

Legal Update

Mexican Ministry of Energy's New Policy: Impact on Wind and Solar Generation Projects

I. SENER's Policy

On Friday, May 15, 2020, the Ministry of Energy (*Secretaría de Energía*, "SENER") published in the Federal Official Gazette (*Diario Oficial de la Federación*) the "Policy for the Reliability, Safety, Continuity and Quality of the National Electric System" (*Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional*, the "SENER Policy"), which has heightened the market's concern that a policy change will affect private sector participation in Mexico's electric industry.

II. Background

The SENER Policy enactment follows the April 29, 2020, issuance by the National Center for Energy Control (*Centro Nacional de Control de Energía*, "CENACE") of a resolution (the "CENACE Resolution")¹ regarding the suspension of ongoing pre-operational and operational tests for renewable plants, the denial of authorizations for future pre-operational and operational tests for renewable plants, and the dispatch of solar and wind power generation plants vis à vis the state-owned Federal Electricity Commission's (*Comisión Federal de Electricidad*, "CFE") thermoelectric and hydroelectric plants during the COVID-19 pandemic.² The stated goal of the CENACE Resolution was to correct failures in the National Electric System caused by a decrease in demand due to COVID-19 restrictions.

The CENACE Resolution is predicated on the COVID-19 pandemic; therefore, its provisions are assumed to be temporary. In a previous [Legal Update](#), we mentioned that if the CENACE Resolution were intended to have indefinite effects, then CENACE could be exceeding its authority. The SENER Policy, on the other hand, is intended to be permanent.

These measures appear to be intended to restrict the participation of the private sector in Mexico's electric industry, principally through solar and wind power generation, and to foster CFE's power in the market. In President López Obrador's own words, it is his intention to give CFE "a fair treatment"³ regarding the dispatch of energy and to eliminate the "preferential treatment for private parties."⁴

III. Controversial Enactment

According to public information, on May 11, SENER requested urgent authorization for the publication of the SENER Policy from the Ministry of the Interior's department in charge of the Federal Official Gazette.⁵ Nevertheless, on May 12, the Ministry of the Interior rejected the publication on the grounds that, according to the National Commission for Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria*, "CONAMER"), the SENER Policy's regulatory impact and costs should be subject to analysis and public comment prior to the policy's enactment.⁶

The purpose of the regulatory analysis set forth in the Regulatory Improvement Law (*Ley General de Mejora Regulatoria*) is to identify the costs and benefits of regulation.⁷ Public entities are obligated to submit regulatory proposals to CONAMER at least 30 days in advance of their enactment or issuance, provided that if the proposed regulation entails no compliance costs (as confirmed by CONAMER within five days from the corresponding request), the relevant regulation will be exempt from the corresponding analysis.⁸

On Friday, May 15, SENER uploaded the SENER Policy to CONAMER's website, along with a request to exempt the policy from the mandatory regulatory impact analysis. On the same date, the head of CONAMER suddenly resigned, and CONAMER issued an official communication to SENER stating that the SENER Policy was not a set of administrative regulations and could not be subject to regulatory analysis (effectively contradicting itself and its prior communications to the Ministry of the Interior).⁹ On that same day, the SENER Policy was published in the evening edition of the Federal Official Gazette.

IV. SENER's Policy Issues

Noteworthy aspects of SENER's Policy are the following:

A. REGULATORY OBSTACLES

- **Additional restrictions and conditions for the issuance of generation permits for solar and wind facilities.** In order to grant a new Generation Permit, the Energy Regulatory Commission (*Comisión Regulatoria de Energía*, "CRE") may request an interconnection validation study.¹⁰ This is a new requirement for obtaining generation permits.
- **Early Termination Clauses.** "New and amended" Generation Permits and the corresponding Interconnection Agreements "to be entered into or amended" must include provisions regarding their early termination in the event interconnection and operations are not achieved within the specified timeframe.¹¹ This could represent a high risk for projects in construction (especially those that have already suffered delays due to causes such as COVID-19).
- **Additional restrictions and conditions for the granting of interconnection contracts to solar and wind facilities.** CENACE is obligated to evaluate the interconnection studies and requests based on the local demand and consumption of electricity,¹² the availability of solar and wind resources,¹³ and the effect on reliability caused by the new generation project, among other factors.¹⁴
- **New criteria for the dispatch of solar and wind plants relative to the dispatch of large hydro and thermal plants.** SENER's Policy expressly prioritizes reliability over economic efficiency.¹⁵ By dispatching with priority higher-cost CFE-owned facilities over lower-cost privately owned renewables projects, the new policy will increase the marginal cost of generation in Mexico. It will

