

THE SHIFT IN MEXICO'S RENEWABLE ENERGY POLICY

Eduardo Marquez Certucha
Sidley Austin LLP

I. Introduction

In the midst of the COVID-19 pandemic, the National Center of Energy Control (*Centro Nacional de Control de Energía* or “CENACE”) and the Mexican Ministry of Energy (*Secretaría de Energía* or “SENER”) issued two regulations that have significantly shifted renewable energy policy in Mexico and changed the rules of the game for solar and wind projects. This article will discuss how the two regulations attempt to implement a new “reliability” policy that is based on tight control over the development of solar and wind projects and prioritizes dispatch of energy through conventional power plants – which are primarily owned and operated by the Mexican government. In addition, this article will discuss the response of the private sector to these new rules and the remedies available for private parties seeking to challenge these resolutions.

II. A Halt on New Solar and Wind Projects

On April 29, 2020, the CENACE essentially halted all new projects involving the solar and wind energy industry in Mexico by publishing the “*Resolution to Guarantee the Efficiency, Quality, Reliability, Continuity and Security of the National Electric System, in connection with the epidemic related to the virus SARS-CoV2 (COVID-19)*” (“CENACE Resolution”). The CENACE Resolution specifies that as of May 3, 2020, all pre-operative tests for solar and wind projects are suspended, and, until further notice, CENACE will not authorize any further pre-operative tests. The resolution is based on the premise that, according to CENACE, restricting solar and wind energy intermittency (i.e. wind energy is only produced when the wind is blowing and solar energy is only produced when the sun is shining) will maintain the quality, reliability, continuity and safety of the electricity supply during the COVID-19 contingency. The resolution further contends these measures are a crisis response to technical stoppages, errors and curtailments caused by solar and wind projects affecting the reliability of the electrical grid. However, the latter has been publicly contested by participants in the renewable energy sector to not be technically correct given in part to the fact that the technical annex attached to the resolution indicates that some of these problems occurred even prior to the COVID-19 pandemic.

The *CENACE Resolution* effectively impedes the ability of solar and wind projects in the development or construction stage to perform the tests required to achieve commercial operation. It also fails to provide a termination date for the suspension of pre-operative tests; thus, all such projects are barred from reaching commercial operation until CENACE lifts the suspension. The resolution also requires that certain “must run” power plants be used to maintain voltage control and minimize the need of opening new transmission lines. This essentially means that conventional power plants, which are mainly state-owned, will be favored to dispatch power. Those conventional power plants will further benefit by providing alternative services (*servicios conexos*) such as control and regulation of frequency, voltage and reactive power, without necessarily offering the best price available to the market.

In response, the Mexican Antitrust Commission (*Comisión Federal de Competencia Económica*) issued a non-binding opinion stating that the resolution lacks clarity in its scope of application, creates uncertainty for solar and wind projects in operation—as well as for those in other stages of development—and lacks parameters for CENACE to select the “must-run” power plants. It contends the latter may violate competition and anti-discriminatory principles of the electric wholesale market.¹

III. Mexico’s New Energy “Reliability” Policy

After the publication of the *CENACE Resolution*, on May 15, 2020, the Ministry of Energy (*Secretaría de Energía* or SENER), published the *Reliability Policy*, a “Resolution issuing the Policy on Reliability, Safety, Continuity and Quality of the National Electric System.” Its stated purpose was to establish guidelines to guarantee electricity supply for regulators to operate, regulate and supervise the efficient functioning of the National Electric System (*Sistema Eléctrico Nacional*).

The new *Reliability Policy* is broad and makes material regulatory changes to the electricity industry. It gives CENACE flexibility to grant or deny renewable energy participants generation and interconnection permits. It also establishes new ancillary services required to guaranty the reliability of the electricity supply in the wholesale market. It gives particular broad powers to CENACE in assessing whether to approve an interconnection request. The policy provides that CENACE will evaluate, among other things: the electricity demand of the area, region or system, and the distance between each solar and wind renewable energy project in such area, region or system; the meteorological conditions of the area in each interconnection point; the capacity of “primary regulation” (*regulación primaria*)—the automatic balance between generation and demand—the regulation of voltage and short circuit levels per geographic zone, and the effect the dispatch of conventional power plants has in the reliability of the National Electric System due to use of solar and wind power projects. CENACE also has the right to deny the feasibility of a project due to any of these factors. Furthermore, pursuant to the *Reliability Policy*, such rejections will not be deemed a breach of the open access and non-discriminatory principles of the National Transmission Grid (*Red Nacional de Transmisión*) and the General Distribution Grid (*Red General de Distribución*) – whether antitrust courts determine that this policy breaches the open access and non-discriminatory principles is yet to be seen.

