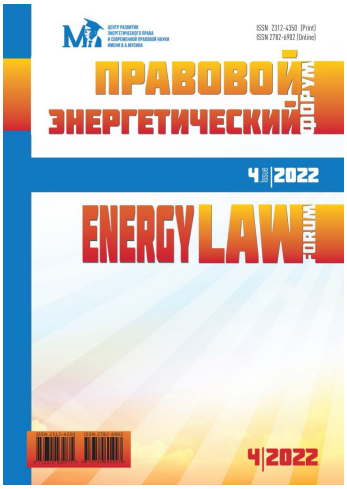

Правовой энергетический форум 2013-2024

ISSN 2079-8784

URL - http://ras.jes.su

Выпуск №4 Том . 2022

Problems of Legal Regulation of Approval of Heat Supply Investment Programs

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Аннотация

It is impossible to ensure uninterrupted heat energy supply if heat systems are in an unsatisfactory condition, and therefore the deterioration of heat systems is a major concern for the state. Nevertheless, in view of tariffs established for regulated entities, an investment program is often the only way to take measures aimed at heat system reconstruction and modernization. Currently, there are a number of gaps in the legal regulation of investment program approval, which, if not addressed, make it impossible to fully implement heat supply investment programs. The lack of requirements for refusal to approve investment programs cause a lot of problems for heat supply organizations. These problems have not been adequately covered by the legal doctrine and have not been addressed by the legislator. The author has studied the major problems associated with the legal regulation of heat supply investment program review and offered ways to address them.

Ключевые слова: energy law, legal regulation in the heat supply sector; investment program approval

Дата публикации: 27.12.2022

Ссылка для цитирования:

Голубь Н. В. Problems of Legal Regulation of Approval of Heat Supply Investment Programs // Правовой энергетический форум – 2022. – Выпуск №4 С. 56-64 [Электронный ресурс]. URL: https://mlcjournal.ru/S231243500023544-6-1 (дата обращения: 19.05.2024). DOI: 10.18254/S231243500023545-7

1 Ensuring reliable heat supply is one of general principles of organizing heat supply relations under Federal Law No. 190-ФЗ on Heat Supply dd. July 27, 2010. [1] Meanwhile, it is impossible to ensure uninterrupted heat energy supply if heat systems are in an unsatisfactory condition.

2 Currently, heat systems require regular reconstruction and modernization due to wear and tear caused by both external factors and equipment obsolescence. Despite the great importance of the energy sector, including heat supply, the critical condition of a part of key assets and the emergency condition of certain utilities have been repeatedly mentioned by the doctrine [2] and mass media. [3]

3 The wear and tear of heat systems is a major concern not only for organizations engaged in heat supply but for the state as a whole because heat system failure can have a negative impact on the energy security of certain regions. Besides, in the Russian climate, people's quality of life as well as the economic development of the state largely depends on heat supply, which is of particular importance under sanctions restrictions.

4 The fact that a significant percentage of utilities need repair makes it necessary to take measures and eliminate existing problems as well as prevent new ones.

5 Nevertheless, due to tariffs established for regulated entities, an investment program approved as per the Rules of Review and Approval of Investment Programs of Organizations Engaged in Regulated Heat Supply Activities, as well as Requirements for the Composition and Content of Such Programs (Except for such Programs Approved under the Electric Power Industry Laws of the Russian Federation), approved by Decree of the Government of the Russian Federation No. 410 dd. May 5, 2014 [4] (hereinafter referred to as Rules No. 410) is often the only way to take measures aimed at heat system reconstruction and modernization.

6 Although Rules No. 410 have been applied for quite a long time, a number of existing legislative gaps do not allow regulated entities to fully implement investment programs, including quality revisions after a refusal to review or approve them.

7 Attention should be paid to the lack of proper study of existing problems related to the approval and revision of heat supply investment programs both at the law-making and doctrinal levels. This situation shows that there is insufficient control over the process of review of investment programs and final decision-making by bodies authorized to review and/or approve an investment program (hereinafter referred to as the competent authority). As a result, such issues are often within the exclusive competence of officials of the competent authorities, which poses a risk of abuse of power without proper external control. At the same time, when regulated entities do not contest the refusal due to the lack of court practice and clear requirements for the content of documents received, is a wrong impression may be made, that there are no problems related to the implementation of heat supply investment programs.

8 We believe that insufficient legal regulation of issues related to refusal to review and/or approve an investment program not only creates additional obstacles for regulated entities by making it impossible to timely address the concerns of the competent authority but may also lead to wrongful refusals caused primarily by the lack of transparency in the relevant decision-making procedure.

