



WHEN OPPOSITE POLES DO NOT ATTRACT: LÓPEZ OBRADOR'S PATH TOWARD ELECTRICITY REFORM IN MEXICO

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Introduction

The holidays mean time off for most Mexicans and time to focus on family, not politics—but decision-makers in Mexico appear to be taking advantage of the lack of attention afforded by the holidays to push for controversial policy decisions that they hope to keep out of the public's watchful eye. The 2013 energy reform bill was approved during the second week of December 2021, when most people were busy getting ready for the Christmas season. Indeed, the biggest breakthrough in the energy industry since the nationalization of oil in 1938 occurred at a time when no one was paying attention, except for key stakeholders. And in 2022, when seeking to revert that 2013 energy reform, this time in the power sector, President Andrés Manuel López Obrador used the same strategy—an Easter Sunday vote. However, this was to no avail:

Initially, the vote was first postponed from November 2021 to April 2022. The president hoped that he could win enough votes from the opposition to pass his proposal. This did not work, so the president's party further delayed the bill's discussion and vote to Easter Sunday in the hope that they could force and even threaten some members of the opposition to split from their parties and vote for the president's reform. This effort was to no avail, and just minutes before midnight on Easter Sunday, the lower house defeated López Obrador's proposal, dealing what is perhaps the greatest defeat of his political agenda.¹

Regardless of this political maneuver, there were indications that the 2022 power reform bill, which would require a two-thirds vote because it proposed a constitutional change, was unlikely to pass. Weeks before it came to a vote, the larger opposition parties—the Institutional Revolutionary Party (PRI), the National Action Party (PAN), and the Democratic Revolution Party (PRD), held together by the coalition *Va Por México* (“Go for Mexico”) and a smaller party, the Citizens' Movement (MC)—stated that they would vote against it.² This was not always assured. PAN refused support for the bill from the beginning. This was expected, as PAN had voted with the then-governing PRI to enact the 2013 energy reform.³ It was slightly less clear, however, which direction the PRD would go, as President López Obrador was

¹ Tony Payan and Miriam Grunstein, “Powerless: López Obrador's Failed Electricity Reforms,” *Baker Institute Blog*, April 25, 2022, <http://blog.bakerinstitute.org/2022/04/25/powerless-lopez-obradors-failed-electricity-reforms/>.

² Luis Pablo Beauregard, “La alianza opositora a Morena nace con la intención de ‘salvar’ al país,” *El País*, December 22, 2020, <https://elpais.com/mexico/2020-12-23/la-alianza-opositora-a-morena-nace-con-la-intencion-de-salvar-al-pais.html>.

³ Sonia Corona, “Peña Nieto y el PAN buscan una reforma energética más flexible,” *El País*, November 6, 2013, https://elpais.com/internacional/2013/11/06/actualidad/1383753662_421317.html.

formerly its national leader⁴ and had refused to support the 2013 energy sector reform. In the end, it finally announced that it would go against the bill. But the real uncertainty came from the PRI. Ironically, the PRI, which spearheaded the 2013 constitutional reform that liberalized the energy industry, was the last party to take a stand. Many observers thought that López Obrador would find the missing votes among its members—but it was not to be. It finally announced that it would categorically oppose López Obrador's proposed constitutional reform to re-monopolize the power sector in the hands of the government.⁵

Thus, it was late on the night of April 17, 2022, with 275 votes in favor of the reform and 225 against it, that the bill failed. It simply did not garner the two-thirds support of the members of the Chamber of Deputies. So, in the technical jargon used by Congress, the bill was “discharged.”⁶

Why *Another* Electricity Reform?

From the moment López Obrador became the president of Mexico, there was much speculation about how he would approach the energy sector, especially whether he would seek to revert the 2013 constitutional changes carried out by the previous administration.⁷ In the beginning, his statements on the subject were ambiguous. One day he stated he intended to honor the rights of private investors; another day he would rail against what he called the “privatization” of Mexico's energy. This cleared up soon, however, as he announced that he would pursue measures to safeguard Mexico's national interests in the energy sector.⁸ The proposed changes to the power sector in 2022 were his first test.

⁴ See Miriam Grunstein's interview in Amineth Sánchez, “La contrarreforma energética de México,” *Lex Latin*, October 19, 2020, <https://lexlatin.com/reportajes/contrarreforma-energetica-mexico>.

