Areas of Concern in Exercising the Reliable Heat Supply Management Powers by Local Self-Government Authorities

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Abstract

The Law On Heat Supply grants local governments the authority to organize reliable heat supply. The problematic aspect of the implementation of this authority is, first of all, the fact that currently there is no uniform approach to the implementation of the authority of local governments to organize reliable heat supply in the legislation and law enforcement practice. The legislator does not specify what actions should be taken by the local government to ensure reliable heat supply. This article suggests to consider, on the basis of examples from court practice, the ways of implementing the local government’s authority to organize reliable heat supply, which are not mentioned in the Law On Heat Supply: the practice of the local government to subsidize heat supply organizations and heat consumers; the practice of the local government to establish legal entities, commercial organizations, which are engaged in activities on heat supply to consumers, and to exercise subsequent control; the practice of withdrawing and granting the status of a unified heat supply organization without observing the procedure established by law with reference to a man-made emergency. The identified problems lead to the conclusion that it is necessary to improve the current regulation. Formalization of the ways of implementation of the local government’s authority to organize reliable heat supply will significantly reduce the use of controversial practices of implementation of this authority by local governments, will make it impossible for law enforcers to interpret Article 6 of the Law On Heat Supply in a broad way, as well as to exclude the interference of the local government in the economic activities of heat supply organizations.
All conclusions drawn by the author in this article are the subjective opinion of the author and do not reflect the official position of her employer.

**Keywords list (en):** energy law, legal regulation in the heat supply area, promotion of reliability of heat supply, heat supply organizations

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1 According to Federal Law No. 190-FZ On Heat Supply dated July 27, 2010, [1] (hereinafter referred to as the Law On Heat Supply), the authority of local governments includes the organization of reliable heat supply to consumers in the territories of settlements and urban districts. The relevance of studying the issues of legal regulation of local governments’ authority in heat supply is determined by the fact that currently there are no unified approaches to the implementation of local governments’ authority to organize reliable heat supply [2].

2 The Law does not have a strictly defined conceptual framework and does not specify measures for the implementation of the authority to organize reliable heat supply, which leads to controversial situations in law enforcement practice.

3 Issues of legal support of effective public administration in heat supply are the subject of a number of scientific studies [3]. However, the issue of implementation of local governments’ authority to organize reliable heat supply has not yet been paid sufficient attention to.

4 In accordance with Article 14 of Federal Law No. 131-FZ On the General Principles of Organization of Local Government in the Russian Federation dated October 6, 2003 [4] (hereinafter referred to as Law No. 131-FZ) [4], the issues of local significance of urban and rural settlements include the organization within the boundaries of the settlement of electric power, heat, gas and water supply to the population, wastewater disposal, fuel supply to the population within the limits of authority established by the laws of the Russian Federation.

5 Article 6 of the Law On Heat Supply defines the authority of local governments in heat supply and contains an open list of powers. The powers listed in this article can be conditionally divided into the following groups: (1) organization of promotion of reliable heat supply to consumers; (2) coordination of interaction between heat supply organizations and consumers; (3) exercise of authority in price (tariff) regulation in heat supply; (4) organizational powers: preparation for the heating season, shutdown for maintenance and decommissioning of heat sources and heat networks, approval of heat supply schemes, granting the status of a unified heat supply organization; approval of investment programs.
The Law On Heat Supply does not provide a separate list of responsibilities of local governments; the responsibilities are distributed in the text of the Law and mostly correspond to the powers formalized in Article 6 of the Law On Heat Supply.

Clause 17 of Article 2 of the Law On Heat Supply provides the legal definition of the concept of “reliability of heat supply”, which means a characteristic of the state of the heat supply system that ensures the quality and safety of heat supply.

Reliability of heat supply is the responsibility of the heat supply organization. Based on subclauses 7 and 8 of clause 5 of Article 20 of the Law On Heat Supply, the heat supply organization shall ensure accident-free operation of heat supply facilities; ensure reliable heat supply to consumers [5]. The obligation to ensure reliable heat supply is imposed on the heat supply organization by the heat supply contract concluded with the consumer. According to subclause 6 of Part 8 of Article 15 of the Law On Heat Supply, the obligation of the heat supply organization to ensure the reliability of heat supply in accordance with the requirements of technical regulations and the rules of the heat supply organization approved by the Government of the Russian Federation, as well as the corresponding obligations of the heat consumer constitute an essential condition of the heat supply contract. The quality parameters of heat supply to be provided by the heat supply organization are strictly regulated [6] and due to the freedom of contract, the parties may additionally agree on higher quality standards. Failure to comply with the obligation to ensure the reliability of heat supply entails civil and administrative liability for the heat supply organization. Based on the above, it can be said that “promoting the reliability of heat supply” is a clear legal category and the legislator pays attention to regulating it. It should also be noted that the heat supply contract is a binding and non-gratuitous contract, therefore, heat supply organizations provide heat supply to consumers as part of commercial activities.

