

## Energy Update Resolution by the Mexican Supreme Court on the Constitutional Controversy claim filed by COFECE against SENER's Reliability Policy

Mexico City, February 4, 2021

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Yesterday, February 3, 2021, the Second Chamber of the Mexican Federal Supreme Court of Justice (Suprema Corte de Justicia de la Nación) ("SCJN") resolved the constitutional controversy 89/2020 filed by the Federal Economic Competition Commission (Comisión Federal de Competencia Económica) ("COFECE") against the "Decree by means of which the Reliability, Security, Continuity and Quality Policy in the National Electric System is Issued" (Acuerdo por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional) (the "Reliability Policy"), which was published in the Official Gazette of the Federation (Diario Oficial de la Federación) ("DOF") by the Ministry of Energy (Secretaría de Energía) ("SENER") on May 15, 2020.

Through the Reliability Policy, SENER attempted to establish new criteria and requirements to regulate the dispatch and interconnection of renewable power plants, mainly, with the National Electric System ("SEN"), which unduly favored CFE and sought to privilege, without any legal support, the security of the SEN over economic merit.

The Reliability Policy, despite being issued as a public policy instrument, also contains general provisions regarding the planning, functioning and operation of the SEN and the Wholesale Electricity Market ("MEM"). Finally, one of the most criticized items, and a key component of the provisions invalidated by the SCJN, consists on the emphasis on the alleged relationship between the generation intermittency of the Power Plants with clean energy sources and the lack of reliability in the SEN, seeking to segregate them through the imposition of procedures, analysis requirements, rules and additional costs, especially aimed at such plants, under the pretension of improving the reliability of the SEN.

The SCJN declared the invalidity of most of the provisions of the Reliability Policy challenged by COFECE, arguing that they contravene the constitutional order in matters of economic competition and hindered COFECE from exercising its constitutional functions. Although the SCJN recognized that the SENER is the authority in charge of issuing policies related to the SEN, it pointed out that such policies must be limited to the legal and current constitutional framework derived from the Energy Reform, not only on economic competition matters, but also as it relates to sustainability and clean energy promotion.

The SCJN declared the unconstitutionality of provisions 3.8.4, 5.4, 5.23, 5.7, 5.12, 5.12.1, 5.12.2, 5.12.3, 5.12.5, 5.12.6, 5.12.8, 5.12.11, 5.13, 5.15 – in the section that establishes "and the interconnection feasibility opinion issued by CENACE" – 7.1, 8.4 and 10.2 of the Reliability Policy, as well as by extension, provisions 5.12, 4 5.12.7, 5.12.9, 5.12.10 and 5.12.12. Some of the most relevant provisions that were invalidated are: (i) taking into account CENACE's feasibility opinion, to be issued for the granting or not of Generation Permits by CRE, (ii) the preferential interconnection, by CENACE, of the projects that SENER has established as a "priority", (iii) the evaluation of demand and supply of the zone, region or System for CENACE's feasibility of interconnection studies, (iv) the weighting of dispatch security over economic efficiency as principles to regulate the dispatch order in the SEN, as well as that CENACE could instruct the allocation and dispatch of Power Plants, even when they are out of merit at such time, and

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(v) the authority of CENACE to deny the interconnection study to Power Plants with intermittent clean energy source, in the event that in a given interconnection point, zone, region or system, the transmission and transformation elements are already crowded.

On the other hand, among the provisions that the SCJN recognized as valid are, among others, the following: (i) establishing as an objective of the planning and operation of the SEN the strengthening of the CFE and its affiliates and subsidiaries to guarantee Electricity Supply as a service of public and universal interest, (ii) the implementation of new Ancillary Services linked to the SEN and which are necessary to guarantee its Quality, Reliability, Continuity and safety, among these the black start, the coverage of variability of the Power Plants with intermittent clean energy sources and the inertia of synchronous Power Plants when they do not offer electric energy and power, among others, (iii) the obligation of the Generators that represent Power Plants with intermittent clean energy sources to cover the cost associated to the Ancillary Services they use to guarantee the reliability in the operation of the SEN, and (iv) the non-crediting for the Power Plants with intermittent clean energy source of the power they have not contributed, which will be computed as a decrease of their annual credited power and of their annual power requirements in the Power Balance Market.

The SCJN will publish the resolution of the Constitutional Controversy in the DOF as well as in the Federal Judiciary Gazette, in order to publish the unconstitutionality of the provisions that were invalidated. Such provisions may not be applied by the SENER, nor implemented by the authorities of the sector. The provisions of the Reliability Policy that were not challenged by COFECE could still be invalidated by the Federal Judiciary Branch when resolving the various amparos filed by individuals and other associations, including NGOs, against such Policy.

The aforementioned resolution of the SCJN confirms the criteria contained in numerous resolutions of the federal courts and tribunals that are reviewing the appeal procedures filed against the Reliability Policy and other measures issued by the authorities of the electricity sector. Likewise, and very importantly, it ratifies the independence of the Judiciary Branch with respect to the Executive and Legislative Branches, exercising with professionalism and seriousness its function of overseeing the constitutionality of the actions issued by public entities.

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