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Synchronization of the Restoration of Violated Economic Interests in Energy Supply Relations: Legal Issues and Legislative Support

Максименко Петр Николаевич

*Division Head of the Department of Legal Expert Examination and Legislative Initiatives of Mosenergosbyt, JSC, Mosenergosbyt, JSC
Российская Федерация, Москва*

Аннотация

In the process of fulfilling contractual obligations for energy supply, cases arise in which a change in the previously fulfilled volume of obligations is required.

In such situations, in order to prevent mutual violation of the rights and legitimate interests of the parties to all contracts executed in the process of energy supply, it periodically becomes necessary to clarify the scope of obligations fulfilled.

At the same time, the law does not contain an unambiguous procedure for correcting such errors, and in law enforcement practices, various approaches are being defined about error tolerance and limits of their elimination.

In this regard, it is advisable to develop legal arrangements that allow synchronizing the procedure for restoring the economic interests of subjects of contractual relationships in energy supply.

The positions, judgments, and statements contained in this article are the author's private opinion and may not coincide with the official position of the organization in which he works, or any other organizations.

Ключевые слова: energy supply contract, retail electric power markets, electric power industry, energy law, private law

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¹ 1. Introduction

² An energy supply contract serves as the main and most common contractual structure that ensures the sale of electric power in retail markets, that is, to end consumers of electric power.

³ The Civil Code of the Russian Federation (hereinafter referred to as the “Russian Civil Code”) determines that when entering into an energy supply contract, electric power metering shall be organized (Clause 2 of Article 539), providing measurement of consumption (Article 541), on the basis of which further calculations shall be performed (Article 544).

⁴ Federal Law No. 35-ФЗ, dated March 26, 2003, on Electric Power Industry and the Main Provisions on the Operation of Retail Electric Power Markets, approved by Decree of the Government of the Russian Federation No. 442 dated May 4, 2012 (hereinafter referred to as the “Electric Power Industry Law” and the “Main Provisions”, respectively), specify that the contractual structure of energy supply, involving the application of the one-stop-shop principle for the consumer, applies if the latter has applied for entering into a contract with an electric power provider of last resort or an energy sales organization (hereinafter referred to as the “provider”) with the simultaneous settlement by the provider of electric power transmission relations with a local grid operator (hereinafter referred to as the “LGO”) in the consumer’s interests. [1]

⁵ For the consumer, such a structure of contractual relations is the best possible, since it eliminates excessive transaction costs associated both directly with the need to enter into another contract with another market participant (LGO), and monthly administration of settlements with an LGO. For the consumer, all relationships related to the acquisition and use of electric power are centralized through the provider of last resort.

⁶ However, in such a situation, the provider is assigned an additional function of comprehensive administration of electric power turnover in general, related to the organization of metering and calculations for net supply not only with the consumer, but also with an LGO, based on the generated consumption volumes.

⁷ In such a chain of legal relations, as in any other commercial relations, the occurrence of certain errors is inevitable, information about which may appear to any of the parties to contractual relations not only in the billing period, but also upon its completion.

8 In general, errors in the performance of contractual obligations may be caused by wrong determination of the volume of net supply or the use of a wrong price (tariff) when making calculations.

9 Having regard to the high level of public legal impact on contractual relations in the retail electric power markets, which are the core of functioning of the economy and the public life activities as a whole, [2] according to the Articles of the Electric Power Industry Law, which is expressed both in increased control (supervision) over the activities of providers, and in detailing the procedure for entering into and fulfilling contractual obligations, as well as taking into account the priority of the provisions of industry-specific laws over the provisions of the Russian Civil Code in terms of regulating an energy supply contract, it must be borne in mind that the elimination of such errors, even if they are very simple in nature, is very difficult in the absence of special legal norms defining the procedure for the actions of the parties in such situations.