At the same time, the courts see a public interest in promoting the reliability of heat supply, because the violation of heat supply leads to the violation of public interests of a municipality and the public at large - the population of the municipality, which includes socially unprotected categories of citizens who have the right to receive quality and timely services in the form of heat supply, as well as socially significant facilities, which, if disconnected from housing and communal services, will cause irreversible consequences [7].

It is the responsibility of the state represented by authorized public bodies, in particular, local governments, to promote the public interest. It seems that in order to protect the public interest, the legislator has granted local governments the authority to organize reliable heat supply. It is obvious that organizing reliable heat supply and promoting the reliability of heat supply are not identical and local governments cannot and should not replace heat supply organizations. Let us turn to the semantics of the word “organization” in an attempt to understand the legislator’s intention. An organization is a set of measures or actions aimed at obtaining optimal conditions for achieving any result, promoting maximum efficiency, productivity, quality of services provided and usually accompanied by reducing the cost of means to achieve this goal [8].
Based on the above definition, it is reasonable to assume that the authority to organize reliable heat supply should include measures for preparing for the heating season, shutting down for maintenance and decommissioning of heat sources and heat networks, approving heat supply schemes, granting the status of a unified heat supply organization, and approving investment programs (organizational powers). However, according to the literal interpretation of Article 6 of the Law On Heat Supply, this conclusion cannot be accepted, as the legislator has separated these powers as independent units. Thus, the Law On Heat Supply has a gap in the definition of organizational measures that local governments are entitled and/or obliged to take in order to organize reliable heat supply.

The scientific literature characterizes the local government’s authority to organize reliable heat supply as an additional unrealizable obligation on the grounds that local governments do not have any real leverage over commercial heat supply organizations [9]. However, it is impossible to fully agree with the above characteristic, because local governments, when exercising their powers, should not interfere in the economic activities of independent commercial organizations. In this regard, it is particularly important to balance public and private interests when defining the powers of local governments to organize reliable heat supply.

Since the legislator did not give us the pleasure to find in the provisions of the Law On Heat Supply any ways of implementing the authority to organize reliable heat supply, let us turn to the law enforcement practice and search there.

It seems that the provision of subsidies by the local government to heat supply organizations for the purpose of timely settlement of accounts with utility providers, or the provision of subsidies to strategically important consumers the purpose of settlement of accounts with heat supply organizations in order to avoid disconnection or limitation of heat consumption can be considered as a way of implementing the authority in question. An example of such behavior of a local government can be found in the case described in Resolution of the Constitutional Court of the Russian Federation No. 4-П on the Case of Verifying the Constitutionality of Paragraph Two of Clause 1 of Article 134 of the Federal Law On Insolvency (Bankruptcy) dated February 1, 2022.

While the first example is a positive practice, the below practices are, in the author’s opinion, extremely controversial and unacceptable. It is quite common for the local government to establish legal entities, commercial organizations engaged in heat supply to consumers. Since the local government, for example, represented by the city district administration, is the majority shareholder, the administration is a controlling body and can give binding instructions to the established organization. Undoubtedly, in this case the local government organizes heat supply in the territory of the municipality entrusted to it. However, this practice cannot be called positive. An example of this is Decision No. 304-ES17-18149(10-14) of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated January 26, 2022, in case No. A27-22402/2015, in which the court recognized as unfair the practice of transferring business in order to write off a part of accumulated debts to utility providers, which is widespread in housing and communal services.
As a rule, business transfer from one entity to another by the controlling body is unfair, since it is often accompanied by the failure to repay debts to creditors of the first company, depriving them of the possibility of obtaining satisfaction in bankruptcy proceedings. In housing and communal services, business transfer is a relatively frequent phenomenon due to the objectively unprofitable nature of such activities in view of the population’s lack of ability to pay (rulings of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation No. 305-ES21-4666(1,2,4) dated August 19, 2021, No. 307-ES21-5954(2,3) dated October 21, 2021). In the case of knowingly unprofitable activities (which cannot be terminated due to public functions), controlling bodies may either systematically increase (subsidize) the capital of UHSOs or transfer their functions to a new body, thus attempting to unfairly transfer the risks of unprofitability of such activities to the creditors of the first company.

