

Reliability Policy - SENER

Resolution whereby the Policy on Reliability, Safety, Continuity and Quality of the National Electric System is issued



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Ministry of Energy

Policy on Reliability, Safety, Continuity and Quality of the National Electric System

1. CONTENT

- On May 15, 2020, the Ministry of Energy (“SENER”, for its acronym in Spanish) published the “Resolution whereby the Policy on Reliability, Safety, Continuity and Quality of the National Electric System is issued” (the “Reliability Policy”) in the Federal Official Gazette, which objective is to establish the general guidelines that allow governmental authorities of the energy sector to guarantee power supply in the National Electric System (“SEN” for its acronym in Spanish) under the principle of Reliability¹.
- The Reliability Policy became effective as of May 16, 2020. Its content does not really constitute a public policy instrument, but mainly sets forth general provisions on the planning, functioning and operation of the SEN and the Wholesale Electricity Market (“MEM”, for its acronym in Spanish).
- Under the arguments that (a) the planning and control of the SEN, as well as the transmission and distribution public services, are strategic areas that correspond exclusively to the State; and (b) SENER has the authority to establish a policy on efficiency, Quality, Reliability, Continuity, security and sustainability in the SEN according to article 132 of the Power Industry Law (“LIE” for its acronym in Spanish); SENER makes material regulatory changes in structural aspects of the SEN and MEM, including: (i) process for the interconnection of power plants to the National Transmission Grid (“RNT”, for its acronym in Spanish) and General Distribution Grids (“RGD”, for its acronym in Spanish), (ii) determination of operating and planning reserves in the SEN, (iii) rules for the assignment and dispatch of power plants, and (iv) requirements for new ancillary services in and outside the MEM. The changes set forth by SENER have an impact on all activities of the power industry, particularly, on power generation, which, by mandate of the Constitution and LIE, is subject to a free competition regime.

¹ Article 3, section X, of the Power Industry Law defines "Reliability" as the ability of the National Electric System to meet the electricity demand of End Users under conditions of sufficiency and Dispatch Safety in accordance with the applicable criteria issued by CRE.

- The Reliability Policy places particular emphasis on the alleged link between the intermittence (variability) of the generation of intermittent renewable power plants (specifically, wind and solar photovoltaic facilities) and the Reliability (or lack thereof) in the SEN. In this regard, the Reliability Policy imposes additional procedures, analysis requirements, rules and costs, aimed at intermittent renewable power plants for purposes of their interconnection to the RNT and the RGD, dispatch in the MEM and operation in the SEN. Among the most relevant provisions imposed by SENER to intermittent renewable energy facilities, the following stand out:
 - CENACE shall conduct interconnection studies based on factors such as (w) geographic location and technical limitations regarding integration of intermittent renewable energy sources, as well as physical distribution of power plants with such technologies, in terms of interconnection point, zone, region and system; (x) ancillary services' capacity in the applicable area, region and system; (y) effects on the Reliability of the SEN as a result of the displacement in the dispatch of fossil-fueled power plants due to the incorporation of intermittent renewable power plants; and (z) recognition of operating costs of conventional power plants for providing ancillary services when intermittent renewable facilities are integrated to the system.
 - Generators representing intermittent renewable power plants in the MEM shall pay the costs associated with the increase of ancillary services' requirements to ensure the Reliability of the SEN when those incremental costs arise from the deployment and operation of such intermittent renewable energy projects.
 - Intermittent renewable power plants shall ensure permanent voltage control.
 - In the Capacity Market calculations, the delivered capacity by intermittent renewable power plants will be subtracted from the Annual Recognized Capacity (*Potencia Anual Acreditada*) of the Generators with intermittent renewable energy facilities. That is, capacity (*potencia*) will not be recognized in the MEM for power plants with these technologies because, according to SENER, they do not contribute to the Reliability of the SEN as they do not provide a firm amount of capacity.
- The Reliability Policy seems to lack sufficient technical motivation to link the Reliability problem in the SEN to the intermittent/variable generation of wind and solar photovoltaic power plants. Nor does it contain a clear explanation of why and how the implementation of these "general guidelines" will supposedly improve the Reliability of the SEN in a comprehensive manner for the benefit of all members of the power industry and, ultimately, the End Users.
- The Reliability Policy cannot be considered a public policy instrument, since it expressly imposes additional requirements, obligations and costs to private companies, especially to those companies that are in the process of developing, constructing/or operating wind and solar photovoltaic power plants. It is important to mention that the Reliability Policy does not refer to intermittent renewable technologies other than wind and solar photovoltaic, making clear that the intention is not to achieve the Reliability of the SEN, but, rather, to affect private investments in these types of technologies.