9 Meanwhile, it seems wrong to ignore the fact that law enforcement practice often differs from region to region, which makes it especially important to unify requirements for refusals to review and/or approve heat supply investment programs.

10 The analysis of court practice and current laws suggests that there are a number of problems related to the approval of heat supply investment programs.

11 Rules No. 410 mention the unaffordability of a regulated entity's tariffs for consumers as a ground for refusal to review and/or approve an investment program. Meanwhile, the analysis of existing regulations of the Russian Federation suggests that the criterion of affordability of tariffs for consumers is not fully disclosed by the legislator.

12 Given the fact that the affordability of tariffs for consumers is evaluated based on the entire scope of public utility services consumed, [5] it is very difficult for a regulated entity to predict the actual heat supply tariff. When planning investment projects, heat supply organizations are unable to predict the exact level of actual tariffs that will be established for public utility services. Despite the fixing of marginal indices and projected indexation, there is a risk of exceeding consumer solvency margin due to the increase of tariffs for certain public utility services and, consequently, reducing its level for other public utility services. A situation when the regulator sets a tariff for a certain heat supply organization exceeding the marginal index, which in turn will also result in the necessity to reduce investment projects for the regulated entity submitting its investment program for approval, is also possible.

13 As a result, when developing an investment program and planning reconstruction and modernization projects for heat supply facilities, regulated entities have to choose activities based on insufficient information about projected tariffs due to the lack of a transparent mechanism to assess the affordability degree.

14 Moreover, it should also be mentioned that tariff growth depends not only on investment components but is also largely associated with such indicators as inflation and fuel price increase. Thus, tariff affordability review includes the assessment of not only investment components, but of all the factors affecting the tariff. At the same time, a regulated entity is unable to have an impact on the above indicators. As a result, a surge in fuel prices may make it impossible to implement most infrastructure modernization and reconstruction activities.

15 It seems that the introduction of the affordable tariff concept as well as the development and establishment of clear affordability criteria can raise heat supply organizations' awareness of the impact of the investment program on the established tariffs. Besides, when disclosing the tariff affordability criteria to approve the investment program, a provision should be included establishing the competent authority's obligation to assess the impact of investment components on tariff changes and tariff affordability for consumers.

16 In addition to the above, it should be noted that there are no requirements in Rules No. 410 for the content of justification of tariffs unaffordability for consumers, in particular for the population. It seems that a vague indication of the very fact of the need to justify the unaffordability of tariffs is not sufficient, because there is no clear list of

information to be provided in the refusal to a regulated entity in this situation. For example, nowadays the competent authorities have no obligation to provide a calculation used to make a decision on tariff unaffordability for consumers as well as to disclose in which part of the investment program the tariff is exceeded.

17 Due to the above circumstances, a regulated entity is often unable to determine the level of tariff unaffordability. Without the above calculations, it is almost impossible to revise the investment program, because the information on the necessary reduction/change of activities is limited.

18 The justification of the above position and consequently the lack of legal regulation can be illustrated by the judgement of the Omsk Region Commercial Court dd. July 7, 2020, in case No. A46-3970/2020, which invalidated the resolution of the Regional Energy Commission (hereinafter referred to as the REC) to refuse to approve the heat supply investment program and send it for revision. [6]

19 According to the case file, the Company submitted an investment program to the REC as per Rules No. 410. For six months, the REC repeatedly returned the investment program on various grounds not related with the tariff affordability for consumers.

20 In revising the investment program, the Company had to make changes in the scope of planned activities taking into account the regulator's comments. Meanwhile, after another submission of the adjusted investment program, the REC refused to approve it and mentioned the tariff unaffordability, because public utility charges would increase rapidly for citizens if the Company's investment program was taken into account in setting heat supply tariffs. To justify its decision, the REC referred to the opinion of the department for monitoring compliance with limits of citizens' charges and provided no calculation or other data for the Company to define the level of overcharge.

21 These circumstances served as the basis for the Company's reference to the Commercial Court to invalidate the refusal to approve the investment program.

22 Having analyzed the submitted materials, the Commercial Court concluded that as per Part 5 of Article 200 of the Commercial Procedure Code of the Russian Federation, [7] the obligation to confirm the legal grounds of the decision on refusal should be imposed on the REC. Since the regulatory body provided no calculation and the opinion of the department for monitoring compliance with limits of citizens' charges contained no provisions that could result in the conclusions on tariff unaffordability if the Company's investment program was approved, the court decided to satisfy the Company's claims.