Another dangerous practice used by local governments to organize heat supply is to grant the status of a unified heat supply organization (hereinafter referred to as UHSO) to a heat supply organization on the basis of an emergency situation or emergency alert regime in the territory of the municipality without following the procedures established by law.

This is exemplified by the background of the dispute described in the text of the decision of the Moscow Region Commercial Court in case No. A41-184/2023, according to which the Emergencies and Fire Prevention Commission decided to introduce a state of high alert for municipal emergencies with local-level response for the authorities because the UHSO showed signs of financial insolvency and in order to prevent a man-made emergency in terms of ensuring proper heat supply to the consumers of the city district. On the same day, based on the above decision, the City District Administration adopted resolutions to revoke the UHSO status of the heat supply organization and to grant the UHSO status to another heat supply organization.

In this regard, the question arises of whether it is permissible for the local government to substitute itself for the legislator and override the provisions of the Law On Heat Supply by granting the UHSO status referring to an emergency (or a similar regime).

Federal Law No. 68-FZ dated December 21, 1994, on the Protection of the Population and Territories from Natural and Man-Made Emergencies (hereinafter referred to as the Law On Emergencies) regulates relations in the sphere of protection of the population and territory against emergencies. According to the Law On Emergencies, an emergency is “a situation in a given territory resulting from an accident, a natural hazard, a catastrophe, the spread of a disease that poses a danger to others, a natural or any other disaster, which may cause or has caused human casualties, damage to human health or the environment, significant material losses and disruption of people’s living conditions”.

According to the provisions of the Law On Emergencies, an emergency is associated with the real-time presence of an emergency source, the effects of which have already caused negative consequences or may cause negative consequences in the future.
The provisions of the Law On Emergencies are disclosed in GOST R 22.0.02-2016, approved and enacted by Order of Rosstandart No. 1111-st of September 12, 2016. Thus, clause 2.1.2 of the GOST provides an exhaustive list of emergency sources, namely a dangerous man-made event, accident, disaster, natural hazard, act of nature, widespread infectious disease of people, farm animals and plants, as a result of which an emergency has occurred or may occur. The possibility of applying GOST regulations depends on the provisions of Federal Law No. 162-FZ On Standardization in the Russian Federation of June 29, 2015 [10] (hereinafter referred to as Law No. 162-FZ). The Law On Emergencies also provides a legal definition of the concept of “emergency prevention”, which means “a set of measures taken in advance and aimed at minimizing the risk of emergencies as much as possible, as well as at preserving human health, reducing the extent of environmental damage and material losses in case of their occurrence”.

Thus, according to GOST R 22.1.13-2013, approved and enacted by Order of Rosstandart No. 1214-ct of October 25, 2013, a set of measures to prevent natural and man-made emergencies means creating a structured system of monitoring and control of engineering systems of buildings and structures (SMIS). Emergency prevention is a set of methodological and organizational measures. The Law On Emergencies does not authorize local governments to restrict the civil rights of citizens and legal entities, to adopt acts that violate the procedure established by law in order to prevent emergencies.

In the dispute under consideration, the reasons for introducing an emergency alert regime included the existence of signs of financial insolvency (debt) of the organization performing the functions of a UHSO and the initiation of bankruptcy proceedings against it.

The existence of signs of financial insolvency (debt) of the organization performing the functions of a UHSO and the initiation of bankruptcy proceedings against it cannot be a basis (prerequisite) for introducing a man-made emergency regime. Heat supply to consumers cannot be endangered by the UHSO’s receivables and the initiation of bankruptcy proceedings against it. Heat supply to consumers is a technological process involving the transferring heat energy (heat carrier) through networks from a heat energy source to a consumer’s heat-consuming unit.

In addition, the legislation prohibits limitation/termination of heat supply/hot water supply during the heating season. Resolution of the Government of the Russian Federation No. 808 of August 8, 2012, approved the Rules of Organization of Heat Supply in the Russian Federation (hereinafter referred to as Rules No. 808). Section VI establishes the procedure for limiting and terminating heat supply to consumers. Violation of this procedure entails liability for heat supply organizations. And socially significant categories of consumers are called “non-disconnectable”.

Moreover, the legislation provides for a special mechanism to protect the rights of consumers of utilities in case of deprivation of the UHSO status, so according to clause 18 of Rules No. 808, an organization that has lost the status of a unified heat supply organization for the reasons specified in clause 13 of these Rules shall perform the functions of a unified heat supply organization until another organization is granted
the status of a unified heat supply organization in accordance with the procedure specified in clauses 5-11 of these Rules.