⁵ Enrique Méndez, “Ordena el PRI votar contra la reforma eléctrica,” *La Jornada*, April 11, 2022, <https://www.jornada.com.mx/notas/2022/04/11/politica/ordena-el-pri-votar-contra-la-reforma-electrica/>.

⁶ Georgina Saldierna and Enrique Méndez, “Sin mayoría calificada, desechan diputados la reforma eléctrica,” *La Jornada*, April 17, 2022, <https://www.jornada.com.mx/notas/2022/04/17/politica/rechazan-reforma-electrica-al-no-alcanzar-dos-tercios-de-la-votacion/>.

⁷ Duncan Wood, “An Uncertain Future: The Energy Sector under AMLO,” in *Mexico's New Energy Reform*, ed. Duncan Wood, Wilson Center, October 2018, 164-168, https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos_new_energy_reform.pdf.

⁸ *Ibid.*

This first attempt was puzzling as the president's attention was initially focused on the oil and gas industries, and there were no visible signs that he was concerned with electricity projects. Still, this was not entirely unpredictable, especially when Manuel Bartlett⁹ became the CEO of the *Comisión Federal de Electricidad* (CFE), Mexico's state-owned public power company. Bartlett is a well-known nationalist and an ally of López Obrador, and the initiatives likely began straight out of his office as a sequence of escalating moves to exclude private investors.

Bartlett has made the claim that certain power generation projects were illegal,¹⁰ although he never gave any evidence to support this. In particular, the projects that fell under his scrutiny were categorized as “self-use,” meaning consumers generated electricity for their own operations. The self-use framework was approved in the now abrogated Law of Public Electricity Service, enacted in 1992 and later replaced by the Electric Industry Law of 2014.¹¹ Self-use generators have allowed companies to form co-operatives to generate electricity for themselves (e.g., by installing wind farms instead of purchasing electricity from the CFE). The purpose of the self-use system was to give large power consumers the opportunity to invest in their own power plants to get a more competitive electricity tariff rate. Bartlett, however, argues that these companies do not generate power strictly for self-use, given that they have sold electricity to third parties since their inception. This, according to Bartlett, was explicitly prohibited by the Constitution before the 2013 reform.¹² On a more ideological basis, Bartlett claims that “self-use” projects have served no other purpose than stealing Mexico's best clients (read: larger consumers) from the CFE by offering them a non-regulated and lower tariff rate.¹³

⁹ “¿Quiénes son Octavio Romero y Manuel Bartlett?” *Manufactura*, July 30, 2018, <https://manufactura.mx/energia/2018/07/30/quienes-son-octavio-romero-y-manuel-bartlett>.

¹⁰ Patricia Tapia Cervantes, “Privados se han apoderado ilegalmente del mercado eléctrico en el norte del país, acusa Bartlett,” *Forbes*, January 19, 2022, <https://www.forbes.com.mx/negocios-privados-se-han-apoderado-ilegalmente-del-mercado-electrico-en-el-norte-del-pais-acusa-bartlett/>.

¹¹ See Article 3 of the now abrogated Law of the Electricity Public Service.

¹² Tapia Cervantes, “Privados se han apoderado.”

¹³ *Ibid.*

Another one of Bartlett's claims is that the CFE's power purchase contracts with independent power producers are way too onerous.¹⁴ However, the purpose of these projects was to alleviate the CFE's burden of having to invest in additional power generation plants at a time when the federal budget was reduced due to low oil prices.¹⁵ In the face of a diminished cash flow, allowing the existence of independent power generators who could sell power to the CFE was a pragmatic decision implemented by the Carlos Salinas administration. It allowed private investors to finance, own, and operate power generation plants and sell electricity to the CFE. Bartlett, however, deems these projects damaging to the CFE. He has accused former administrations of binding the CFE to long-term power purchase contracts in which the generators get, in Bartlett's words, "the lion's share of the deal." He believes that by obligating the CFE to purchase power from these independent generators through contracts that can last up to 35 years, the CFE is banned from using its own plants while paying abusive prices.¹⁶ This is not necessarily so, but what matters at this point is what Bartlett believes. According to him, not only are power prices set by independent power generators abusive, but the very existence of these contracts is abusive to the CFE. This accusation may be because power purchase agreements have a fixed charge as well as a variable charge. The fixed charge is payable to the generator regardless of whether power is purchased or not, while the variable charge depends on the amount of dispatched electricity. This model guarantees the generator a return for investment in a scenario where there is a decrease in power demand. It is important to underscore that this model, named "take or pay," is required by banks for the financing of these projects.¹⁷

