



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Riga, December 24, 2002

## JUDGMENT in the name of the Republic of Latvia

in case No. 2002 – 16 – 03

The Constitutional Court of the Republic of Latvia in the body of the Chairman of the Court session Romāns Apsītis, justices Juris Jelāgins and Andrejs Lapse

under Article 85 of the Republic of Latvia Satversme, Articles 16 (Item 3), 17 (Item 11 of the first part), 19<sup>2</sup> and 28<sup>1</sup> of the Constitutional Court Law,

on the basis of the constitutional claim (application) by Aleksandrs Rudišs (the authorized representative - the sworn advocate Mihails Silins)

holding the proceedings in writing reviewed the case

**”On the Compliance of Item 2.8, Sub-items 1 and 2 of the ”Methods for Calculating Natural Gas Rates” by the Energy Supply Regulation Council (in the wording of Item 1 of the Energy Supply Regulation Council December 19, 2000 Directive) with Article 91 of the Republic of Latvia Satversme (Constitution), Article 5 of the Law ”On Regulators of Public Services” as well as Articles 84 (Item 5 of the First Part) and 85 (Item 2 of the First Part, in the Wording, which was in Effect up to October 1, 2001)of the Power Industry Law””.**

### **The establishing part**

Article 4 (the first part) of the Law ” On Regulation of Entrepreneurship of Power Industry”, adopted on September 6, 1995 envisages that state administration for regulation of the energy supply is carried out by the Energy Supply Regulation Council (henceforth – Council). In compliance with Item 2

of Article 6 (its first part) of this law, the Council was authorized to work out normatives regulating the energy supply.

By the Council May 5, 1998 Directive No. 34 were confirmed "Methods for Calculating Natural Gas Rates" (henceforth- Methods), which took effect on December 1, 1998. Item 2.8 of Methods was expressed in a new wording by Council December 19, 2000 Directive No. 192. In accordance with it all the natural gas energy users were classified into the following groups:

- 1) inhabitants, with an exception of those, mentioned in Sub-item 2;
- 2) industrial, communal and other commercial users, including persons, renting apartments or owners of the apartments, leaseholders of non-residential buildings or their owners, who have installed gas equipment for central heating and/or water heating and who consume more than 5000 cubic metres of natural gas a year;
- 3) motor transport.

On September 3, 1998 the Republic of Latvia Saeima passed the Power Industry Law which substituted the former Law "On Regulation of Entrepreneur Activity in Power Industry". Article 84 (Item 5 of the first part) of it determines that in order to ensure regulation of entrepreneurial activity within the field of energy supply the Council shall defend the interests of energy suppliers and consumers. In its turn Article 85 (Item 2 of the first part) gives the Council the right to determine normatives, regulating the energy supply within the limits of its authority.

In compliance with May 10, 2001 Amendments to the Power Industry Law, regulation of the energy supply shall be carried out by a specific institution for regulation public services in accordance with the Law "On Regulators of Public Services" (Article 83). Item 7 of the Transitional Provisions of the Power Industry Law determined that from October 1, 2001 the functions of the Council have to be taken over by the Regulation Commission of Public Services (henceforth – Regulator).

Item 5 of the Law "On Regulators of Public Services" envisages that the regulator shall be an independent entity, which shall carry out the functions, determined by the Law, adopt decisions and pass administrative acts to defend the interests of the consumers and advance the development of the public services.

**M.Silins -the representative of the submitter of the claim A.Rudišs** (henceforth – the representative of the submitter) points out that A.Rudišs owns an apartment house in Mazā Bišu street, Rīga, in which he lives together with his family. In 2000 the submitter consumed 12 000 cubic metres of natural gas, i.e. – he exceeded the limit of 5000 cubic metres and the supplier of the natural

gas demanded him to settle up accounts under the rates established for industrial, communal or commercial users.

