**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 2.0.1 and 2.0.2 of the Law of the Republic of Azerbaijan “On Administrative Procedure”*

# 6 October, 2012 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Fikret Babayev, Rovshan Ismaylov, Jeyhun Garajayev(Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Vidadi Gasimov, Court of Appeal of Sheki city, Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

expert: Farhad Mehdiyev, associate professor of Department of theory and history of slate and law of the Law Faculty of Baku State University;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Court of Appeal of Sheki city on interpretation of Articles 20.1 and 2.02 of the Law of the Republic of Azerbaijan “On Administrative Procedure”.

having heard the report of Judge Jeyhun Garajayev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

As it is evident from the inquiry there were difficulties at resolution of issue of court jurisdiction on the case of cancellation of “The act of violation of the rules of electricity consumption” within framework of claim from E. Gashimov against “Mingechevir Regional Electric Network” Limited Liability Company (hereinafter referred to as the JSC MREN) which is in procedure of Court of Appeal of Sheki city.

The applicant notes that in jurisprudence there are cases of consideration of similar cases by both courts of law and administrative economic courts.

In this regard the Court of Appeal of Sheki city asks the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) to give interpretation to Articles 2.0.1 and 2.0.2 of the Law of the Republic of Azerbaijan “On Administrative Procedure” (hereinafter referred to as the Law “On Administrative Procedure”) from the point of view of recognition of local structures of Azerenerji Open joint stock company (hereinafter referred to as the JSC Azerenerji) administrative bodies, and the “The act of violation of the rules of electricity consumption” which are drawn up by them as the administrative acts.

In the inquiry it is also specified that in the “Classification of administrative bodies” approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan N. 136 of August 28, 2007 (hereinafter referred to as the “Classification of administrative bodies”), JSC MREN is not provided in quality of administrative body and there are no legislative norm conferring it authority to adopt the administrative act. Along with it, rules of consumption of electric energy by consumers are carried out on the basis of contracts. But, as the nature of the similar acts applied by a regional electric network to consumers is interpreted differently, these acts are challenged in courts of different jurisdiction.

In connection with the inquiry the Plenum of the Constitutional Court considers necessary to note the following.

The main social function of the state is providing a worthy standard of living of people and service to society. “Public interest” makes the final purpose of the democratic, constitutional state. The public services directed on satisfaction of public needs share on administrative, economic, social, scientific and technical and cultural types of service. Such principles as stability and stability, variability and quality, objectivity and equality, without prosecution of the mercenary purpose are peculiar to all of them.

Consumption of electric energy is necessary public need, and the structures providing it - the subjects that are carrying out the public service. The enterprises satisfying public needs (public catering, electricity, water, gas, communication, etc.) in most cases have character of natural monopoly. The enterprises of natural monopoly, acquiring production offered on the market on low production expenses, possess opportunity to provide all with this production on available conditions, without the competition. The enterprises of natural monopoly work in the order regulated by the state control as provide the social order and requirements without the competition.

According to Article 5.1.3 of the Law of the Republic of Azerbaijan “On Natural Monopolies” (hereinafter referred to as the Law “On Natural Monopolies”), services in transfer and distribution of electric and thermal energy are referred to a field of activity of subjects of natural monopolies. According to Article 4 of this Law the natural monopoly is such condition of the commodity market at which the satisfaction of needs is more effective in the conditions of lack of the competition owing to technological features of production and made (realized) subjects of monopoly goods cannot be replaced at consumption with other goods, and the subject of natural monopoly is the economic subject who is engaged in production (realization) of goods in the conditions of natural monopoly.

Production and transfer of electric energy in the Republic of Azerbaijan is carried out by JSC Azerenerji. This organization was created by the Decree of the President of the Republic of Azerbaijan as of September 17, 1996; its activity completely belongs to the state, and it acts in the sphere of power industry as the subject of natural monopoly.

There are two instruments for ensuring of socially acceptable behavior of natural monopolies: state ownership and state regulation. According to Article 6 of the Law “On Natural Monopolies” activity of subjects of natural monopoly is regulated by the state. The subject of natural monopoly, first of all, acts as the body which is carrying out sovereign powers of the state.