The current legislation prohibits the restriction (suspension) of heat supply to the population during the heating season and to end consumers who do not owe for heat energy. In accordance with Part 4 of Article 22 of the Law On Heat Supply, limiting the supply of heat and heat carriers to consumers who do not fulfill their obligations to pay for the consumed heat energy (capacity) and heat carriers should not lead to changes in the regime of heat supply to other consumers. Part 1 of Article 22 of the Law On Heat Supply establishes that Rules No. 808 define socially significant categories of consumers and the specifics of the introduced limitation and termination of heat and heat carrier supply for them. According to clause 122 of Rules for the Provision of Utilities to Owners and Users of Premises in Apartment Buildings and Residential Houses No. 354 of May 6, 2011, (hereinafter referred to as Rules No. 354) approved by the Government of the Russian Federation, actions aimed at limiting or suspending the provision of utilities should not result in a violation of the established requirements for the suitability of residential premises for permanent residence of citizens (Resolution of the Supreme Court of the Russian Federation No. 47-АД19-2 of March 5, 2019, Resolution of the Supreme Court of the Russian Federation No. 4-АД18-3 of April 19, 2018, Ruling of the Supreme Court of the Russian Federation No. 308-ЭС19-2242 of March 29, 2019, in case No. А32-25392/2018, the Decision of the Perm Administration of the Federal Antimonopoly Service of Russia of July 10, 2012, in case No. 214-12-a).

The filing of an insolvency (bankruptcy) petition against a debtor with the court does not automatically mean that the debtor is bankrupt and cannot indicate a threat to heat supply to consumers. According to Article 52 of the Bankruptcy Law, after considering a bankruptcy case, the commercial court shall issue one of the following judicial: a decision to declare the debtor bankrupt and open bankruptcy proceedings; a decision to refuse to declare the debtor bankrupt; a decision to initiate financial rehabilitation; a decision to initiate receivership; a decision to terminate bankruptcy proceedings; a decision to leave the bankruptcy petition without consideration; a decision to approve the settlement agreement. In other words, there is no direct interdependence between the filing of a petition to declare a debtor bankrupt and the issuance of a judicial act declaring the debtor bankrupt.

In itself, the filing of an insolvency (bankruptcy) petition against a debtor is not even a basis for deprivation of the UHSO status. According to clause 13 of Resolution No. 808, the grounds for deprivation of the UHSO status are only the adoption by the commercial court of a decision declaring an organization with the status of a unified heat supply organization bankrupt, but not the initiation of bankruptcy proceedings.

Thus, the existence of signs of insolvency of a legal entity and the initiation of bankruptcy proceedings against it cannot be considered as a source of emergency.

Another important issue is the legitimacy of introducing an emergency regime (emergency alert regime) on the basis of the resolution of the Commission.

determines the list of tasks to be solved by the commissions. At the same time the
competent authorities may expand the list of tasks assigned to them. Among the tasks
assigned to the commissions the Resolution of the Government of the Russian
Federation, it is worth mentioning, first of all, working out proposals for improving state
policy in the field of safety in emergencies, secondly, considering issues of involving
civil defense forces in eliminating emergencies, as well as issues related to alerting the
population and, thirdly, coordinating and ensuring the consistency of authorities in
matters of ensuring safety in emergencies. The competence of the commissions should
be determined by the commission regulations or decisions establishing the commissions.

Thus, the issue of the legal force of decisions adopted by the commissions and,
consequently, the binding force of these decisions on other entities, remains unsettled.
However, according to the theory of administrative law, coordinating bodies only
coordinate the activities of authorities in a certain area. There is an opinion in the
literature that all decisions of coordinating bodies, including commissions, should
become effective only after they are adopted as a normative legal act by the authority
whose competence includes solving such issues. The current situation is aggravated by
the ambiguity in understanding the terms used to define the authority’s competence [11].

According to Article 34 of Federal Law No. 131-FZ On the General Principles
of Organization of Local Government in the Russian Federation dated October 6, 2003,
the structure of local governments includes the representative body of the municipality,
the head of the municipality, the local administration (executive and administrative body
of the municipality), the control and accounting body of the municipality, other bodies
and elected officials of local government provided for by the municipal charter and
having their own powers to solve local problems. Emergencies and Fire Prevention
Commissions of municipalities are municipal-level coordinating bodies of the unified
state system of emergency prevention and response (cl. “c” of Part 2 of Art. 4.1 of Law
On Emergencies).

In view of the above, the Commission is not a local government and,
consequently, does not have the right to introduce an emergency high alert regime.