The representative of the submitter points out that the objective of the Methods is to create the mechanism for calculating rates of energy supplying enterprises but not to restrict the rights of certain consumers by determining the limit of natural gas consumption. To his viewpoint by determining the limit of natural gas consumption – 5000 cubic metres, the Council has exceeded its authority, established in the Power Industry Law.

In the constitutional claim it is stressed that the division of the consumers of natural gas into inhabitants, industrial, communal and other commercial users is not in conformity with the Power Energy Law. The representative of the submitter holds that the Power Industry Law determines classification of consumers depending on the fact whether the consumers use natural gas for their own needs, for energy supply or for other kind of entrepreneurial activities. To his mind the rate of the consumed natural gas shall be determined on the basis of the aim of using it.

The representative of the submitter is of the opinion that the criterion used in the challenged norms, on the basis of which different gas rates have been determined to two groups of physical persons has been chosen arbitrarily and thus the principles of fairness, equality and proportionality are violated. Observation of the above principles is envisaged in Article 5 of the Law "On Regulators of Public Services and in Article 91 of the Republic of Latvia Satversme, which determines that all human beings in Latvia shall be equal before the law and the courts.

**The representative of the regulator** – the sworn advocate Gundars Cers (henceforth- the representative of the regulator) requests the Court to declare the constitutional claim as ungrounded.

In his written reply the representative of the regulator points out that the Council did not exceed its authority when confirming the Method. He holds that calculation of rates envisages not only the procedure of calculating the natural gas but also differentiation of rates. Rates may be differentiated on the basis of the aim of using gas (for heating, gas stove, motor transport etc.), on the consumed amount or some other criterion.

The representative of the regulator expresses a viewpoint that determination of increased rates for persons who consume more than 5000 cubic metres of natural gas may not be regarded as discrimination as those users of natural gas, who consume less than 5000 cubic metres of gas do not find themselves in similar and comparable circumstances with those consumers, who exceed the limit. A greater amount of gas shall be regarded as an additional service and one has to additionally pay for it.

The representative of the regulator holds that the limit on the amount of natural gas for use of the inhabitants, established in the challenged norms, is reasonable and complies with the real possibilities of use of gas by the inhabitants. The above amount of natural gas is sufficient for using gas stove, water heating and heating of a comparably big house (up to 300 square metres of heating area). In compliance with the data of the stock company "Latvian Gas", in 2001 only 0,3% of all the consumers – physical persons - of natural gas have used more than 5000 cubic metres of gas.

The representative of the regulator explains that differentiation of natural gas rates is accomplished on the consumed amount of gas but not on the fact whether the consumer carries out entrepreneurial activities or not. The representative of the regulator holds that such a differentiation of rates does not violate the interests of consumers but vice versa – protects them. When refusing from the above idea the rates for consumed gas shall have to be increased. Before introduction of differentiated rates many inhabitants disconnected their apartments and apartment houses from the collective heating supply system and installed individual gas heating systems. As the heating supply enterprises purchase natural gas for a higher price, differentiation of rates ensures efficient performance. When adopting the challenged norm, the Council acted in compliance with Article 84 (Item 5 of its first part), which establishes that the interests of energy suppliers have also to be defended.

Determination of differentiated rates is objectively justified by the character and principles of regulation of entrepreneurial activity within the field of gas supply: to defend the interests of energy suppliers and consumers; ensure the possibility of receiving qualitative services for economically reasonable prices by stimulating efficient performance and development of energy supplying enterprises, as well as by advancing efficient utilization of the supplied energy.

Certificate No. 856 –IR, granted on November 20, 2002 by the Department of Naturalization and Migration of the Ministry of the Interior, testifies that no person is registered at No.3 Mazā Bišu street. In its turn, the print out of the LURSOFT data base shows that at No.3 Mazā Bišu street, Riga are situated several commercial companies – companies with limited liability "KRESCO CONSULTATIONS" and "SEMIDEX-RIGA" as well as the public stock company "THE RIGA INVESTMENT FUND", with parts of their property belonging to the submitter and in which he holds positions.