10 Since any confirmed fact of fulfillment of an obligation under a contract with a deviation from the required Clause meters entails economic damage to one or another party to the contract (hereinafter referred to as the “errors”) or a group of contracts, it should be possible to restore the violated economic interest of each party to the legal relationship.

11 This approach will fully comply with both the basics of building civil law relations, in particular equality of the parties to contractual relations and ensuring the restoration of violated rights (Clause 1 of Article 1 of the Russian Civil Code), and the principles of functioning of the electric power industry, including compliance with the balance of economic interests of the parties to a contract (Clause 1 of Article 6 of the Electric Power Industry Law).

12 In this regard, it is necessary to search for legal mechanisms to resolve such situations in view of the specifics of the turnover in electric power supply.

13 **2. Private Law Qualification of Error Correction Procedure**

14 The energy supply contract by its legal nature refers to a type of contract of sale and purchase, which is supported by both the legislator (including through the including of energy supply contracts in the Contract of Sale and Purchase section of the Russian Civil Code) and the doctrine. [3]

15 In the classical buyer-seller relationship, the Russian Civil Code determines the procedure for the parties to a contract in identifying deviations in the volume of obligations fulfilled.

16 Article 466 of the Russian Civil Code establishes that:

17 - If the seller has transferred a smaller quantity of goods than specified in the contract, the buyer may, unless otherwise provided by the contract, either demand the transfer of the missing quantity of goods, or refuse of the transferred goods and its payment, and if the goods are paid, demand a refund of the amount of money paid (Clause 1);

18 - If the seller has transferred the goods to the buyer in an amount exceeding that specified in the contract of sale, the buyer is obliged to notify the seller respectively, and if the seller does not dispose of the relevant part of the goods within a reasonable time after receiving the buyer's notice, the buyer may, unless otherwise provided by the contract, accept all goods (Clause 2) and pay for them at a set price (Clause 3).

19 At the same time, such an approach is only partially applicable to energy supply, since, for example, it is impossible to additionally supply electric power, because this process is linear, and consumption and metering are performed directly at the time of supply, thus, in the current conditions of technological development, it is impossible to "additionally supply" energy (except for its accumulation using appropriate means).

20 Acceptance and payment of the "oversupplied" goods is also impossible in the classical form for the same reasons outlined above, but if it is revealed that the energy is metered wrongly, in an understated volume, and this fact is later established, then the consumer will just have to pay for the actual volume.

21 If the situation becomes more or less clear in the relationship with the consumer, then the situation is more complicated in the relationship between the provider and an LGO.

22 An electric power transmission service agreement is classified as a type of a fee-based service provision contract provided for in Chapter 39 of the Russian Civil Code.

23 As such, the concept of "quantity" of services is not provided for by the Russian Civil Code, therefore, it is technically impossible to "overprovide" or "underprovide" the service. It may be provided, provided improperly, or not provided.

24 Clauses 13 and 15(1), 15(3) and 15(5) of the Rules of Non-Discriminatory Access to Electric Power Transmission Services and Their Provision, approved by Decree of the Government of the Russian Federation No. 861 dated December 27, 2004, also proceed from the fact that the service is defined as an obligation to transmit the required volume of electric power, therefore, when the electric power is transmitted in the required volumes, then the service shall be paid in full.

25 If it is revealed that the volume was overstated during the provision of the service, then from a civil-law point of view, unjust enrichment arose on the side of an LGO, which shall be returned to the provider according to the provisions of Article 1102 of the Russian Civil Code.

26 This approach is due to the fact that settlements with an LGO were performed for the volume of service that was not actually provided.

27 In situations where there is a wrong determination of the price (tariff) for the supplied energy or the services provided for its transmission, it will always be the issue of collecting unjust enrichment. [4]

28 **3. Classification of Errors (Misstatement) Requiring Correction of Fulfilled Contractual Obligations for Energy Supply (Hereinafter Referred to as the "Recalculation")**

29 The first category of misstatement entailing the need for recalculation is the
identification of a wrong determination of the volume of electric power net supply.

