

The Energy Regulatory Commission rolls back the energy transition

On May 29, 2023, Resolution number A/018/2023 (the “**Resolution**”) of the Energy Regulatory Commission (“**CRE**”) entered into force, which generates a negative impact on the energy transition through various modifications to the applicable regulations to efficient cogeneration systems and, indirectly, has a significant impact on the form and requirements for the issuance of Clean Energy Certificates (“**CELS**”), as described below:

1. Modifications and additions established in the Resolution:

- A. First, the Resolution modifies the methodology for calculating the efficiency of electric power cogeneration systems and the criteria for determining systems such as “*efficient cogeneration*”, issued in Resolution RES/003/2011. The main modifications include the following:
- A definition of “*Cogeneration*”¹ is added, which was not previously described in the methodology, including the following two conditions for it to be considered cogeneration: (i) the electricity generated is used to satisfy the needs of establishments associated with cogeneration, or (ii) the generator provides its surplus electricity production to the Federal Electricity Commission.
 - The definition of “*Fuel-free energy*” is added, defined as: “*electric power attributable to the use of clean energy, defined in each case, in terms of this Methodology*”.
 - In addition, the *reference values* for calculating the efficiency of a system are modified, increasing the percentage of these values, while at the same time updating the electric power *loss factor*, increasing the amount to be considered according to the voltage level at which the National Electric System is interconnected.
- B. Second, the Resolution modifies the sixteenth and eighteenth provisions to certify an efficient cogeneration system, issued through Resolution RES/291/2012. The express reference to the fact that oil industry processes must be evaluated to be considered efficient is eliminated.

¹ Cogeneration: generation of electric power produced together with steam or other secondary thermal energy, or both; when the thermal energy not used in the processes is used for the direct or indirect production of electric power or when fuels produced in its processes are used for the direct or indirect generation of electric power.

C. Third, the Resolution modifies the general administrative provisions that set forth the efficiency criteria and the calculation methodology to determine the percentage of fuel-free energy from energy sources and electricity generation processes established by Resolution RES/1838/2016. These adjustments include the following:

- An additional situation is added to which the methodology will be applicable, which is those centers that use auxiliary cooling technology to improve the thermal performance of the compressor-turbine ratio.
- The values of the *loss factor* and the *reference values* are updated, which directly affect the formula for calculating the fuel-free energy in efficient electric power cogeneration processes.
- The installed capacity is expanded (from 30 MW to 50 MW) of the power plants installed at a height above 1500 meters above sea level to which the new reference values will be applicable, which are considerably lower than those previously considered.
- The processes of the oil industry or any other industry whose purpose is the production of some type of fuel may be considered as efficient cogeneration.
- The identification of clean power plants that use fossil fuels now includes those that generate electricity with two or more thermodynamic cycles sequenced for the maximum use of the residual thermal energy of their main cycle that meet the efficiency criteria established by the CRE.
- Finally, Chapter VIII is included, which specifies the formula for power plant units that use auxiliary cooling to condition the air input to the thermodynamic cycle, which meet the efficiency criteria established by the CRE, to determine the fuel-free energy that is applicable.

These modifications represent a drastic change for the perception and development of the clean energy market and the energy transition in Mexico, by considerably expanding the situations and/or scenarios for the determination of fuel-free energy within the processes of electricity generation, as well as the reduction of those limitations established for consideration. In this regard, the publication of the Resolution will have serious repercussions on the Clean Energy Certificates Market.

2. Impact of the Resolution on the Clean Energy Certificates Market

The Electricity Industry Law determines the general bases for the operation and obtaining of CELs, and also establishes that efficient cogeneration is considered as a type of clean energy. In this regard, CELs are certificates issued by the CRE to certify the production of a specific amount of electricity from clean energy sources. The main objective of these certificates is to encourage the generation of clean energy, creating additional economic value for renewable energy producers and thus contributing to decarbonization.