also shift revenues from private generating facilities to CFE (and shift losses from CFE onto private parties).

B. ECONOMIC IMPACTS

- The new rules of the Wholesale Power Market will recognize no value for the capacity of the solar and wind plants. Under the current framework, wind and solar power generators may commercialize energy and capacity. Under the new rules, solar and wind generators will be able to sell only energy, and load serving entities may no longer acquire capacity from such projects.¹⁶ Reference is made to the Wholesale Power Market only, but if SENER Policy is intended to apply to the legacy self-supply projects (*proyectos legados o de autobastecimiento*), this could result in a clear contradiction with the transitional provisions set forth in the Electric Industry Law (*Ley de la Industria Eléctrica*).
- The new rules also allocate to wind and solar generators virtually all costs related to ancillary services and infrastructure improvements to accommodate increasing energy from renewable sources.¹⁷ The SENER Policy provides that clean power projects shall carry the costs associated with their incorporation into the National Electric System.

C. OTHER RELEVANT ISSUES

- The CRE is expected to "update, issue and apply" regulations following the guidelines and policy set forth by SENER.¹⁸ CENACE is also expected to "update, issue and apply" reliability criteria for the National Electric System's expansion plans and operation, with the approval of SENER.¹⁹ The powers of each of CRE and CENACE may be limited by the SENER Policy and subordinate to those of SENER.
- CFE will have a "proactive" role in the design and regulation of the National Electric System expansion plans and operation.²⁰
- When the CRE authorizes the assignment, transfer or lien on the rights of a Generation Permit, the terms set forth in the original version of the Generation Permit shall not be amended.²¹ This restriction is not provided for in the applicable law.
- The SENER Policy provides that CENACE will consider the "distance" (*espaciamiento*) between renewable power generation projects in their interconnection studies and with respect to the National Transmission Grid and the General Distribution Grid expansion studies.²² This could advance discretionary actions by CENACE and restrict the development and construction of new projects depending on their location.
- SENER will have the right to categorize certain projects as fundamental for the development of its policy, and thus interconnection of such projects will have a preferential status.²³

V. Potential Recourse

A. LITIGATION UNDER MEXICAN LAW

Over the past few weeks, many holding companies and private generators have initiated *amparo* proceedings before federal courts to challenge the legality and constitutional validity of the CENACE Resolution. Since May 18, 2020, District Court No. 1, which specializes in Antitrust and Telecom Procedures, as well as other District Courts have issued temporary relief orders (*suspension provisional*), granting at least 23 plaintiffs protection against the effects of the CENACE Regulation.

CENACE has ordered interconnection tests to resume with regard to those projects which received a temporary relief order.²⁴

Similar to what happened with the CENACE Resolution, lawsuits (foreseeably, *amparo* proceedings) challenging the SENER Policy are expected. Among the bases for attack, the validity of the SENER Policy is expected to be disputed on the basis of its conflicts with the Electric Industry Law, the Energy Transition Law (*Ley de Transición Energética*), the Network Rules (*Código de Red*)²⁵ and those laws that establish the power and authority of CENACE and the CRE. Also, failure to observe the provisions of the Regulatory Improvement Law and antitrust arguments are expected to be advanced. Furthermore, the SENER Policy may be disputed in light of Mexico's commitments related to climate change, including the Paris Climate Agreement.