The new *Reliability Policy* also recognizes new alternative services (*nuevos servicios conexos*), which include monitoring demand due to the effect of solar radiation and gusts of wind, voltage control, black start and hedge or cover of the variability of intermittent (solar and wind) energy power plants. CENACE will issue the rules and the applicable tariffs for such ancillary services, which will incorporate the “variable and uncertain behavior of the Intermittent Power Plants,” as well as fixed costs and other costs related to the improvement, operation and maintenance of the power plants that provide such ancillary services. The policy also provides that any isolated supply project—the successor projects to the self-supply or *autoabastecimiento* regime under the abrogated electricity law prior to the 2014 energy reforms—must comply with such interconnection studies to determine if they may be connected to the grid. It is important to note that such isolated or self-supply projects do not necessarily need to connect to the grid because their primary purpose is to cover their own power needs. Yet, if such projects want to

participate in the electric wholesale market to sell energy surplus or purchase energy due to a shortage, they must connect to the grid and seek approval from CENACE.

IV. Market Reaction to the New Energy Reliability Policy

After publication of the *CENACE Resolution* and the *Reliability Policy*, numerous public-sector organizations have voiced concerns against the new renewable energy policy. Media outlets reported that renewable energy companies affected by the resolutions filed *amparo* proceedings challenging the validity of the resolutions.ⁱⁱ Soon thereafter, it became evident that the antitrust federal courts were granting private parties the preliminary injunction (*suspensión provisional*) that would exempt them from being subject to the *CENACE Resolution*. Of particular note is that the *amparo* would only benefit the persons filing it and any favorable resolution would not automatically apply to other persons. Although receiving a preliminary injunction is a win for private parties—it may only be a short-term boon. The courts have yet to review the merits and constitutionality of the petition and rule whether to grant the permanent injunction (*suspensión definitiva*).

In response to the numerous *amparo* proceedings that were filed, on May 19, 2020, CENACE issued a resolution allowing 23 projects to either continue preoperative tests to achieve commercial operation, or, if such projects had only been scheduled and not begun tests, CENACE would approve their tests as long as they “comply with the National Electric System ‘reliability’ analysis.” Such loose language would seem to open the door for CENACE to keep these entities subject to the new criteria under the *Reliability Policy*, thus maintaining the new flexibility to accept or reject interconnection requests if the solar or wind projects are deemed to not be reliable.

Another way to challenge these new regulations would be to seek relief and submit a dispute to arbitration under Bilateral Investment Treaties (BITs) or any investment chapter of a Free Trade Agreement to which Mexico is a part. It seems for the moment, however, the *amparo* proceeding is the most cost-effective measure to safeguard the rights and development of projects. It is worth mentioning that in addition to private parties, representatives of the U.S. and Canadian embassiesⁱⁱⁱ have also raised concerns over the new reliability policy. This would seem to put political pressure on any claim that may be filed as a private right of action under Bilateral Investment Treaties (BITs) or any investment chapter of a Free Trade Agreement.

V. Conclusion

The *CENACE Resolution* and the new *Reliability Policy* took participants of the renewable energy industry in Mexico by surprise. The numerous ambiguities and deficiencies in the *CENACE Resolution* and the *Reliability Policy* have allowed private parties to seek legal remedies to challenge the resolution. For the time being, it seems that courts have initially sided with preserving the rights of private parties. If the new policy is aimed to make the dispatch of electricity more reliable, then, instead of slowing down the development of renewable energy perhaps the government and private parties should explore other technical alternatives such as investing in smart transmission grid technology. What is clear is that the best next move would be for the government to open a dialogue with the business sector and engage with electricity industry participants to analyze and determine the long-term economic and technical effects this

policy may have in the industry and on Mexico's ability to seek (and retain) direct foreign investment.

ⁱ See OPN-006-2020 available at <https://www.cofece.mx/wp-content/uploads/2020/05/OPN-006-2020.pdf>

ⁱⁱ See "Otorgan a empresas suspensión temporal contra acuerdo de SENER" available at <https://oilandgasmagazine.com.mx/2020/05/otorgan-a-empresas-suspension-temporal-contra-acuerdo-de-sener/>

ⁱⁱⁱ See "Canada, EU raise concerns to Mexico over renewable energy policy dispute" available at <https://globalnews.ca/news/6953055/energy-dispute-canada-eu-mexico/>