23 The correctness of the judgement was confirmed by the ruling of the Eighth Commercial Court of Appeal dd. October 29, 2020, [8] as well as the ruling of the West Siberian District Commercial Court dd. March 10, 2021. [9]

24 It seems that the litigation and, as a result, the delay in the approval of the investment program could be avoided, if the obligation of the competent authorities to attach supporting materials, in particular, tariff unaffordability calculations, to refusals to approve investment programs was established at the legislative level.

25 Moreover, it should be noted that this problem is not solved at the level of constituent entities of the Russian Federation. For example, by its Order No. 22-П dd. August 8, 2016, the Regional Energy Commission of the Omsk Region approved administrative regulations for the Approval of Investment Programs of Organizations Engaged in Regulated Heat Supply Activities public service. [10] Meanwhile, these regulations contain no requirements for the content of decisions made by the REC of the Omsk Region following the review of submitted investment programs. As per clause 48 of the regulations, an authorized REC specialist can simply submit a letter indicating a section (clause) of an investment program that requires revision to provide a high-quality public service. At the same time, there is no requirement to make and attach a calculation to confirm tariff unaffordability.

26 As a rule, heat supply investment programs include a large number of activities to improve heat systems and heat supply facilities. Having no idea of the level of tariff excess at the time of refusal to approve the investment program, the regulated entity is unable to recalculate as correctly as possible and exclude the minimum number of activities necessary to reduce the impact on the tariff. This creates a risk of excluding a part of the investment projects, without which the local self-government authority may refuse to review/approve an investment program based on clause 26 and sub-clause “a” of clause 37 of Rules No. 410 when re-examining it because the revised investment program will not contribute to the development of heat supply systems included in the heating scheme or the achievement of target values of reliability and energy efficiency for heat supply facilities that are part of the centralized heating system.

27 As a result, we have a situation, where a regulated entity has a choice: to negligibly reduce investment components with the risk of keeping the tariff unaffordable or significantly change the planned activities, without which there is also a risk of investment program rejection based on clause 26 and sub-clause “a” of clause 37 of Rules No. 410.

28 We believe that in such situation, the actions of the competent authority violate the rights of the regulated entity and create unjustified barriers to business and other activities. Meanwhile, the lack of clear requirements for the content of the refusal to approve the investment program creates the impression that such decisions of the regulator are legitimate.

29 The legislator certainly does not prohibit a regulated entity to address the competent authority for the necessary information. However, since there is no unified form of refusal to approve an investment program and no requirements to the amount of information included in such refusal, the regulator, upon receipt of such request, has no obligation to provide a tariff affordability calculation or a more detailed response with additional materials, even if such information is provided within the period established for revision.

30 Moreover, speaking of investment program revision, we should take into account the terms established by Rules No. 410. For example, if an executive authority of a constituent entity of the Russian Federation or a local authority (if empowered to do so) refuses to approve an investment program, the regulated entity has 15 days to revise

it and re-submit the revised investment program for review (clauses 23 and 38 of Rules No. 410).

31 If an executive authority of a constituent entity of the Russian Federation refuses to approve an investment program, as per clause 32 of Rules No. 410, the regulated entity has 30 days to submit the revised investment program for re-consideration. However, if a local authority makes an approval decision, such term is halved and makes 15 days only (clause 42 of Rules No. 410).

32 Thus, the regulated entity shall take all necessary steps to revise and amend the investment program within the prescribed period. Failure will make it impossible to implement planned investment projects. As noted above, quality revisions become almost impossible to arrange within the specified time frame without the necessary information.

33 Given the shortened period for revision, the regulated entity needs to have all the necessary information which formed the grounds for the return of the investment program at the initial stage of eliminating the competent authority's comments. Otherwise, it is likely that by the time the tariff unaffordability calculation or other supporting materials are received the regulated entity has insufficient time to study the provided information and change the investment components.

34 the regulated entity may send a corresponding request to the competent authority in compliance with the provisions of the current laws to obtain the required data. Meanwhile, Part 1 of Article 12 of Federal Law of the Russian Federation No. 59-ФЗ on the Procedure for Consideration of Appeals of Citizens of the Russian Federation dd. May 2, 2006, sets a period of 30 days to consider an appeal. [11]

35 As a result, a request sent to the competent authority after refusal does not guarantee that the necessary information will be provided before the deadline for investment program revision.

36 Besides, it should be borne in mind that the term of investment program approval differs from the term of tariff decision-making by the regulatory authority.

