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Regulatory Developments in the Mexican Power Sector—Chapter 6: The Mexican Supreme Court Takes Decisive Action: A New Hope?!

By [Alexandro Padres](#)

In prior chapters of this series of my authorship regarding regulatory developments in the Mexican power sector during 2020 and 2021, we examined various actions taken by the administration of President Andrés Manuel López Obrador (hereinafter, “AMLO,” and his administration, the “AMLO Administration”), including the amendment to the *Ley de la Industria Eléctrica* of March 9, 2021¹ that purports to unwind Mexico’s 2013 Energy Reform (hereinafter, the “LIE 2021 Amendment”). The LIE 2021 Amendment was in furtherance of AMLO’s stated objective of pursuing any legislative and legal actions necessary to bring the entire power generation value chain into State ownership and control. On January 31, 2024, the Supreme Court of Mexico held that several provisions of the LIE 2021 Amendment are unconstitutional² and, more importantly, extended the benefit of such holding to all market participants and not only the claimants.

Though the opinion has not been published as of the date of this chapter, a draft has been made available to the public.³ In addition to addressing procedural matters regarding standing of the various parties, admissions or denial of claims on the basis of the legitimacy thereof,⁴ the opinion tackles the issue of whether the priority in dispatch rules and the implementation of physical delivery power purchase agreements with basic service suppliers are consistent with the Constitution (as amended in 2013 in the Peña Nieto administration).

The opinion gives standing to the six generators presenting claims on the sole basis of holding generation permits under the *Ley de la Industria Eléctrica*, as well as being party to interconnection agreements and *contratos de cobertura* (power purchase agreements) (i.e., being a participant in the wholesale market)—this alone was sufficient evidence to grant standing to these parties despite claims from the AMLO Administration that the parties had suffered no actual harm.

The Court viewed the changes to the dispatch order as fundamentally distorting and disrupting free competition in the wholesale electricity market and conflicting with Article 28 of the Constitution. It further concluded that the fact that the basic supply services (i.e., residential users) are provided primarily, if not only, by *Comisión Federal de Electricidad* (“CFE”), further restricts competition in the market.

The Court also analyzed the move from dispatch based on marginal cost to unitary cost, finding that the latter favors larger incumbent players in the market, namely, CFE. These changes, the Court found,

artificially and intentionally disrupt the Constitutional mandate to create efficiency and competition in the market, elevating barriers to entry to the market and preventing the formation of the market itself.

The justices also found that because the physical delivery power purchase agreements with basic service suppliers were afforded priority in dispatch, they too are unconstitutional as they altered the order of priority in dispatch rules that promoted equal treatment to all generators based on marginal costs. In essence, all power plants owned by CFE (whether legacy or new) would benefit from this arrangement since CFE is the main basic services supplier. By incentivizing purchase from physical delivery contracts⁵ over others, CFE was unjustifiably favored in direct violation of the principles set forth in the Constitution. Both the district court below and the Supreme Court characterized the LIE 2021 Amendment as intentionally attempting to alter competition and free participation in the electricity market in a manner disadvantageous to market participants that are not CFE.

With respect to the suspension or cancellation of wholesale auctions, the Court further concluded that doing so further hindered competition and afforded different treatment to private sector participants and to CFE.

The Court then negated the argument proffered by the AMLO Administration that strengthening CFE justifies the LIE 2021 Amendment (and that the Court should uphold the same). The Court did not hold back—"there is no validity to introducing barriers to competition (whether through legislation or otherwise) under the guise of "strengthening" CFE in light of its nature as a productive State enterprise."⁶ The Court's view, which is consistent with the Constitutional text, is that CFE is one of many market participants that happens to be State-owned and benefits from certain privileges that do not override free competition and participation in the electricity market or the goals of fostering efficiency and stability in the transmission system.

Though the AMLO Administration alleged the legitimacy of the LIE Amendments given the authority vested in the federal government to own, control, and operate the National Electricity System (i.e., the grid), the Court discerned that such ownership and control did not, in turn, extend to altering free competition in the generation and commercialization sectors of the electricity industry.

In addition, the Court found that the preference given to conventional fuel generation over clean energy generation and the distortion caused to the clean energy certificate market are also in violation of Article 25 of the Constitution.

Though this presents new hope for the electricity industry in Mexico, the AMLO Administration has sought to continue finding ways to redefine the electricity industry in Mexico in a manner that favors CFE. On February 5, 2024, the AMLO Administration submitted to Congress a package of reforms to the Constitution and various laws described as "anti-popular". These reforms include amendments that would return the provisions of the Constitution to the text in effect during the Lopez Mateos presidency. In other words, to a time when even self-supply, independent power producers, exporters, and small-scale producers did not exist. Further, the reforms aim to strengthen CFE and convert it from an "*empresa productiva del Estado*" (productive state enterprise) into an "*empresa pública estratégica*" (strategic state enterprise), which means giving CFE a state-sanctioned vertically integrated monopoly over the power industry.

As a final touch, this new package also provides for changes to the Supreme Court of Justice of Mexico, such that justices are proposed by the Executive Branch, selected by Congress and then appointed through a popular vote process.

We will stay tuned for further developments in this space and whether Federal and State congresses align with the AMLO Administration's vision for the power industry in Mexico.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings New York lawyer:

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- ¹ Seeking to amend the Electricity Industry Law (*Ley de la Industria Eléctrica—LIE*) to, among others: (i) modify the dispatch order of power plants to favor CFE; (ii) allow legacy power plants (i.e., those operating before the Energy Reform) to receive clean energy certificates (*certificados de energía limpia—CELS*) for power generated; (iii) allow CFE to purchase power directly from market participants and not exclusively from public energy bids; (iv) allow CRE to terminate certain existing legacy self-supply permits; and (v) allow CFE to renegotiate or terminate existing power purchase agreements executed with independent power producers for certain legacy projects.
 - ² Certain provisions relating to the authority of the *Comisión Regulatoria de Energía*, the revocation of permits obtained fraudulently (with respect to self-supply permits), among others, were upheld as they did not cause direct and immediate harm to existing permit holders.
 - ³ For the text in Spanish of this draft, see https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2023-09/164.pdf
 - ⁴ Note that various claims were denied on the basis that the parties had not been affected by the entry into force of the LIE 2021 Amendment, thus leaving open the ability of parties to raise such claims at a later date upon the enforcement thereof on such or other parties, in particular as it relates to self-supply permits.
 - ⁵ These are contracts for sale of electricity where physical delivery on specific dates and times over the tenor of the contract are provided, something that in practice would exclude interruptible sources of energy, such as solar, wind and, possibly, hydro, thereby favoring conventional fuel-fired power plants which are, in their majority, owned by *Comisión Federal de Electricidad*.
 - ⁶ Translated from the original Spanish: “tampoco es válido introducir una barrera a la competencia (sea por vía legislativa o de cualquier otro tipo) so pretexto de “fortalecer” a la Comisión Federal de Electricidad.

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