The documents attached to the constitutional claim and print-out submitted by the representative of the regulator name another place of residence of the submitter – at No.29 Ieriķu street, Apt. 52, Riga.

## The concluding part

1. In compliance with the wording in effect up to October 1, 2001 Article 85 (Item 2 of its first part) of the Power Industry Law the Council has the right within the limits of its authority to determine normatives regulating the energy supply. An analogous norm is incorporated also into the wording of the Power Industry Law in effect at the present moment.

The representative of the submitter holds that Sub-items 1 and 2 of Item 1 of the Methods (henceforth- the challenged norms) are at variance with the above norm of the Power Industry Law, as to his mind only the creation of the mechanism for calculation of the supply tariffs is within the authority of the Council and not the restriction of the rights of certain gas users by determining consumption limits.

One cannot agree with this viewpoint of the representative of the submitter. Functions of the Council are to be considered in their interconnection. It has to be taken into consideration that Article 84 (Item 2 of its first part) of the Power Industry Law authorizes the Council to affirm rates calculated by energy supplying enterprises.

No legal arguments, prohibiting determination of differentiated rates depending on the amount of the consumed natural gas can be found. The amount of the consumed amount of gas serves as the criterion for determining differentiated tariffs also in other states, not only in Latvia.

Thus in Lithuania, in compliance with Item 3.3 of the National Control Commission for Prices and Energy Decree on Methods of Natural Gas Price Calculation November 16, 2001 Decree No. 111 ” Methods for Calculating the Price of Natural Gas” on the criterion of the consumed amount of gas consumers are classified into six groups (*see National Control Commission’s for Prices and Energy Decree on Methods of Natural Gas Price Calculation No.111 of 16 November 2001, Vilnius*).

From Items 4 and 5 of the European Council Recommendation of 21 April 1983 on the Methods of Forming Natural Gas Prices and Tariffs in the Community” it follows that division of gas users may depend on the consumed amount of gas (*see Council Recommendation of 21 April 1983 on the methods of forming natural gas prices and tariffs in the Community /83/230/EEC/*).

**Thus within the authority of the Council are both - creation of the mechanism for calculating rates and determination of differentiated tariffs by choosing the amount of the consumed gas as the criterion.**

2. Article 1 (Item 12) of the Law "On Entrepreneurial Activity in the Power Industry" states that energy user is a physical or legal person who purchases energy resources for energy supply or for its own needs.

In its turn Article 1 (Item 10) of the Power Industry Law determines that energy user is a physical or legal person who/which purchases from energy supplying enterprises and consumes a specific kind of energy or fuel for its own needs or uses it in energy supplying or in other kinds of entrepreneurial activity.

The term "the user" is interpreted in a similar way also in Item 1.11 of the Republic of Latvia Cabinet of Ministers January 20, 1998 Regulations "On Gas Supply and Use".

The representative of the submitter concludes that the consumers (users) of natural gas may be classified into four groups: 1) a physical person, who uses gas for its own needs; 2) a physical person, who uses gas for entrepreneurial activity; 3) a legal person, who uses gas for its own needs; 4) a legal person, who uses gas for entrepreneurial activity, including heat supply. Regardless of the above, the Methods give another interpretation of the term "the user" and have introduced another classification of the users. Item 1 of the Methods states: "Energy user is a physical or legal person, who uses gas, supplied in accordance with the agreement by the Gas Networks Supplying Enterprise". Item 2.8 of the Methods classifies the users of gas into three groups: inhabitants; industrial, communal and other commercial users; motor transport. The representative of the submitter points out that the terms "industrial, communal and other commercial users" cannot be found in any law.

The terms used in normative acts and their interpretation are envisaged for correct understanding of particular normative acts.