This may explain why the president (and Bartlett) decided to try to reform the power sector. They dislike these contracts, and it can be safely assumed that Bartlett persuaded the president that, since 1992, when the industry was first beginning to open to private investment, the CFE has become increasingly dependent on private power generators, reducing its standing as the great national utility it once was. This clearly rubs against the nationalism shared by both the president and Bartlett. In their view, the 2013 reform further allowed the "self-use" framework to create a "black market" that has now taken away the CFE's most valuable clients—larger consumers. According to Bartlett, the 2013 reform under the Enrique Peña Nieto administration,

¹⁴ The "self-use" generators stemmed from the 1992 reform to the Electricity Public Service Law. These facilities generate electricity exclusively for the CFE and have entered contracts that were awarded by way of public auctions. Further, in order to operate, they must obtain a permit awarded by the Federal Energy Regulatory Commission (*Comisión Reguladora de Energía* or CRE).

¹⁵ Jesús Carrillo, Diego Díaz, and Oscar Ocampo, *El Autabasto Eléctrico en Datos*, Instituto Mexicano para la Competitividad, May 5, 2022, 10-13.

¹⁶ Tapia Cervantes, "Privados se han apoderado."

¹⁷ Daniel R. Rogers and Merrick White, "Key Considerations in Energy Take-or-Pay Contracts," *Energy Law Exchange* (blog), King & Spalding, April 1, 2013, <https://www.kslaw.com/blog-posts/key-considerations-energy-take-pay-contracts>.

when the CFE was further forced into a competitive market, weakened the company through policies that he believed were aimed at making private companies rich at the expense of the only utility committed to serving all Mexicans, rich or poor, urban or rural. The issue, as they see it, is that the 2013 energy reform fully opened generation to private companies that could now sell power directly to third parties. Under the more recent reform, however, the CFE was allowed to buy from private power generators that would earn contracts through public auctions by offering the most economic tariff rate.¹⁸

According to the government, these changes, first in 1992 and then in 2013, were part of a plan by previous administrations to ensure the CFE's entrapment in a set of rules designed for its demise. Not only did the reform allow preexisting generation projects to continue operating under the same conditions as before the 2013 reform, but it also organized public auctions to force the CFE to purchase more power from private companies, strengthening its dependence on external generators. Furthermore, now independent generators could sell autonomously of the CFE, leaving it out completely. That kind of market is unacceptable to both López Obrador and Bartlett. The following sections take stock of the steps that the López Obrador administration and the CEO of the CFE have taken to reverse these changes.

Step 1—Toward Reducing Private Investment: The Electric Public Service Reliability Policy

The Electric Public Service Reliability Policy¹⁹ was the first of a sequence of actions implemented to exclude power generation companies from the electricity industry. Steps toward marginalizing private players ranged from administrative measures and the approval by the president's political party of a reform to the Electric Industry Law to, ultimately, initiating the constitutional reform submitted before Congress in September of 2021—which was eventually defeated in the 2022 Easter Sunday vote discussed above.

Justified by the COVID-19 pandemic, in May of 2020, Mexico's Department of Energy issued an administrative order that contained a binding agreement titled the "Electric Public Service Reliability Policy," which was specifically directed at privately owned renewable generation projects. According to the order, renewable energy sources did not operate under the necessary conditions to guarantee the integrity, reliability, and

¹⁸ Bloomberg New Energy Finance, "Mexico's second power auction results: Record low prices in Latin America," Research Note, October 4, 2016, https://data.bloomberglp.com/bnef/sites/14/2017/01/BNEF_MexicosSecondPower_SFCT_FNL_B.pdf.