B. INTERNATIONAL ARBITRATION

Foreign investors have invested billions of dollars in Mexico to purchase or develop renewable energy projects based on the prior regulatory framework. The change in key aspects of that framework under the SENER Policy may not only result in the reduction in value of those investments or the impossibility to pursue new projects but, in doing so, may violate investor protections in international treaties and agreements to which Mexico is a party. This may trigger investment arbitration claims under almost 30 bilateral investment treaties, as well as under multilateral investment agreements, such as NAFTA – USMCA or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

C. POLITICAL PRESSURE

Foreign governments (including Canada and the member states of the European Union), chambers of commerce (including the *Asociación Mexicana de Energía Solar*, the *Consejo Coordinador Empresarial* and the *Confederación de Cámaras Industriales de los Estados Unidos Mexicanos*) and professional associations (including the *Barra Mexicana de Abogados* and the *Asociación Nacional de Abogados de Empresa*) have expressed their concerns with respect to the SENER Policy, its legality and the uncertainty it has caused to renewables companies and to their lenders and consumers across all industries. Political pressure and lobbying is expected to grow and toughen.

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¹ "Acuerdo para garantizar la eficiencia, Calidad, Confiabilidad, Continuidad y seguridad del Sistema Eléctrico Nacional, con motivo del reconocimiento de la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19)", CENACE, April 29, 2020. Available at: <https://www.cenace.gob.mx/Docs/MarcoRegulatorio/AcuerdosCENACE/Acuerdo%20para%20garantizar%20la%20eficiencia.%20Calidad.%20Confiabilidad.%20Continuidad%20y%20seguridad%20del%20SEN%202020%2005%2001.pdf>

² "CENACE Measures Impact Renewable Energy Projects in Mexico," Mayer Brown, last modified May 14, 2020 <https://www.mayerbrown.com/en/perspectives-events/publications/2020/05/cenace-measures-impact-renewable-energy-projects-in-mexico>

³ Presidencia de la República, Conferencia de Prensa, May 6, 2020.

⁴ Presidencia de la República, Conferencia de Prensa, May 18, 2020.

⁵ Unidad de Asuntos Jurídicos, Secretaría de Energía. Oficio 120/UAJ/1080/2010, May 11, 2020.

⁶ Dirección General Adjunta del Diario Oficial de la Federación, Subsecretaría de Gobernación. Oficio DGADOF/211/240/2020, May 12, 2020.

⁷ Article 66 of the Regulatory Improvement Law (Ley General de Mejora Regulatoria).

⁸ *Ibíd.* Article 71.

- ⁹ Dirección de Manifestaciones de Impacto Regulatorio, CONAMER. Oficio CONAMER/20/2079, May 15, 2020.
- ¹⁰ Dirección de Manifestaciones de Impacto Regulatorio, CONAMER. Oficio CONAMER/20/2079, May 15, 2020.
- ¹¹ *Ibíd.* Section 5.6.
- ¹² *Ibíd.* Section 5.12.1.
- ¹³ *Ibíd.* Section 5.12.3.
- ¹⁴ *Ibíd.* Section 5.12.8.
- ¹⁵ *Ibíd.* Sections 5.3 and 7.1.
- ¹⁶ *Ibíd.* Section 10.8.
- ¹⁷ *Ibíd.* Section 10.4.8 and 8.10.
- ¹⁸ *Ibíd.* Section 3.1.
- ¹⁹ *Ibíd.* Section 3.3.
- ²⁰ *Ibíd.* Section 3.8.
- ²¹ *Ibíd.* Section 5.8.
- ²² *Ibíd.* Sections 5.12.3, 5.12.6 and 10.4.5.
- ²³ *Ibíd.* Section 5.23.
- ²⁴ Press Release dated May 20, 2020. Available at: <https://www.gob.mx/cenace/es/articulos/nota-informativa-para-los-integrantes-de-la-industria-electrica-243416>
- ²⁵ Disposiciones Administrativas de carácter general que contienen los criterios de eficiencia, calidad, confiabilidad, continuidad, seguridad y sustentabilidad del Sistema Eléctrico Nacional: Código de Red.

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