

# SENER Publishes "Fast Track" Policy on Reliability of NES

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Last Friday evening, the Ministry of Energy (*Secretaría de Energía*) ("**SENER**") published in the Federal Register (*Diario Oficial de la Federación*) a ruling establishing the new "Policy on Reliability, Safety, Continuance and Quality of the National Electric System" (the "**Policy**"). The Policy was published following a highly irregular and controversial process before the National Commission of Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria*), wherein SENER bypassed the mandatory notice-for-comment-period established by law, and proceeding with its forthwith publication on Friday night.

The Policy repeals and replaces a policy on reliability published by the previous federal administration in 2017, which was focused on determining parameters applicable to: (i) maximum likelihood of non-supplied energy, (ii) value of non-supplied energy, and (iii) indicative values of minimum planning and efficient planning; which parameters were maintained in this new Policy. In this new Policy, however, SENER argues that the previous policy was insufficient for what SENER believes is a proper policy on reliability related to the so-called "dispatch security"; therefore, additional (overreaching) considerations and principles were included in the Policy.

The main purpose of the Policy is, in SENER's words, to establish guidelines that shall be followed by the competent authorities (namely, the Energy Regulatory Commission (*Comisión Reguladora de Energía*) ("**CRE**") and the National Center for Energy Control (*Centro Nacional de Control de Energía*) ("**CENACE**")), to comply with the reliability principle established in the Electricity Industry Law (*Ley de la Industria Eléctrica*) ("**LIE**"), by contributing to a rational and complete planning and operation of the National Electric System ("**NES**").

In addition to the CRE, CENACE and Comisión Federal de Electricidad ("**CFE**"), the Policy requires all state and municipal governments, autonomous constitutional bodies, all administrative units and offices of SENER, and all research institutions to abide by the principles set forth therein "in order to guaranty the reliable Supply of Electricity."

Notwithstanding its alleged formal purpose, the Policy is actually focused on establishing limitations on the development, commissioning and operation of upcoming and existing renewable energy generation facilities, particularly wind and solar; technologies where private investment is predominant. Moreover, the Policy also includes a series of guidelines that may eventually affect of all sorts of private generation facilities, not only those based on renewable energies.

In a nutshell, the Policy determines and/or establishes the following:

1. Modifications to the current dispatch criteria, by giving priority to the "security of dispatch" over the economic efficiency criteria provided in the implementing regulations of the LIE, while also including the possibility to curtail dispatch instructions for wind and solar power facilities.
2. New "Ancillary Services" in order to cover the behavior of wind and solar renewable generation facilities, establishing obligations for the latter to reimburse other generators (i.e. CFE) for the provision of those new Ancillary Services.
3. New requirements and restrictions to interconnect renewable energy generation facilities; essentially suspending

all ongoing interconnection applications for solar and wind projects until further notice by SENER, and allowing CENACE to reject future interconnection applications on the grounds of congestion or Reliability risks.

4. New planning and control guidelines for the NES, instructing CENACE to submit before SENER any activity or planning proposal related to the NES, as well as amending existing interconnection criteria and procedures.
5. New requirements to grant generation permits by the CRE, including the requirement to obtain an interconnection feasibility report from CENACE as part of the permitting application process.
6. New criteria to assess the feasibility of interconnection of new generation facilities, including limitations to wind and solar renewable generation facilities, and back-up capacity margins with conventional power plants (basically fossil-fuel-fired facilities).
7. New priority criteria to interconnect the power plants designated by SENER as strategic facilities.
8. New rules on the sufficiency of the NES, establishing parameters for operating reserves (primary, secondary and tertiary), requiring all existing and new generation facilities to participate in primary reserves; as well as criteria for planning reserves, including requirements on the variability of wind and solar renewable generation facilities.
9. A new concept called “Reliable Distributed Generation”, whereby certain additional technical requirements are introduced for distributed generation systems intended to be interconnected to the distribution grids, such as smart invertors with the capability to regulate frequency and voltage.

The Policy was issued following an -also- highly irregular and controversial ruling issued by CENACE a couple of weeks ago, focused on hindering the development and operation of renewable energy generation in Mexico as well.

Same as CENACE’s ruling, the Policy is in line with several previous attacks made to renewable energy generators since the current federal administration took the office back in December 2018, which many considered are led by the CFE’s CEO and the head of the Ministry of Energy.

Unlike CENACE’s ruling, however, the Policy is not predicated on the alleged slump on electric energy demand during the COVID-19 sanitary emergency, and for that reason the Policy is not intended as a temporary instrument.

While the Policy attempts to justify the legal grounds of CENACE’s ruling (which had many legal deficiencies), there are multiple legal considerations to question its constitutionality and legality, namely:

- a. The Policy illegally discriminates generation of electricity from renewable sources to favor conventional generation sources, which are mainly controlled by the CFE.
- b. With the excuse of reliability of the electric system, SENER violates its foremost responsibility to establish and conduct Mexico’s energy policy in line with other Constitutional principles of the Energy Reform, by illegally restricting access to competition by private players.
- c. SENER encroaches on the scope of authority/jurisdiction of other governmental agencies and entities of the federal government, and materially amends the principles established in a federal statute (i.e. the LIE) and other applicable laws, which overstep on the authority of Congress, as required under the principles of legality and legal certainty established in the Mexican Constitution.
- d. The issuance of this Policy breaches international commitments of the Mexican State on climate change.
- e. The retroactive effects over existing investments and development of renewable generation facilities.
- f. The implementation of disproportionate measures (using also unjustified international examples) with respect to its purpose.
- g. The harm to the general public by affecting the fundamental rights to a sustainable and a healthy environment, as well as establishing principles that will affect energy prices, which will be either directly passed-through to end users or indirectly subsidized with public resources that could be destined to other urgent matters.
- h. The Policy violates international commitments adopted by the Mexican State on the protection of foreign investments, including breaches to principles of national treatment, minimum treatment and regulatory expropriation.

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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