2. SUBORDINATION OF CRE AND CENACE TO SENER.

The Reliability Policy aims to subordinate, de facto, the Energy Regulatory Commission (“CRE” for its acronym in Spanish) and the National Center of Energy Control (“CENACE” for its acronym in Spanish) to the decisions and criteria of SENER, by subordinating their technical and operative actions to the political decisions of the ministry, which seems to undermine the purpose set forth in the Constitution with respect to such entities, given that CRE and CENACE were conceived in the Constitution, the LIE, amongst other laws, respectively, as an autonomous regulatory authority and a decentralized public entity with certain technical “independence” in their functions.

3. CONTESTED PROCESS FOR THE ISSUANCE OF THE RELIABILITY POLICY IN TERMS OF THE REGULATORY IMPROVEMENT PROCEEDING.

The issuance process of the Reliability Policy has been severely contested since, prior to its publication in the DOF, the National Commission of Regulatory Improvement (“CONAMER” for its acronym in Spanish), through its Regulatory Impact Statements Department, determined that CONAMER was impeded from making any assessment regarding the Reliability Policy, and therefore, the regulatory improvement mechanisms provided by the General Law for Regulatory Improvement (“LGMR” for its acronym in Spanish) were not applicable.

Regardless of the content of the document, there were some irregularities in the process of issuance and publication of the policy, including the communication of the Ministry of the Interior (*Secretaría de Gobernación*) to SENER which indicated that the Reliability Policy had to comply with the regulatory impact assessment requirement, as well as the resignation of the head of CONAMER – effective the same day of the publication of the Reliability Policy in the DOF.

4. ANALYSIS OF THE LEGALITY OF THE RELIABILITY POLICY.

- The Reliability Policy will have to be analyzed from a formal and a substantive point of view in order to conclude whether:

(i) SENER has the power and authority to instruct CRE, which has technical and administrative autonomy by constitutional mandate as a regulatory authority in the energy sector, or CENACE, as a decentralized public entity responsible of the Operational Control of the SEN and the operation of the MEM;

(ii) the Reliability Policy had to be subject to the regulatory improvement proceeding according to the LGMR as well as the process established in the Manual for the Development of Market Rules given that the Reliability Policy is – essentially – a set of rules and general provisions that modifies, replaces and/or supplements the Grid Code (“Código Red” in Spanish) and the Market Rules.

(iii) the Reliability Policy is consistent with principles and rights protected by the Constitution and law such as legality and legal certainty, including the impediment to invade the powers reserved in the Constitution or the law to other governmental authorities or entities, the right to a healthy environment, sustainable national development, competition and free market, legitimate expectations (*confianza legítima*), free and non-discriminatory access to the the RNT and the RGD, promotion of deployment of clean energy projects and compliance with clean energy-related obligations, efficiency and economic dispatch of the MEM, amongst others; and

(iv) the content of the Reliability Policy violates any Agreements on Reciprocal Promotion and Protection of Investment (“APPRIs” for its acronym in Spanish) executed by Mexico or similar provisions in other Free Trade Agreements.

- The technical, financial and legal effects and consequences of the implementation of the Reliability Policy, as well as the constitutional violations and available defenses of the affected parties require a technical, economic and legal in-depth analysis by the whole sector, both from competent governmental authorities as well as private developers and development and commercial banks which have invested or are likely to invest in the Mexican power sector.



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