**The sense of the term "the user", incorporated into the Methods, may differ from the interpretation given in other normative acts, even in acts with a higher legal force.**

3. When evaluating the classification of users, determined by the method (with an exception of motor transport) one may conclude that the amount of the consumed gas but not belonging of the user to a definite group – inhabitants and commercial users - serves as a criterion for differentiation of the rates of natural gas. Classification into inhabitants and commercial users is conditional as the rates are not determined by taking into consideration the objective of using of natural gas. If there is a commercial company in the apartment house, which yearly uses less than 5000 cubic metres of natural gas, it is included into the category of inhabitants. In its turn, if in the year the inhabitant of the apartment

house consumes more than 5000 cubic metres of natural gas, he will be included into the category of commercial users.

Consumers (users), who consume 5000 cubic metres or less a year pay for it in accordance with a lower rate than the users, who consume more than 5000 cubic metres of natural gas.

**Thus the criterion used in the challenged norm for determination of differentiated rates of natural gas is the consumed amount of the natural gas and not belonging of the user to the group of inhabitants or to the group of commercial users.**

4. To assess whether the differentiated rates are legally justified and are not discriminating for one of the two groups, it shall be established whether the users, who consume more than 5000 cubic metres of natural gas in a year, find themselves in circumstances, comparable with those of the users, who consume less.

Ungrounded is the viewpoint of the regulator that users, who consume more than 5000 cubic metres of natural gas are not in comparable circumstances with users, who consume less just because the former users consume more. One cannot agree with the statement that supply of a larger amount of gas shall be regarded as an additional service, like e.g. a greater capacity of electrical energy or use of the internet, for which the user pays an additional sum of money. Both – the greater capacity of electrical energy, received by the user or the internet connection, made use of by the telecommunications client, are qualitative and not quantitative types of services.

**Users, who consume more than 5000 cubic metres of natural gas in a year, are in circumstances comparable with those of users, who consume less.**

5. The amount - 5000 cubic metres, determined as the criterion for differentiated tariffs has been chosen by taking into consideration the fact that the above amount satisfies the needs of inhabitants. With the above amount of natural gas it is possible to heat a comparatively big house, to supply hot water and make use of a gas stove. The users pay for heating less than the inhabitants of the houses, which are connected to the collective heat supplying system, because enterprises of heating supply - as the commercial users – buy gas for higher prices.

In compliance with wording of Article 84 (Item 5 of the first part), which was in effect up to October 1, 2001, the regulator shall defend not only the interests of the users but also the interests of energy suppliers. When regulating public services, interests of two parties- first of all the

interest of the suppliers to ensure the economic activity and development of their enterprise and secondly - the interest of the user (the consumer of natural gas, the user of the services of heating supply enterprises etc.) shall always be taken into consideration.

The regulator points out that the criterion of consummation of 5000 cubic metres of gas has been determined because before that gas for the lowest tariff was used not only for heating small apartment houses but also for heating multiple apartment houses and heating of premises, in which entrepreneurial activity was carried out and thus an unfair competition was created.

The materials in the case testify that there are no inhabitants at No. 3 Mazā Bišu street in Riga, but it is occupied by several legal persons, engaged in commercial activity.

**Taking into consideration the above circumstances, the amount of consummation of 5000 cubic metres of natural gas as the criterion for determination of differentiated tariffs shall be regarded as objectively justified and is not discriminating.**

### **The substantive part**

On the basis of Articles 30 – 32 of the Constitutional Court Law

the Constitutional Court

#### **decided:**

to declare Item 2.8, Sub-items 1 and 2 of the Energy Supply Regulation Council "Methods for Calculating Natural Gas Rates" as conformable with Article 91 of the Republic of Latvia Satversme, Article 5 of the Law "On Regulators of Public Services" and Articles 84 (Item 5 of the first part) and 85 (Item 2 of the first part) of the Power Industry Law".

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of its publishing.