At the same time, subjects of natural monopoly are participants of the civil relations. In these relations, the bodies possessing character of natural monopoly can adopt acts of notifying and precautionary character. In case of need, these acts challenged in courts of law in a civil and procedural order. However, implementation by the subject of natural monopoly of civil activity is not decisive criterion for definition of a question, whether is it administrative body or not. These subjects can accept and execute the acts obligatory concerning other persons. In that case, the acts adopted by them can be challenged in administrative and economic courts as the administrative act.

Article 62 of the Constitution of the Republic of Azerbaijan establishes the right of everyone for consideration of his/her case in the law court specified by the legislation. The provision “the law court specified by the legislation” noted in this norm includes rules of jurisdiction of cases, existence of lawful judicial structure, etc. subjective elements.

Consideration of the case by competent court creates a guarantee of the comprehensive and objective solution of dispute by specialized court. Judicial jurisdiction cannot be unreasonably and illegally changed. According to Article 15 of the Law of the Republic of Azerbaijan “On Courts and Judges”(hereinafter referred to as the Law “On Courts and Judges”) the diverting of cases from the appropriate jurisdiction of courts provided by the legislation of the Republic of Azerbaijan or undue withdrawal of the cases from the relevant authorized judge is not allowed.

Plenum of the Constitutional Court notes that judicial jurisdiction is one of the conditions guaranteeing procedural ensuring of the rights and legitimate interests of the person at administration of justice and has to be accurately established by the law. Otherwise, there can be an uncertainty concerning in what order of legal procedure the case has to be considered. Such uncertainty can create difficulties in consideration of the case by court in reasonable terms and finally make impossible restoration of the violated rights of the person.

The European Court of Human Rights (hereinafter referred to as the European Court) in the decision of December 22, 2009 on case of Bezymyannaya v.Russian Federation specified that the criteria defining jurisdiction issues between separate courts in judicial systems of the states serve for duly ensuring implementation of justice.

The acts adopted by body of natural monopoly by the nature can be challenged as various legal proceedings. For this reason, the accurate and clear assessment of essence of the act adopted by JSC MREN can create the basis for the correct determination of judicial jurisdiction of contest of this act.

According to Article 2.0.1 of the Law “On Administrative Procedure”, any natural or legal entities authorized to adopt administrative acts on the basis of the law are administrative bodies. Transfer of sovereign authority by the state to adopt administrative acts to subjects of natural monopoly creates a basis in order that at implementation of the activity by them at the level of administrative law they acted as administrative body.

The list of administrative bodies is presented in “Classifications of administrative bodies”. The list of the administrative bodies listed in this Classification is not exhaustive. Thus, according to point V of “Classification of administrative bodies”, “other administrative bodies authorized to adopt according to the legislation the administrative act” are considered as administrative body. According to an essence of this norm, the administrative functions assigned to the enterprises of natural monopoly give the grounds to call them administrative body in certain relations. However, the natural monopolist does not bear feature of administrative body in all legal relationship in which it participates.

In Article 8.33 of the “Rules of consumption of electric energy” approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan N. 18 of February 2, 2005 it is established that “at identification of an assumption by the household subscriber of violation in consumption by the electric power, the representative of the enterprise of power supply in the presence of it and two witnesses draws up the statement which one copy gives out to the household subscriber”. This act, without possessing character of an administrative penalty, aims to settle a specific issue (repayment of a payment for the consumed energy) and creates the certain legal consequences for the person to whom it is addressed.

At first sight, it is noticeable that this act adopted by natural monopoly has public character since it is accepted unilaterally and applied by the monopoly enterprise possessing power to carry out on behalf of the state the administrative functions between the subjects that are in unequal conditions.

However, it is necessary to consider that natural and legal entities use services of subjects of natural monopoly on the basis of the contract. Such contracts differ a little from the concept “contract” accepted in the plane of civil law, but arise between subjects of the civil relations and have individual (private) character.

The civil legislation established free character of the nature of the contract. According to Article 390.1 of the Civil Code of the Republic of Azerbaijan, natural and legal entities can freely sign contracts and define their contents.

