

Bill of Amendments to the Electricity Industry Law

February 1, 2021

Today, the House of Representatives published a bill of amendments to the Electricity Industry Law (*Ley de la Industria Eléctrica* - “**LIE**”), as submitted by the President of Mexico a few days ago.

The bill has been submitted under priority basis, through the exercise of an extraordinary constitutional right granted to the President every time the ordinary period of meetings of the Congress starts. This means that the House of Representatives shall discuss and approve the bill within 30 calendar days, and thereafter, the Senate would have the same period for discussion and approval.

The (alleged) purpose of the bill can be divided in six different subject matters, as follows:

- (i) Amend the economic dispatch mechanism, by giving priority to hydropower generation and generation from CFE power plants, in detriment of generation from clean energy sources (wind and solar) and combined cycles owned by private companies, which would be dispatched in third and fourth place, respectively.
- (ii) Establish the obligation that any permit issued by the Energy Regulatory Commission (*Comisión Reguladora de Energía* – “**CRE**”) shall abide by the panning criteria of the National Electric System issued by the Ministry of Energy.
- (iii) Establish that granting of Clean Energy Certificates would not be subject to requirements related to either the ownership of the power station or the commencement of its commercial operations.
- (iv) Remove the obligation of the State-productive subsidiary of CFE in charge of Basic Supply, to acquire energy and associated products exclusively through long-term auctions.
- (v) Obligating the CRE to revoke self-supply permits granted under the Electricity Utility Law (*Ley del Servicio Público de Energía Eléctrica* “**LSPEE**”) –which were grandfathered when the LIE was enacted-, whenever those permits were obtained under ‘fraud on the law’ or *fraus legis facta* basis.
- (vi) Review the legality and profitability for the Mexican government of the power purchase agreements entered by the CFE and independent power producers under the LSPEE.

For its main purpose –*i.e.* amend dispatch rules-, the bill introduces the concept of “*Electricity Hedging Agreements with Commitment of Physical Deliveries*”, which is used to appoint those power purchase agreements entered by Basic Suppliers and Generators, which generation schedules would be delivered to the Mexican ISO, the National Center of Energy Control (*Centro Nacional de Control de Energía*), for their (priority) dispatch through fixed schedule offers in the Wholesale Electricity Market. The bill also expands the scope of “*Legacy Power Plants*” in order to cover a wider range of power plants that would be subject to enter into the power purchase agreements described above.

On this regard, it is important to note that the actual draft of amendment decree do not contemplate the dispatch priority rules provided in the explanatory memorandum (e.g. first hydropower, then CFE plants, then solar and wind and finally combined cycles from private parties).

Furthermore, the bill gives priority to CFE power plants over the use of transmission and distribution infrastructure, and also restricts the access to such infrastructure by establishing exception rules on open access for interconnection and connection.

The bill also removes an express statement in the LIE which provides that power generation and marketing activities are services rendered under free competition basis, and also includes restriction for access to the transmission and distribution grids.

This bill was submitted in a context where several policies and orders implemented by the new Mexican administration –aimed at strengthening the position of CFE in the Mexican market- have been recently set aside in constitutional court proceedings.

Needless to say, if passed, the relevant amendment decree can be subject to constitutional review, either through *amparo* actions filed by private stakeholders or through constitutional challenges by public entities, such as the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*), as was the case for the so-called “Reliability Policy” issued by the Ministry of Energy in May 2020, which effects were suspended by the Supreme Court of Justice and District Courts.

Among the multiple legal considerations to question its constitutionality, interested parties may argue that Constitutional principles of the Energy Reform are breach through the bill, by illegally restricting access to competition by private players and also giving retroactive effects over existing investments.

The foregoing, in addition to breaches to international treaties entered by Mexico on climate change, investment protection and free-trade (including the USMCA).

Affected parties may seek for local remedies before federal courts, or even before investment arbitration panels (to the extent foreign investment is involved with respect to a country with which Mexico has a bilateral investment treaty in place).

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