

Modification of the rules to amend the permits granted under the grandfathered regime¹

Mexico City

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On October 7, 2020, the Energy Regulatory Commission (“**CRE**” per its Spanish acronym) published in the Federal Official Gazette an amendment (the “**Amendment**”) to the guidelines for modification and transfer of electric power generation permits granted under the so-called Grandfathered Regime (the “**Guidelines**”). The scope of such amendment was previously analyzed by Cuatrecasas when the draft of the Amendment was released for public consultation through the official webpage of the National Commission of Regulatory Improvement in order to clear the regulatory improvement proceedings for administrative regulations.

The Amendment was intended to prevent new consumers from the benefits of the conditions of the generation permits granted under the Grandfathered Regime, which, according to the CRE, creates a scheme of unfair competition with respect to those permit holders operating under the regime currently into force, that is, the electricity supply set forth in the Electrical Industry Law (*Ley de la Industria Eléctrica*, the “LIE”).

In this regard, in order to clarify the scope of the Amendment to the referred guidelines sponsored by the CRE, we analyze the main considerations thereof.

¹ Please be aware that this document is an update of the previous version published back in April 2020 by Cuatrecasas.



What changed with the Amendment?

Pursuant to the Amendment, holders of Grandfathered Permits (as defined below) may only supply electric power to those load centers that were either included in the permit's conditions or under the expansion plans originally submitted and approved by the CRE. Thus, the companies or load centers not foreseen thereunder will only be supplied with electric power through the LIE's schemes; and holders of Grandfathered Permits will only be able to offer its available capacity to the companies listed in the permit's expansion plan, provided that the load centers meet the conditions mentioned thereunder.

Holders of Grandfathered Permits are only allowed to deliver electric power to their shareholders, as listed in the permit's conditions. In this regard, under the original terms of the Guidelines, permit holders were allowed to modify the terms of their permits in order to include new shareholders thereunder (even if those companies were not included in the permit's expansion plan). However, the Amendment now excludes such possibility and, actually, expressly prohibits it.

The prohibition encompassed within the Amendment provides that no modifications to the Grandfathered Permits are allowed if they are aimed at including new load centers that have not received the public service of electric power supply upon the LIE's entry into force. Therefore, this may entail the following restrictions:

- The current shareholders of the Grandfathered Permits holders will only be able to include load centers that received electric power supply under the regime of the Electric Power Public Service Law, currently repealed ("*Ley del Servicio Público de Energía Eléctrica*", the "**LSPEE**").
- The companies included in the permit's expansion plans will only be able to include load centers that received electric power supply under the regime of the LSPEE.
- The companies not included in the permit's expansion plans, will not be able to be listed in the Grandfathered regime.

For further explanation, please find below a general overview of the Grandfathered Regime.



A brief of the Grandfathered Regime in Mexico

With the enactment of the Constitutional Amendment of December 2013 (the so-called “**Energy Reform**”), the energy power industry in Mexico changed substantially: since then, the Mexican State was no longer the only participant in the market and the private sector was allowed to participate in almost each activities of the industry (except from those reserved as strategic activities by the State, such as public power transmission services).

Prior to the enactment of the Energy Reform and the LIE, the private sector was allowed to participate only in the power generation through the following schemes: (i) self-supply; (ii) cogeneration; (iii) small production; and (iv) independent production (all together, the “**Grandfathered Permits**”). Neither of them was considered a public service in order to comply with the constitutional provisions on strategic activities reserved only to the State.

With the enactment of the LIE, the private sector was allowed to compete in the power generation market, subject to the obtainment of a single generation permit issued by the CRE (when the power plant has a capacity greater than or equal to 0.5 MW). Under the LIE’s scheme, the generated power and other associated products may be sold through bilateral contracts with qualified users or offered to the Wholesale Electricity Market (the “**Market**”). In turn, Final users can satisfy its power demand by acquiring it from a Basic Service Supplier (*Suministrador de Servicios Básicos*) or a Qualified Service Supplier (*Suministrador de Servicios Calificados*), depending on the level of power consumption.

In this regard, the second transitional article of the LIE provides that the Grandfathered Permits granted (or under granting process) under the LSPEE shall continue to be governed by the terms established in the aforementioned law and in the other provisions deriving from it; except for those provisions that may be incompatible with the LIE. The above includes the Grandfathered Interconnection Contracts (the “**Contracts**”) executed during the regime of the LSPEE. For these purposes, the LIE’s transitional articles provide that the instruments associated to such Contracts shall be respected in terms of the LSPEE’s provisions, and until the termination of their term.



Final remarks

The CRE believes that the original terms of the Guidelines distort the nature, purpose and object of the Grandfathered Permits by allowing the modification of the power beneficiaries and creating the possibility to include new load centers that were not owned by shareholders at the time of the permit granting, or that were otherwise not included in the original permit's expansion plan.

The Amendment is in full force and effect since October 8, 2020. In our view, the Amendment generates a considerable level of uncertainty and raises concerns about its own lawfulness. In a nutshell, the Amendment may be disregarding the general principle of non-retroactivity as it modifies the legal situation of the Grandfathered Permit Holders operating under the cogeneration and self-supply schemes.

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