As the client (subscriber) contract signed with the subject of natural monopoly is regulated by the act of normative character, it is established for any person on standard, that is, on the same provisions and conditions. Parties of this kind of contracts in a certain degree are in unequal conditions. The consumer is compelled to adopt the contract, such as it is, having no right to change it at any situation and to raise any reservations. As in domestic market services are provided only by the natural monopolist, the person is compelled to adopt this contract irrespective of the will.

On the other hand, it is necessary to consider that the subject of natural monopoly also is not fully free at conclusion of this kind of contracts. Thus, in Article 10.3 of the Law “On Natural Monopolies” it is specified that subjects of natural monopoly, having opportunity to make (to realize) the goods relating to spheres of natural monopoly, have no right to refuse the conclusion with consumers of the contract on realization of such goods.

Thereby, the legislator, having raised requirements to natural monopoly (the special tariff prices, obligation of the conclusion of the contract, etc.), identifies opportunities between it and consumers. From this point of view it would be wrong to read out the contract between JSC MREN and the consumer of the electric power as the administrative contract, and the act adopted on the basis of Article 8.33 of “"Rules of consumption of electric energy” as the administrative act.

The administrative contract is the contract signed between executive authority and other subjects for implementation of executive function. In such kind of contracts, the one of the parties compulsorily becomes as the subject that is carrying out executive functions.

It should be noted that the basis of the administrative contract is made not by rules of the special right, but rules of administrative law. Besides, the most important feature distinguishing administrative contracts from others consists that the governing body, unlike the opposite side, possesses big powers and uses big privileges. Such contracts generally consist between subordinated subjects in connection with implementation of administrative functions in administrative and territorial units.

In this sense, in order to define on the basis of what rules of a procedural law dispute has to be resolved, it is necessary to consider that the sphere of public law is connected with public management and here powers of the power are applied. Powers of the authority are carried out by the appropriate administrative authority at unilateral will in an order and by the principles established by the legislation without requirement of a consent of other party, leading to certain legal consequences concerning it.

In the decision of Plenum of the Constitutional Court of April 4, 2012 “On interpretation of Article 87.2 of the Law of the Republic of Azerbaijan “On Execution” and Article 2.1 of the Administrative Procedural Code of the Republic of Azerbaijan” it is noted that “one of features the distinguishing the administrative legal relations from other legal relationship is the forming of these relations on the basis of the principle the power submission”.

From the side of state to the enterprises of natural monopoly the powers of public character can be also assigned. In that case, the relations of the enterprise of natural monopoly with other subjects formed by the principle the power submission. At the same time, the enterprise of natural monopoly in connection with ensuring public interests can have the limiting effect on any subject.

It should be noted that existence of judicial control of the administrative acts adopted by administrative bodies and other activity in the sphere of public law is one of the main signs of the constitutional state. From this point of view, administrative acts of the enterprise of natural monopoly can be challenged in a judicial proceeding on the basis of norms of the Administrative Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the APC).

The European Court in the decision of March 9, 2006 on case of Menesheva v. Russian Federation emphasized that according to requirements of Article 13 of the Convention, where an arguable breach of one or more of the rights under the Convention is in issue, there should be available to the victim a mechanism for establishing any liability of State officials or bodies for that breach.

Subjects of the dispute put in the inquiry are on the one hand the natural person, and on another hand the JSC MREN. JSC MREN is the independent producer of energy, that is the legal entity supplying consumers with electric and thermal energy by means of the state enterprise of power industry, or the enterprises of power supply. This structure is the stable participant of civil legal relationship. However along with implementation of activity following from civil legal relationship, the certain administrative powers are conferred to them by the Law.

As it was noted, the judicial jurisdiction of the disputes connected with administrative legal relationship, the procedural principles and rules of consideration and settlement of these disputes in courts are regulated by norms of APC According to Article 1.1 of the APC, this Code establishes judicial jurisdiction of the disputes connected with administrative legal relationship (hereinafter referred to as the administrative disputes), the procedural principles and rules of consideration and settlement of these disputes in court. According to Article 2.1 of this Code the judicial proceeding of cases on administrative disputes held by administrative-economic courts and administrative-economic collegiums, unless the law did not establish other order of jurisdiction. Expression “unless the law did not establish other order of jurisdiction” in this norm directs to norms of the civil procedural legislation and legislation on administrative offenses.