30 Similar situations may occur, including in the following cases:

31 -Transmission of wrong readings of electric power metering devices
(hereinafter referred to as the “metering device”);

32 - Use of a wrong method for determining the volume of net supply in cases of
failure to provide metering device readings (instead of substituting information, the
volume is determined by calculation or vice versa);

33 - Technical errors that led to the issue of a wrongly generated electric power
bill;

34 - Improper determination of the volume of off-the-meter electric power
consumption.

35 The second category of misstatements is errors in the application of prices
(tariffs) when making calculations for the generated consumption volumes. These
include, in particular:

36 - Making calculations on the wrong voltage level, which entails the application
of an improper price (tariff);

37 - Errors in the application of the price (tariff), for example, for electric power
transmission services when forming the final price for electric power (for example, tariff
overstatement or understatement).

38 It is worth noting that the elimination of such misstatements and, consequently,
the possibility of their elimination are critically important not only for consumers, but
also for professional participants of retail electric power markets (providers and LGOs),
since for the latter, the existence of such errors can lead not only to civil liability, but
also to the risks of liability for abuse of a dominant position, and hence the imposition of
significant administrative fines.

39 Consequently, the lack of legal regulation of the procedure for eliminating the
misstatements that have arisen and restoring violated economic interests creates
increased risks for all parties of unjustified losses in conditions of significant limitations
in the application of the general provisions of the Russian Civil Code on this issue.

40 The source of errors may be each of the parties to the contractual relationship
on energy supply, for example:

41 - a consumer regarding the transmission of wrong metering device readings;

42 - a provider in terms of wrong determination of the volume of net supply, for
example, in the presence of indirectly technologically connected consumers to the main
service receiver, which requires the correct distribution of energy consumption between
the main consumer and its sub-receivers;

43 - an LGO in terms of wrong determination of the volume of off-the-meter
consumption.

⁴⁴ The examples of misstatements and their sources, of course, are not exhaustive and may occur in a different form, with a different distribution of guilt.

⁴⁵ Also, an error can occur both in the presence and in the absence of fault of one of the parties.

⁴⁶ For example, a bad-faith consumer, trying to reduce its expenses for consumption, may intentionally understate the volume of transmitted readings of the metering device or a bad-faith LGO, wanting to increase profits and reduce costs, overstates the volume of off-the-meter consumption, by the amount of which the volume of electric power transmission services payable increases and the volume of electric power losses paid by it decreases according to Clause 193 of the Main Provisions.

⁴⁷ Moreover, a technical error in the provider's or LGO's billing system, due to which the transmitted readings from a consumer are wrongly accepted (for example 1,000 kWh is displayed instead of 100 kWh), is not due to the presence of fault.

⁴⁸ Regardless of the presence or absence of fault, any misstatement shall be corrected by recalculating.

⁴⁹ **4. Methodology of Recalculation**

⁵⁰ From the point of view of functioning of business processes to identify and correct misstatements, they are generally performed as follows.

⁵¹ Firstly, based on the consumer's application or by professional market participants on their own, often during the inspections of the metering devices by the provider or LGO, provided for in Clauses 170 to 176 of the Main Provisions, the provider and/or LGO establishes the fact and circumstances of the error.

⁵² If misstatement is confirmed, then in the future the provider will recalculate the volume of net supply generated and make adjustments to the settlements with the consumer, accordingly. If necessary, simultaneously with the change in volume or instead of it, the amount of the cost of electric power can be specified in cases of wrong application of prices (tariffs).

⁵³ An overpaid charge, from the point of view of minimizing transaction costs, is often utilized to set off part of future payments, and the underpaid one is included in the next bill to be paid.

⁵⁴ Also, misstatements can be established during legal proceedings, for example, when confirming a wrong determination of the volume or period of off-the-meter consumption, [5] based on which the bill for off-the-meter consumption was issued with an erroneous value, which requires correction.