¹⁹ "ACUERDO por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional," *Federal Official Gazette*, May 15, 2020, https://dof.gob.mx/nota_detalle.php?codigo=5593425&fecha=15/05/2020.

continuity of the electric service, and thus were to be barred from connecting to the transmission grid. Without any evidence, the government claimed that the intermittency of sun and wind generation could destabilize the nation's power supply, causing power outages for the 140 million Mexicans in need of reliable electricity and putting the nation's energy security at risk. Thus, from one day to the next, without warning, renewable energy plants were ordered to disconnect from the grid.

Renewable power companies had good reason to be alarmed. Besides the costs and burdens of being severed from the grid, the message was clear: Private companies were to be excluded from participating in the power industry. The effects of this were deep, especially considering that solar and wind facilities in Mexico are entirely owned and operated by private investors. It appeared that the administrative order was not really designed to increase reliability in the power supply and protect vulnerable Mexicans from power outages during the pandemic, as was claimed. Instead, it appeared to be an initial warning that privately owned power projects could be shut down indefinitely.

This policy was challenged in court, and hundreds of *amparos* and/or injunctions were awarded by federal judges, which ended in a stoppage of the administrative order's application.²⁰ However, the president was not deterred and decided to employ greater legal force by submitting a bill to reform the Electric Industry Law for the same effect.²¹ If governing by decree was not going to work, then the president was going to get his party, MORENA, which had a majority in both chambers of Congress, to make it law.

Step Two—The Reform to the Electric Industry Law

The legislative changes the president sent to Congress were, predictably, approved. The amendments to the Electric Industry Law were much wider in scope and deeper in effect than the aforementioned administrative order issued under a presumed concern for power reliability. Still in force even after several constitutional challenges before the Supreme Court,²² the Electric Industry Law is clearly about making the CFE the centerpiece and leader of the power industry and substantially hindering market competition in the sector. This is deduced from examining its content.

²⁰ Diana Nava, "Hay más de 170 solicitudes de amparo contra medidas de Sener, CFE y Cenace: CCE," *El Financiero*, June 26, 2020, <https://www.elfinanciero.com.mx/economia/hay-mas-de-170-solicitudes-de-amparo-contra-medidas-de-sener-cfe-y-cenace-cce/>.

²¹ Carlos Ochoa and Aldo González, "México Presenta Iniciativa para Reforma la Ley de la Industria Eléctrica," *Holland & Knight*, February 3, 2021, <https://www.hklaw.com/es/insights/publications/2021/02/mexicos-congress-to-vote-on-electricity-reform-bill>.

²² Rubén Zermeño, "Tormenta de recursos legales contra reforma eléctrica," *Reporte Índigo*, March 25, 2021, <https://www.reporteindigo.com/reportes/tormenta-de-recursos-legales-contra-reforma-electrica/>.

To begin with, the Electric Industry Law, as approved by Congress, bars the CFE from purchasing power through public auctions. In terms of Article 134 of the Constitution, government purchases must be made at the lowest costs available and by way of competitive bids. Bartlett claimed that these auctions were a corrupt mechanism, aimed at weakening the CFE by forcing it to purchase power from foreign companies at higher costs. This was so even in the face of evidence showing that power prices offered in the sector were the lowest in Latin America.²³ Indeed, Bartlett's arguments are inconsistent with evidence from international power market prices. With offers as low as \$20 per kilowatt-hour, Mexico stands out in Latin America for having the cheapest energy for the CFE.²⁴ The discrepancy between Bartlett's arguments and publicly known market-driven tariff rates leads to the conclusion that the real reason behind the elimination of power auctions was to ensure that the CFE purchases power from its own plants, instead of relying on a competitive market that lowers prices without government intervention. Further, aside from hydroelectric and one nuclear power plant, the CFE does not own any facilities with zero emissions, which compromises Mexico's domestic and international climate change commitments.²⁵ Indeed, to generate electricity, the CFE has resorted to burning fuel oil, which has resulted in higher pollution levels in and around Mexico City. Finally, the lack of public auctions hinders transparency, since without them, it will be difficult—if not impossible—to ascertain how efficient the CFE's internal power purchase transactions are.

Although there is evidence that independent power providers can supply cheaper and even cleaner energy, Bartlett argues that no electricity generator is able to provide better conditions than the CFE's own generation facilities. To conform to this view, Article 4, Section VI of the amended Electricity Industry Law alters the electricity dispatch²⁶ order priority for supply as follows: 1) The CFE's hydroelectric plants come first; 2) other CFE facilities come second; 3) renewable energy generators come third; and 4) privately owned combined cycle plants are last. The most evident change in the way power will be injected into the grid is that it gives utmost priority to the CFE as a generator, disregarding economic, technical, environmental, and social consequences.

