Galicia

Administrative Litigation Update

Draft Ruling - Mexican Supreme Court Amparo vs. amendments to the Power Industry Law

Mexico City, September 12, 2023

On September 8, 2023, the Second Chamber of the Mexican Supreme Court of Justice ("SCJN") set September 27, 2023, as the date to discuss the draft ruling of the appeal number 106/2023 whereby the federal government is challenging a first-instance amparo ruling that declared several amendments to the Power Industry Law published in the Federal Official Gazette on March 9, 2021 ("LIE Reform") unconstitutional.

The unconstitutionality action 64/2021 brought by members the Senate failed to reach a qualified majority of Justices to invalidate several provisions of the LIE Reform in the hearing held on April 7, 2022. Therefore, the Second Chamber's decision becomes especially relevant, given that a simple majority of Justices would suffice to declare the LIE Reform unconstitutional for the plaintiffs.

The final ruling issued by the SCJN on September 27 will establish a precedent for the Courts of Appeals that are currently processing similar appeals brought against the first-instance rulings rendered by the District Courts with regards to the LIE Reform.

The Draft ruling essentially states the following:

1. Unconstitutionality of several provisions of the LIE Reform

Under the assumption that the analyzed provisions are self-applicable (*autoaplicativas*), meaning that no additional regulation is required to inflict harm on the plaintiffs, the Draft ruling analyzes and renders the following provisions unconstitutional:

- Article 3, sections V, XII Bis, XII and XIV , which were amended to: (i) consider any power plant under the Federal Electricity Commission (*Comisión Federal de Electricidad* - "CFE") as a **Grandfathered Power Plant**, even if said power plant was built after the entry into force of the Power Industry Law , meaning these power plants can be included in a

Basic Supply Grandfathered Agreement in order to have priority in terms of dispatch; (ii) introduce the Power Hedging Agreements with Physical Delivery Commitments; (iii) state that Power Hedging Agreements with Physical Delivery Commitments can only be entered into by Basic Service Suppliers; and (iv) add the notion of "physical delivery commitments" for Grandfathered and External Grandfathered Power Plants to the definition of Basic Service Grandfathered Agreements.

- Article 4, sections I and VI , which were amended to: (i) state that the National Energy Control Center (*Centro Nacional de Control de Energía* - "CENACE") will grant open access to the National Transmission Network and the General Distribution Networks in terms that are not unduly discriminatory, insofar as said access is "**technically feasible**"; and (ii) establish "unitary production costs" as the new criterion for dispatch in the wholesale electricity market and that energy supply under Power Hedging Agreements with Physical Delivery Commitments must be prioritized.

- Articles 26 and 53, which were amended to: (i) state that CENACE should prioritize **Grandfathered and External Grandfathered Power Plants** in the instructions issued to distributors and carriers with regard to the use and dispatch of distribution and transmission grids; and (ii) remove Basic Service Suppliers' obligation to acquire power exclusively through the **auctions** held by CENACE.

- Article 101 and 108, sections V and VI , which were amended to: (i) force CENACE to consider Power Hedging Agreements with Physical Delivery Commitments in the allocation and dispatch of Power Plants; (ii) establish that CENACE can determine the allocation and dispatch of Power Plants, Controlled Demand and import and export programs so as to maintain Dispatch Security, Reliability, Quality and Continuity of the National Electric System; and (iii) state that CENACE may receive generation and consumption programs related to Power Hedging Agreements with Physical Delivery Commitments.

- Section II of article 126, which was amended so the issuing of **Clean Energy Certificates** ("CELS") is not dependent upon who owns the Power Plant or its initial date of commercial operations.

In the Draft ruling, the SCJN declares these provisions unconstitutional mainly because:

i) These provisions violate the constitutional principle of **free competition** because they impose undue restrictions on the wholesale electricity market. The amendments deter

the creation of a new electricity market, discouraging the inclusion of new participants and breaking with CENACE's neutrality mandate, along with other unconstitutional market barriers.

ii) The fact that these provisions were enacted in exercise of the State's economic governance or the fact they were meant to regulate strategic sectors, guarantee dispatch security, or strengthen the CFE are not valid reasons from a constitutional standpoint. None of these reasons justify a breach of fundamental rights, such as the right to free competition.

    The Draft ruling states that the provisions interfere with free market competition in the wholesale electricity market and favor a specific group of companies, hindering the rest of the participants.

iii) These provisions also violate the sustainable development principle enshrined in the Mexican Constitution. They deliberately and directly place clean energy on a secondary plane which goes directly against the State's mandate to promote clean energy investments in order to progress towards energy transition.

2. Dismissal of transitory provisions

The Draft ruling proposes to dismiss the amparo claim with respect to the Fourth and Fifth transitory articles which state that the Energy Regulatory Commission ("CRE") shall revoke self-supply permits obtained or procured by fraud and order a review, renegotiation or even early termination of the agreements entered with independent energy producers under the previous legal framework. The Draft ruling does not consider these provisions to be self-applicable, meaning they require a subsequent act or provision to affect the plaintiffs.

3. Ruling effects

Even though the Draft ruling does not contemplate *erga omnes* effects and as such, may only benefit the plaintiffs, the SCJN may discuss the ruling effects should it be approved by the majority.

Whether the Draft ruling meets a qualified majority of votes in its favor (constituting a binding precedent) or whether it is approved by a simple majority, it will constitute a benchmark ruling for the rest of the amparo claims currently pending resolution.

Should you have any additional questions or comments, we are at your service.

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