⁵⁵ After the recalculation with the consumer is completed, the provider needs to synchronize the corrected volumes of net supply with the LGO, by adjusting the volume of electric power transmission services provided in relation to the corresponding period and the volume of electric power purchased to compensate for losses.

⁵⁶ **5. Gaps in the Legal Regulation of the Procedure for Eliminating Misstatements and Restoring Violated Economic Interests**

57 The current law contains only 2 cases of regulation of recalculation:

58 1) If an LGO or the provider of last resort has revealed the unserviceability of the metering device installed by them within the framework of the obligation of the providers of last resort and LGOs to install (replace) the metering devices, which has entered into force since 2020, then a recalculation of the volume of electric power consumed shall be performed using calculation methods, which is also taken into account in the electric power transmission service agreement (Clause 188 of the Main Provisions);

59 2) The Provider's identification of the discrepancy between the metering device readings from the consumer of the "population" category and the volumes of consumption transferred by such a consumer to the provider for calculations. The elimination of the above discrepancy is performed by recalculating the amount of the charge based on the actual metering device readings (Clause 61 of the Rules for the Provision of Utilities to Owners and Users of Premises in Apartment Blocks and Residential Houses approved by Decree of the Government of the Russian Federation No. 354 dated May 6, 2011).

60 The legislator has not determined any other cases of elimination of the misstatements revealed.

61 In the conditions of fragmented legal regulation of recalculations, there are ambiguous law enforcement practices on the issue of the admissibility and limits for the restoration of violated economic interests in the event of misstatements in contractual obligations.

62 Using the example of wrongly determined off-the-meter consumption or the setting of off-the-meter consumption by mistake, in the absence of actual consumption in violation of metering requirements, it seems correct and fair that the changed volume of consumption is necessarily communicated throughout the chain of subjects of legal relationship on energy supply. [6]

63 In turn, there are opposite legal standings of the courts, which exclude the possibility of synchronous elimination of misstatements in the relationship between the provider and the LGO, even if confirmed facts are revealed in the supplier-consumer contractual relationship. [7]

64 The following arguments are given in support of the latter approach:

65 - "the above provision of the Law (referring to Clause 193 (previously Clause 188) of the Main Provisions for the Procedure for Metering the Volume of Off-the-Meter Consumption in the Calculations for Transmission Services Provided and Electric Power Purchased to Compensate for Losses) does not establish it as an obligation of the grid operator to adjust the volume of services provided downward, if the provider of last resort is denied debt collection under the off-the-meter consumption report";

66 - "the plaintiff does not provide reasonable references either to the norms of law or to the provisions of the disputed electric power transmission service agreement and the purchase and sale of electric power losses, obliging the defendant to reduce the

volume of services provided and increase the volume of losses in their grids by the volume of off-the-meter consumption”;

⁶⁷ - “the basis for dismissing a claim against the consumer for the recovery of the cost of off-the-meter consumption may be both the absence of the fact of off-the-meter consumption, and formal violations committed by the provider of last resort when drawing up an off-the-meter electric power consumption report, or failure by it to fulfill its procedural obligations to provide relevant evidence in the case file”.

⁶⁸ It seems that the arguments presented cannot be considered fully adequate, including for the following reasons:

⁶⁹ 1. Legal regulation is based not only on the direct and literal indication of the law (other regulations), but also shall take into account the purposive interpretation, which is designed to proceed not only from the letter, but also from the meaning of the legal norm, in connection with which it is obvious that there is no direct indication in the Main Provisions or in an agreement entered into between the provider and the LGO of the procedure for changing the parameters of the net supply generated when recognized as missing or wrongly determined off-the-meter consumption, cannot serve as an objective obstacle to recalculation;