37 For instance, Rules No. 410 established the following deadline for investment program approval: October 30 of the year preceding the period of investment program implementation start. As for the introduction of changes in a previously approved investment program, the deadline for the competent authority to make the final decision is November 20 of the year in which the regulated entity applied to amend the investment program (para. 3 of clause 45 of Rules No. 410).

38 The above deadlines for investment program approval and amendment are preclusive, i.e., when they expire the regulated entity loses the right to change the investment components and re-submit the revised investment program.

39 At the same time, upon receipt of the revised investment program, the competent authority re-submits it for approval to the local government body (except where investment projects have barely been changed as a result of revision). Tariff affordability is assessed after the repeated review of the investment program only.

40 It should be noted that when an investment program is rejected due to tariff unaffordability for consumers, the list, composition, and/or timing of investment projects are changed anyway to reduce investment components, which implies repeated reviews at all stages of approval. Given the absence of materials justifying the refusal to approve an investment program and, consequently, difficulties in prompt revision, this procedure delays the process of final decision-making by the competent authority. After all, until a final decision to approve the investment program is adopted, the regulated entity is unable to obtain information on the quality of investment program revision in terms of ensuring tariff affordability for consumers.

41 In this case, as per clause 11 of the Basic Principles of Formation of Indices of Changes in the Amount of Citizens' Payment for Public Utilities in the Russian Federation approved by Decree of the Government of the Russian Federation No. 400 on the Formation of Indices of Changes in the Amount of Citizens' Payment for Public Utilities in the Russian Federation dd. April 30, 2014, limiting indices are established no later than December 15 of the year preceding the first year of the long-term limiting indices establishment period. [12]

42 Heat supply tariffs are established directly by the regulator no later than on December 20 of the year preceding the following regulation accounting period (clause 6 of the Rules for the Regulation of Heat Supply Prices (Tariffs) approved by Decree of the Government of the Russian Federation No. 1075 on Pricing in Heat Supply dd. October 22, 2012). [13]

43 Thus, the actual tariff is established after almost two months of expiry of the deadline for investment program approval. Meanwhile, it should be borne in mind that projected tariffs taken into account in investment program reviews quite often do not correspond to actual tariffs.

44 As a result, at the time of investment program approval, the regulated entity's tariff may be declared unaffordable, which will make it impossible to implement the entire investment program or a part of investment projects. However, the regulator may establish a tariff different from the projected one later, which can allow for the implementation of certain activities excluded from the investment program.

45 As a consequence, differences in the terms of investment program approval and tariff decision-making by the regulator may result in unjustified non-inclusion of implementable investment projects, including those aimed at infrastructure modernization, in the investment program.

46 Thus, the current legislative gaps and lack of clear legal regulation of certain issues related to heat supply investment program approval give rise to a situation when a regulated entity virtually loses the right to revise an investment program within the established time.

47 For addressing these problems, it seems necessary to introduce a number of additions to the current regulations governing tariff setting and approval procedures for heat supply investment programs, in particular, to Rules No. 410.

48 Firstly, it is proposed to approve a form of refusal to review/approve a draft investment program as well as guidelines for completing the form. This decision will not

only protect the rights of regulated entities from unjustified refusals but also reduce the number of judicially disputed refusals because the content of these documents will be transparent and authorities will not be able to abuse their power due to clear legal regulation.

49 The above measures can be implemented in several ways. For example, it is possible to add the above form and guidelines as an annex to Rules No. 410. Another way is to issue a new regulation consolidating such provisions and include a reference to the newly adopted regulation in Rules No. 410.

50 The second option seems preferable because, given legal changes and taking into account law enforcement practice and problems identified in certain regions, it will allow making changes and additions to the guidelines for completing the form of refusal to review/approve draft investment programs without changing Rules No. 410, if necessary.

51 When developing the above changes, particular attention should be paid to the importance of including the following provisions.

52 Firstly, the refusal form should have a clear structure and include a section with a calculation of the unaffordability of a regulated entity's tariff for consumers if a draft investment program is rejected based on clause 26 (1), sub-clause "a" of clause 30, or sub-clause "a" of clause 40 of Rules no. 410. At the same time, the above form shall include required fields disclosing refusal reasons and justification as well as references to a specific part requiring revision.

53 Unified formulas and a tariff unaffordability calculation form will help regulated entities to prepare and provide a high-quality counter-calculation within the term established for revision. Besides, the unified form of the competent authority's final decision will solve the problem of different enforcement practices in different the regions. It will solve the problem of tear and wear of heat supply networks throughout the country, not only is some parts of it, which will have a significant impact on improving the quality of heat supply in general and will raise the regulator's credibility by excluding unlawful decisions, in particular, refusals to approve investment programs.