However, in practice there are cases when local governments have used the
mechanism of introducing an emergency regime for purposes other than those stipulated
in the Law. For example, Resolution of the Seventeenth Commercial Court of Appeal
invalidated the decision of the Emergency Prevention Commission on the basis of which
apartment buildings were transferred to the management of a legal entity without
following the procedure established by law.

The right of a local government to introduce a high alert or emergency regime is
formalized in subclause “j” of clause 2 of Article 11 of the Law On Emergencies,
according to which a high alert or emergency regime for the relevant management
bodies and forces of the unified state system of emergency prevention and response shall
be introduced on the basis of a decision of a local government.

However, if an emergency regime has been introduced in accordance with the
procedure established by law, does a local government have the right to grant the UHSO
status to an organization without following the procedures established by law?
According to clause 26 of Article 2 of the Law On Heat Supply, a “unified heat supply organization in the heat supply system” is a heat supply organization that has been granted the status of a unified heat supply organization with respect to the heat supply system (systems) in the heat supply scheme by a local government on the basis of the criteria and in accordance with the procedure established by the rules of the heat supply organization.

A unified heat supply organization is a heat supply organization, which is obliged to conclude a heat supply contract with each consumer applying to it, whose heat consumption units are located in the heat supply system in which the UHSO operates (clause 1, Part 2, Article 15, clause 28, Article 2 of the Law On Heat Supply), as well as to connect (technological connection) heat networks and heat energy sources to heat supply systems (Part 16, Article 14 of the Law On Heat Supply). Rules No. 808 define the criteria and procedure for granting the UHSO status and the requirements for its activities.

Clause 17 of Rules No. 808 stipulates that within 3 business days from the date of the decision to revoke the UHSO status, the local government of an urban district shall (1) publish the relevant decision on the official website, and (2) invite heat supply and/or heat network organizations to apply for the unified heat supply organization status.

Interested organizations shall submit an application, and the UHSO status shall be determined, according to the procedure set forth in clauses 5-11 of Rules No. 808. Pursuant to clause 5 of Rules No. 808, in order to become a UHSO, entities owning or otherwise possessing heat energy sources and/or heat networks shall submit an application for granting the status of a unified heat supply organization to the local government of the urban district within one month from the date of publication of the decision to withdraw the UHSO status in accordance with the established procedure, specifying the area(s) of their activity.

In accordance with clause 5(1) of Rules No. 808, the local government of the urban district is obliged to publish information on accepted applications on the official website of the urban district on the Internet within 3 business days from the deadline for submission of applications for granting the UHSO status. Thereafter, in accordance with the procedure established by clauses 6-11 of Rules No. 808, the local government of the urban district determines the organization to be granted the UHSO status based on the special criteria.

At the same time, according to clause 18 of Rules No. 808, the organization that has lost the UHSO status continues to perform the UHSO functions until a new UHSO is assigned.

In view of the above, it is obvious that the law provides for a strictly regulated set of actions required for granting the UHSO status, and the law provides no exceptions to this set.

Granting the UHSO status without a competitive procedure provided for by law is an interference of a local government in the business activities of a commercial organization. According to Article 2 of the Civil Code of the Russian Federation,
entrepreneurial activity is an independent activity carried out at one’s own risk and aimed at systematic profit from the use of property, sale of goods, performance of works or rendering of services. In accordance with Article 1 of the Civil Code of the Russian Federation, civil legislation is based on the recognition of the inadmissibility of arbitrary interference in private affairs and the necessity of the free exercise of civil rights, the guarantee of the restoration of violated rights and their protection in court. Civil rights may be restricted only on the basis of a federal law and only to the extent necessary to protect the foundations of the constitutional system, morality, health, rights and legitimate interests of other persons, national defense and state security (clause 2, Article 1 of the Civil Code of the Russian Federation). Granting the UHSO status imposes additional obligations on an organization, in particular, those established by Article 15 of the Law On Heat Supply.

Thus, granting the UHSO status without following the procedure established by law can be considered as arbitrary interference of a local government in the entrepreneurial activity of a legal entity by imposing additional obligations on it through the granting of the UHSO status and is a direct violation of the legitimate interests and rights of a commercial organization to the independence of the entrepreneurial activity of a legal entity.

In view of the above, it is clear that the lack of a clear formalization of the ways of implementing a local government’s authority to organize reliable heat supply in the current legislation leads to negative consequences for all parties to legal relations in the field of heat supply. The formalization of the ways of implementing the local government’s authority to organize reliable heat supply will significantly reduce the use of controversial practices by local governments when implementing this authority, make it impossible for law enforcement bodies to interpret Article 6 of the Law On Heat Supply in a broad manner, and exclude the interference of local governments in the business activities of heat supply organizations.

References:


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Аннотация

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