⁷⁰ 2. The reference to the fact that, for example, there could have been errors in the actions of the provider that resulted in the denial to recover (full or partial) the cost of off-the-meter consumption from the consumer, in connection with which it is impossible to transfer the provider’s losses caused by the latter’s violation of legal requirements (if any) to the LGO, also hardly meets the criterion of fairness and compliance with the law, including due to the fact that such an error is in any case taken into account in the settlements with the LGO (that is, settlements for transmission services and electric power losses are performed on the basis of wrongly compiled off-the-meter consumption reports by the provider), therefore, confirmation of the presence of such misstatement in the performance of contractual obligations with the consumer cannot be ignored in the relationship between the provider and the LGO, since otherwise unjust enrichment also occurs on the side of the latter, moreover, arising from improperly drawn up documents (that is, there are two defects in contractual obligations). With regard to the facts that the documents on off-the-meter consumption form the basis of calculations, regardless of the complier, recalculation shall be performed in case of misstatements therein.

⁷¹ Besides, it is worth noting that from the point of view of anti-monopoly control, an artificial increase in net supply, entailing wrong determination of consumption volumes and wrong accruals and calculations, entails abuse of a dominant position and violation of economic interests of all parties in relations with which it is applied and not corrected further (Letter of the FAS of Russia No. ИА/55189/20 dated June 30, 2020 on Providing Recommendations on the Initiation and Consideration of Cases of Violation of Anti-Monopoly Laws on the Facts of Violation of the Procedure for Conducting Inspections of Electric Power Metering Devices and Determination of Off-the-Meter Consumption (Section 2, Violations in Determining the Volume of Off-the-Meter Electric Power Consumption (Capacity) Chapter)

72 Identical situations arise for other types of errors (misstatements) and entail the formation of contradictory law enforcement practices.

73 Another very ambiguous legal standing, which excludes the spread of recalculations to the entire chain of contractual relations for energy supply, is the argument that:

74 - An LGO is not a party to the energy supply contract;

75 - An LGO does not participate in mutual settlements of the parties under the energy supply contract;

76 - Adjustment documents on the volume of consumption between a consumer and an LGO do not entail legal effect for the LGO. [8]

77 It is not possible to agree with this legal logic, since electric power transmission services are an integral part of an energy supply contract, although they are provided by a third party.

78 At the same time, the provider, if the consumer has applied to it for entering into an energy supply contract, cannot but settle these relations in the interests of the consumer, since this is a public-law requirement for the implementation of energy supply under this type of contract, although implemented on a contractual basis between the provider and a third party [9].

79 Consequently, although an LGO is not directly a party to an energy supply contract, it directly takes part in the chain of contractual relationships that provide energy supply to the consumer and, moreover, since 2020, it provides the organization of commercial metering for all types of contracts entered into in the retail electric power markets, which means it actually acts as the primary holder of information on consumption volumes, according to Clauses 136, 151 and other norms of the Main Provisions.

80 The above confirms the need to create a regulatory environment that will ensure the full elimination of misstatements and the restoration of economic interests along the entire energy supply chain, which will comply with the principles of building the electric power industry set out in Article 6 of the Electric Power Industry Law.

81 **6. Possible Legal Arrangements for Ensuring the Implementation of Recalculations in the Current System of Legal Regulation**

82 In the current conjuncture of legal regulation, it is possible to implement two approaches to resolving the accumulated problems regarding the implementation of recalculations.

83 The first, and perhaps the most obvious, is to create full-fledged contractual terms and conditions for all interested parties (the consumer, provider and LGO) to correct errors in the establishment and payment of net supply.

84 At the same time, the main obstacle to the implementation of such an approach may be the radically opposite approaches of each of the named parties to the relationship to the grounds, procedure and admissibility of eliminating misstatements in one case or

another, in connection with which the actual implementation of such an approach seems unlikely, at least from the point of view of its generality.