54 Moreover, the liability of the competent authority's officials for failure to comply with such form of refusal should be formalized. For example, failure to use such form and the absence of materials justifying refusal should give unconditional grounds to consider such refusal to approve an investment program unlawful. These provisions will help to exclude abuse by the competent authority and as a consequence will facilitate control by supervising authorities.

55 Secondly, to prevent any misinterpretation of the law, it is necessary to:

56 1. Prohibit comparing economically justified and reduced tariffs when assessing tariff affordability. Reduced tariffs application is a mechanism for protecting the rights of certain categories of consumers, which is why it is incorrect to take into account such tariff more favorable for consumers when considering an investment program and analyzing tariff affordability. Since the difference between such tariffs exceeds the limiting index even without adjusting for the investment program, their comparison is

incorrect and, in any case, will result in an unjustified refusal, even if the regulated entity reduces the economically justified tariff.

57 2. Established criteria for determining a set of public utilities most unfavorable for consumers and make a clear list of circumstances in which it is possible to change the object selected for calculation after a revised investment program has been submitted. Due to rapid changes in the economy and other sectors of the state, a situation may occur, in which different objects are categorized as the most unfavorable set of public utilities on the day an investment program is submitted to the competent authority and at the time it is approved. That is why it is important to develop a mechanism and calculate such set in such a way as to allow the regulated entity to make changes in the investment components on time. It is proposed, among other things, to formalize the obligation to make a preliminary tariff affordability calculation at the initial stage of investment program verification and prohibit changing the object in the tariff affordability calculation, if the investment program is reviewed, to address the above problem.

58 Besides, it seems necessary to add clause 41 to Rules No. 410 to read as follows: “The refusal of the local government authority to approve an investment program in compliance with clause 40 of these Rules shall be justified. Provided that such refusal shall state the grounds for rejection and include the calculation confirming the legitimacy of the rejection.”

59 In addition to the above measures, it is also necessary to adjust the terms of investment program approval. As stated above, the difference in the terms of the final decision to approve the investment program and tariff decisions may result in the unjustified exclusion of certain investment components.

60 Adjusting the above terms and the terms for tariff decisions made by the regulatory authority to make them identical would allow the regulated entity to include all necessary activities in its investment program. However, it seems wrong to extend the possibility of adjusting investment programs until December 20, because it could lead to certain abuse by regulated entities, which, in its turn, would have a negative impact on the quality of the review of tariffs established by the regulator.

61 Meanwhile, we believe that if the regulated entity’s projected tariff is exceeded negligibly, it is possible to extend the deadline for approving the final version of the investment program to prevent unjustified exclusion of certain investment projects. In such case, the regulated entity should have an obligation to submit in due time a revised investment program that will make tariffs affordable, and failure to submit the program would result in a refusal to approve it. Thus, if the actual heat supply tariff was reduced, the competent authority would be entitled to approve the original investment program and, if the tariff remained at the same level, it would be entitled to approve an adjusted investment program. Such solution helps to make sure that the maximum number of investment projects are implemented, which is important for all participants of legal relations in the heat supply sector.

62 It seems that the above changes will help to address the existing problems in the legal regulation of heat supply investment programs, which, in its turn, will have a positive impact on the energy security of the state.

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Problems of Legal Regulation of Approval of Heat Supply Investment Programs

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Abstract

It is impossible to ensure uninterrupted heat energy supply if heat systems are in an unsatisfactory condition, and therefore the deterioration of heat systems is a major concern for the state. Nevertheless, in view of tariffs established for regulated entities, an investment program is often the only way to take measures aimed at heat system reconstruction and modernization. Currently, there are a number of gaps in the legal regulation of investment program approval, which, if not addressed, make it impossible to fully implement heat supply investment programs. The lack of requirements for refusal to approve investment programs cause a lot of problems for heat supply organizations. These problems have not been adequately covered by the legal doctrine and have not been addressed by the legislator. The author has studied the major problems associated with the legal regulation of heat supply investment program review and offered ways to address them.

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Publication date: 27.12.2022

Citation link:

Golub N. Problems of Legal Regulation of Approval of Heat Supply Investment Programs // Energy law forum – 2022. – Issue 4 C. 56-64 [Electronic resource]. URL: https://mlcjournal.ru/S231243500023544-6-1 (circulation date: 19.05.2024). DOI: 10.18254/S231243500023545-7