As a result of the above, on October 31, 2014, the guidelines that establish the criteria for granting these CELs and the requirements for their acquisition were published in the DOF. The conditions for granting CELs include the following: (i) Clean Power Plants that come into operation after August 11, 2014, and (ii) Legacy Power Plants that generate electricity from Clean Energies that have entered into operation before August 11, 2014, as long as they have carried out a project to increase their production of Clean Energy.

Taking into account the above regulation of CELs, it is clear that the changes implemented by this Resolution, in updating the reference values of the methodologies for calculating the efficiency of cogeneration systems, the criteria for determining efficient cogeneration and the calculation methodology for determining the percentage of fuel-free energy, directly impact the form and requirements for obtaining CELs, by facilitating or expanding the cases in which such certificates may be granted. This will have the direct effect of increasing the supply of such CELs in the market, while reducing their value and, consequently, the incentives to obtain them.

As a result of the Resolution, the mechanisms and incentives that Mexico has been implementing to reduce emissions at the national level and comply with its international commitments are being undermined. One of these incentives is CELs, which play a critical role in fostering decarbonization and a sustainable energy transition. By undermining these incentives, Mexico will face strong criticism and difficulties in meeting the commitments that contribute to emissions reductions at the national and international levels.

This has a direct impact on the goal established by the Energy Transition Advisory Council, which seeks that 35% of electricity generation in the country comes from clean energy sources by 2024. Likewise, Mexico would be failing to comply with different international instruments regulating climate change, such as the Paris Agreement that Mexico signed in 2016 and which seeks to keep the increase in global temperature below 1.5 ° C, through incentives that reduce carbon emissions.² This makes it clear that Mexico's actions are not in line with the global trend that seeks to mitigate and eradicate – *to the extent possible* – the negative impacts of climate change.

3. Means of defense available to those affected by the Resolution.

Article 27 of the Law of the Coordinated Regulatory Bodies in Energy Matters establishes that general regulations – such as the Resolution – acts or omissions of the Commission may only be challenged through an indirect amparo lawsuit.³ However, in 2020 the Second Chamber of the Supreme Court of Justice of the Nation declared – through binding precedent – this provision to be unconstitutional.⁴ In other words, individuals may have access to ordinary remedies or means of defense - such as a nullity lawsuit - prior to filing an amparo lawsuit.

Since the mere entry into force of the Resolution causes harm to the affected parties – situation that should be the subject of particular analysis – they can challenge the Resolution through the indirect amparo lawsuit within a period of 30 days from the date of its entry into force. That period expires on July 7, 2023.

² IMCO Staff. (November 7, 2019). Mexico ratifies the Paris Agreement on climate change - IMCO. Mexico ratifies the Paris Agreement on climate change. <https://imco.org.mx/mexico-ratifica-el-acuerdo-de-paris-sobre-el-cambio-climatico/>

³ Law of the Coordinated Regulatory Bodies in Energy Matters. Article 27.- The general rules, acts or omissions of the Coordinated Regulatory Bodies in Energy Matters may only be challenged through the indirect amparo lawsuit and will not be subject to suspension. Only in the cases in which fines are imposed, those will not be executed until any amparo lawsuit that is filed is resolved.

⁴ Court precedent 2a./J. 43/2020 (10a.), with digital registration number 2021957, Second Chamber, Tenth Period, Constitutional Matters, Gazette of the Federal Judicial Weekly. Book 77, August 2020, Volume V, p. 4331 (Heading: “COORDINATED REGULATORY BODIES IN ENERGY MATTERS. ARTICLE 27 OF THE LAW REGULATING THEM, UPON ESTABLISHING AN ADDITIONAL EXCEPTION TO THE PRINCIPLE OF DEFINITIVENESS GOVERNING THE AMPARO LAWSUIT, VIOLATES THE PRINCIPLE OF CONSTITUTIONAL SUPREMACY.”).

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