

Supreme Court rules on the amparo in review against the amendment to the Electricity Industry Law.

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In the session of January 31, 2024, the Second Chamber of Mexico's Supreme Court ruled on the amparo in review that was filed by six private companies, against the provisions of the "Decree amending and adding various provisions of the Electricity Industry Law" published in the Official Gazette of the Federation on March 9, 2021 (the "Amendment").

Justices Yasmín Esquivel Mossa and Lenia Batres Guadarrama voted against the unconstitutionality of the Amendment, while Justices Luis María Aguilar Morales and the presiding Justice of the Second Chamber, Alberto Pérez Dayán, voted in favor, where the tie-break for unconstitutionality was ultimately decided by the presiding Justice's vote.

The Second Chamber's ruling leaves without effect the modifications sought in the Amendment to articles 3, sections V, XII, XII bis y XIV, 4, sections I y VI, 12 section I, 26, 35, first paragraph; 53; 101, 108, sections V y VI, and 126, section I. In turn, the amparo relating to transitory article fourth (relating to the review of self-supply permits) was dismissed, while transitory article fifth (pertaining the review of independent producer power purchase agreements) was not subject of the amparo in question.

In summary, the Second Chamber of the Supreme Court determined that the priority in the dispatch order set forth in the Amendment, which gives preference to state-owned generators such as the Federal Electricity Commission ("CFE") and its associated power plants to feed their energy into the National Grid, contravenes the principles of free competition and fair market practices as outlined in Article 28 of Mexico's Federal Constitution and in the 2013 energy reform.

This is because this mechanism does not follow the energy efficiency criterion set out in Mexico's Federal Constitution, changing the principles under which the electricity industry operates and the economic criterion by which the National Center of Energy Control should first dispatch the most efficient power plants. Instead, it imposes an obligation to first dispatch plants that have entered into an electricity coverage agreement with physical delivery commitment.

Moreover, the Amendment gives preferential treatment to CFE by introducing electricity coverage agreements with physical delivery commitment, which may only be entered into by basic service suppliers,

namely, CFE's subsidiary. This removes the need for basic service suppliers to enter into contracts through auctions, giving them a preferential treatment over private sector companies, once again affecting the principle of free competition.

On the other hand, the Decree seeks to change the process for granting clean energy certificates, allowing that both market participants operating under the regime resulting from the 2013 energy reform, and those under the grandfathered regime of the Electric Energy Public Service Law, to acquire clean energy certificates. The Second Chamber deemed that this measure could distort the clean energy certificates market due to potential over-issuance, thus discouraging the actual production of clean energy and infringing on the rights to a healthy environment and sustainable development.

The Supreme Court also decided that the strengthening of the state-owned companies proposed in the Amendment does not justify ignoring the Mexico's Federal Constitution content regarding electric energy; specifying that, although the CFE is a state-owned company, it cannot have advantages that go against the constitutional principles of free competition and fair market practices.

Finally, while the amparo was initiated by six private companies, the Supreme's Court resolution was issued with general effects. The Second Chamber deemed that otherwise, it would create different rules for contracting electric energy, access to the National Grid, and acquisition of clean energy certificates, going against the principles set out in the Constitution for the electric industry, reason why, the resolution will have a general impact for all participants in the Wholesale Electricity Market.

Contact Us:

Horacio M. de Uriarte
Partner | hdeuriarte@macf.com.mx

Everardo J. Espino
Partner | ejespino@macf.com.mx

Aisha Calderón
Associate | acalderon@macf.com.mx

Salvador E. Alday
Associate | sealday@macf.com.mx

+52 (55) 5201 7400
For more information, visit:
www.macf.com.mx

