

Supreme Court rules on constitutional claim filed by the Antitrust Commission against energy policy

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On February 3, 2021, the Second Chamber of Mexico's Supreme Court of Justice (the "Supreme Court") issued a final ruling on the constitutional claim filed on June 19, 2020 by Mexico's Antitrust Commission against the Policy for the Reliability, Security, Continuity and Quality in the National Electricity Grid (the "Policy"), issued by the Ministry of Energy on May 15, 2020.

For context, the Policy aimed at establishing new guidelines with the purpose of, among others, (a) allowing the Federal Commission of Electricity and its subsidiaries to have an active participation in the planning of the National Grid; (b) imposing additional requirements for the granting of generation permits and for the interconnection of intermittent power plants; (c) establishing a new dispatch order in which "reliability" is prioritized over economic dispatch; (d) imposing additional charges on intermittent power plants to cover the costs of new ancillary services (*servicios conexos*); and (e) preventing the accreditation of Capacity (*Potencia*) for intermittent plants. To access our client alert on the Policy, see [here](#).

The Antitrust Commission filed a constitutional claim against the Policy – constitutional claims are a type of a constitutional remedy that may be exercised by government agencies and entities when they consider that an act of another government authority contravenes constitutional principles. Through such constitutional claim, the Antitrust Commission argued that, among other violations, the Policy: (a) affects the principle of economic competition and free competition in the markets of electricity generation and electricity commercialization or supply; (b) affects the principle of open and non-discriminatory access to the Grid provided for in the Electricity Industry Law; (c) compromises the economic dispatch, hindering the ability to compete in the generation market; (d) grants exclusive advantages in favor of the Federal Commission of Electricity and privileges less efficient and more polluting power plants; and (e) violates the principle of constitutional supremacy, since it includes provisions that are contrary to those put in place in the Mexican Constitution through the structural reform of the energy sector of 2013.

In its ruling, the Supreme Court declared invalid most of the provisions in the Policy that were challenged by the Antitrust Commission. In particular, the Supreme Court declared the unconstitutionality of provisions pertaining to the following matters:

- I. the strengthening of the Federal Commission of Electricity through the appointment of strategic projects;
- II. the granting of preferential interconnection to projects that are defined as "strategic" by the Ministry of Energy;
- III. the additional requirement to obtain an interconnection feasibility be granted a generation permit;
- IV. the granting of powers to the National Energy Control Center to evaluate the feasibility of interconnection requests, or even deny them, based on the demand and consumption levels in a region, and on the dispersion and presence of intermittent power plants in the area;
- V. the establishment of a dispatch order where reliability is prioritized over economic dispatch.

On the other hand, the Supreme Court recognized as valid provisions referring to the following:

- I. the provision establishing that, for purposes of reliability in the operation of the National Grid, the Federal Commission of Electricity's strategic planning must be strengthened, as well as the provision establishing that its Transmission and Distribution units may draft proposals for planning programs for the modernization and development of the National Grid;
- II. the imposition of new ancillary services to ensure the reliability of the Grid, which, among others, include "variability coverage" of intermittent clean energy, as well as the provision setting forth that intermittent clean energy generators that cause an increase in the requirement of ancillary services as a result of the need to ensure the reliability of the Grid, must cover such increase in costs as determined by the Energy Regulatory Commission;
- III. the provision establishing that intermittent clean energy does not provide a firm amount of Capacity and, therefore, does not contribute to the reliability of the Grid; in consequence, in the calculations of the Capacity Balance Market, the delivered Capacity of such power plants will be considered as a decrease in the annual capacity requirements of all Load Serving Entities, proportionally.

What's next?

The provisions of the Policy that were not challenged by the Antitrust Commission, and which constitutionality was not analyzed by the Supreme Court, may still be invalidated and declared unconstitutional through the constitutional review claims (*amparos*) filed by the industry and environmental NGOs. Likewise, the provisions that were recognized as valid by the Supreme Court could still be reviewed by the Judiciary based on arguments of a nature different from violations in matters of antitrust, such as of environmental character.

Notwithstanding the fact that the Policy has been declared partially unconstitutional by the Supreme Court, on February 1, 2021, the President of Mexico, Andrés Manuel López Obrador, submitted a bill to reform the

Electricity Industry Law, which also aims at strengthening the Federal Commission of Electricity and displacing renewables. Our Client Alert on such bill is available [here](#).

However, it must be noted that certain provisions of such bill refer to the same aspects as those included in the Policy and that have been already invalidated by the Supreme Court.

For any additional information, do not hesitate to contact our expert team on energy and antitrust issues, who can be of assistance.

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