It is necessary to consider that the relations following from administrative offenses and regulated by the Code of Administrative Offences of the Republic of Azerbaijan (hereinafter referred to as the CAO) are also the part of public law. If this directing norm was not reflected in Article 2.1 of the CAO, when the cases connected with administrative offenses would be considered by administrative-economic courts. However, as, the relations connected with administrative offenses have repressive character, they differ from the relations regulated by the Law “On Administrative Procedure”.

According to Article 12 of the CAO, an administrative offence is characterised as a guilty (deliberate or careless) deed (action or inaction), infringing upon social relations protected by this Code, which would involve an administrative liability.

The subject of the case which is in procedure of Court of Appeal of Sheki city can also make the dispute connected with violation of the rulesof electricity consumption, and application of an administrative penalty for these violations. In that case violation of requirements of the legislation in the sphere gas-power - and heat supplies, and also rules of their use according to provisions of Articles 116-118 of the CAO, makes structure of administrative offense.

According to Article 3.2.2 of the Law “On Administrative Procedure”, the provision of this Law are not applied to activities for cases of administrative offenses of the bodies established by the legislation of the Republic of Azerbaijan as administrative bodies. According to the Law “On Courts and Judges”, authority to consider cases on administrative offenses as the first instance it is conferred to district (city) court.

According to point 3.16 of the Decree of the President of the Republic of Azerbaijan “On application of the Law of the Republic of Azerbaijan “On approval and coming into force of the Code of the Republic of Azerbaijan “On Administrative Offences” and the issues of legal regulation connected with it” the cases of administrative offenses provided in Articles 116-118 of the CAO are considered by Ministry of Industry and Energy of the Republic of Azerbaijan.

In Article 430.2.3 of the CAO it is specified that the complaint to the decision of authority (official) can be made to higher authority (official) or to court. By Article 431.1.3 of this Code it is established that the claim or objection against the resolution on application of administrative punishment in the form of administrative arrest should be sent to appeal court at the date of receive of claim or objection.

Thus, disputes on violation of requirements of the legislation in the sphere of electric energy and concerning violation of the rules of its consumption have to be considered by the Ministry of Industry and Energy of the Republic of Azerbaijan or by regional (city) courts of law as court of the first instance.

Considering the above, Plenum of the Constitutional Court comes to the following conclusion:

- According to Article 2.1 of the CAO the disputes following from the decision, action or inaction of subjects of natural monopoly in the sphere of public law should be considered by administrative and economic courts in the order of administrative procedure.

- According to Article 431.1.3 of the CAO the complaints made concerning the administrative acts adopted by the subject of natural monopoly on cases of administrative offenses should be considered by regional (city) courts of law.

- From the point of view of Article 2.0.1 of the Law “On Administrative Procedure” the subject of natural monopoly cannot be considered as the administrative body, and from the point of view of Article 2.0.2 of this Law the act of violation of the obligations following from the individual contracts signed by it and consumers in civil circulation cannot be considered as the administrative act. According to Civil Procedure Code of the Republic of Azerbaijan, the disputes following from these acts should be considered by regional (city) courts of law.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to Article 2.1 of the CAO the disputes following from the decision, action or inaction of subjects of natural monopoly in the sphere of public law should be considered by administrative and economic courts in the order of administrative procedure.

2. According to Article 431.1.3 of the CAO the complaints made concerning the administrative acts adopted by the subject of natural monopoly on cases of administrative offenses should be considered by regional (city) courts of law.

3. From the point of view of Article 2.0.1 of the Law “On Administrative Procedure” the subject of natural monopoly cannot be considered as the administrative body, and from the point of view of Article 2.0.2 of this Law the act of violation of the obligations following from the individual contracts signed by it and consumers in civil circulation cannot be considered as the administrative act. According to Civil Procedure Code of the Republic of Azerbaijan, the disputes following from these acts should be considered by regional (city) courts of law.

4. The decision shall come into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.