⁸⁵ The second approach may be related to the introduction of digital technologies in the settlement of energy supply contracts. Thus, the electric power industry is included in the list of industries for which a “regulatory sandbox” legal regime can be established, allowing the possibility of creating special legal regulation that differs from the general regime in the relevant area of activity (Article 5 of Federal Law No. 258-ФЗ dated July 31, 2020 on Experimental Legal Regimes in the Field of Digital Innovations in the Russian Federation and Decree of the Government of the Russian Federation No. 2149 dated December 18, 2020 adopted in its development on the Establishment of Areas for the Development, Testing and Implementation of Digital Innovations, According to Which an Experimental Legal Regime in the Field of Digital Innovations can be Established). [10]

⁸⁶ For example, the implementation of a controlled version of Blockchain technology for the formation of the volume of net supply along the entire chain of energy supply relations and automatic calculation [11] may have the function of automatic elimination of misstatements with subsequent adjustment of accruals simultaneously to all its participants.

⁸⁷ It is necessary to make a reservation that participation in such an experimental legal regime will be possible only if at least professional market participants (the provider and LGO) agree to create such a system (or its creation by a provider as the main link in the process of energy supply and integrating an LGO into it), and consumers, for example, can voluntarily switch to its use both within the framework of existing energy supply contracts, and when entering into new ones.

⁸⁸ Of course, the implementation of such an approach will not be based only on solving the problem of eliminating misstatements, but it can also solve it among other things.

⁸⁹ **7. Legislative Support**

⁹⁰ In the long term, the main way to eliminate misstatements and restore the violated economic interests of subjects of contractual relations on energy supply shall be the creation of regulatory terms and conditions that determine the grounds and procedure for recalculations and their mandatory simultaneous implementation for all participants of the chain of relations on energy supply.

⁹¹ It seems that the need for recalculations will not disappear even after the full implementation of smart metering systems for electric energy (capacity) and the installation of smart metering devices for all consumers, since certain circumstances will still arise that require the elimination of misstatements, but they will undoubtedly become less.

⁹² The implementation of such a legal arrangement fully meets the trends of legal regulation of public relations in the retail electric power markets, [12] which are aimed both at eliminating gaps in regulation that cannot be filled in the absence of legal norms in law enforcement practices, and creating legal conditions for further development.

⁹³ In addition, the creation of legal norms on the procedure for eliminating misstatements will ensure compliance with the private law principles of the functioning of retail electric power markets, in particular, equality of subjects of relationship, balance of economic interests and the possibility of restoring violated rights.

⁹⁴ **8. Conclusion**

⁹⁵ There is a well-established opinion that the electric power industry has a very special character for the economy, and not only in the economic, but also in the legal dimension.

⁹⁶ This leads to a significant number of specifics of turnover in electric power supply and the need to create special legal regulation, which in many respects has priority over general civil laws.

⁹⁷ In such a system of legal regulation, the filling of individual legal gaps is not always possible only with the use of the analogy of statute or the analogy of law.

⁹⁸ The issues considered in this article are actually connected not just with the elimination of misstatements required to restore the violated individual economic interest.

⁹⁹ The need to regulate the procedure for correcting such errors is one of the essentially tools for restoring collective economic good, since the correct formation of net supply volumes ultimately has a certain impact on a wider range of social relationships than on the individual relationships of several persons.

¹⁰⁰ In this regard, the creation of a regulatory framework to eliminate emerging misstatements will improve the situation in retail markets and, moreover, will not become something fundamentally new, but will serve as a development for the already established arrangements for performing recalculations, which were mentioned in Section 5 of this article.

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Petr N. Maksimenko

*Division Head of the Department of Legal Expert Examination and Legislative Initiatives of Mosenergosbyt, JSC, Mosenergosbyt, JSC
Russian Federation, Moscow*

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In such situations, in order to prevent mutual violation of the rights and legitimate interests of the parties to all contracts executed in the process of energy supply, it periodically becomes necessary to clarify the scope of obligations fulfilled.

At the same time, the law does not contain an unambiguous procedure for correcting such errors, and in law enforcement practices, various approaches are being defined about error tolerance and limits of their elimination.

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