²³ Aside from Article 135 of the Constitution, in terms of the Electric Industry Law and its regulation, the CFE must dispatch the power in accordance to the lowest cost possible. The results of the most recent auctions that took place during the Peña government favored solar and wind projects, as no other power source offered such low prices. See Bloomberg New Energy Finance, "Mexico's second power auction results."

²⁴ Ibid.

²⁵ Iván Santoyo, "El Impacto de la Reforma Eléctrica en el Acuerdo de Paris," Lofton Servicios Integrales, March 4, 2021, <https://loftonsc.com/blog/comercio-externo/reforma-electrica-y-acuerdo-de-paris/>.

²⁶ IMCO (Instituto Mexicano para la Competitividad), "Cambiar El Criterio De Despacho Del Mercado Eléctrico Mayorista Abona A Un Entorno De Incertidumbre En Detrimento De La Competitividad Del Sector Y Del País," November 8, 2020, <https://imco.org.mx/cambiar-el-criterio-de-despacho-del-mercado-electrico-mayorista-abona-a-un-entorno-de-incertidumbre-en-detrimento-de-la-competitividad-del-sector-y-del-pais/>.

And, by placing private generation in last place, which may violate their rights, it is questionable that this ranking of priorities satisfies the needs of all types and sizes of consumers. In the course of the Peña Nieto administration, several of the CFE's generation plants were turned off because they were deemed obsolete and generated too much pollution.²⁷ However, the López Obrador government appears willing to power up such plants in order to exclude private investors and meet power demand.

In terms of the legal certainty required by investors, another alarming aspect of the legislative change to the Electricity Industry Law is that it empowers the Energy Regulatory Commission or CRE to terminate permits for self-use projects that it deems illegal.²⁸ The CRE is staffed by loyalists to López Obrador, who may be willing to do the president and Bartlett's bidding. Thus, the law awards the CRE exceptional powers within Mexico's institutional framework. In other contexts and times, these powers would belong to the judiciary. That is, in general, a permit granted to a company could only be terminated as a result of due process in court and only after clear and convincing evidence of illegal activity is provided by the affected party, who is also subject to legitimate standing in the trial. Now, the CRE can do this without having to go to court. Moreover, the reformed law fails to establish who can initiate this action, on what grounds, and even a set of fair rules of procedure to suspend permits. The CRE makes all these decisions—adding enormous uncertainty for investors who are at their mercy.

Furthermore, contrary to well-recognized practices that help to reduce greenhouse gas emissions, Article 126 in Section II of the new Electricity Industry Law allows the CFE's older projects to acquire clean energy certificates.²⁹ It does this not by ensuring that they produce clean energy, but by eliminating the requirement that such projects are built after 2014 and operate with certifiable clean technologies.³⁰ These certificates were created as an incentive to develop cleaner energy plants, but the CFE has not invested in such plants—and now it does not have to.³¹ Consequently, according to analysts, a sharp increase in the supply of these certificates will allow the CFE's older plants to be traded, which will reduce their value dramatically.³²

²⁷ Such is the case for power plants that run on fuel oil and/or coal, thereby generating expensive and polluting electricity. *Ibid.*

²⁸ This is set forth in Transitory Article 4.

²⁹ Article 126, Section II of the amended Electric Industry Law.

³⁰ IMCO, "Cambiar El Criterio De Despacho."

³¹ *Ibid.*

³² *Ibid.*

As happened with the administrative order overturned by federal judges through various lawsuits, the amended articles of the Electric Industry Law were challenged in the Mexican courts. As with the administrative order, hundreds of injunctions were awarded as the amendments were ruled to violate constitutionally protected anti-trust, environmental, investment, and human rights.³³ This led both the president and Bartlett to believe that, if they wanted to change the industry model and lock in those changes, they needed to present a reform to the Constitution itself. And so, they tried.

Step 3—The Constitutional Amendment

Before returning to a discussion of the failed constitutional reform of the power sector, it is helpful to review the context of the current debate. Mexico held its midterm elections in June of 2021. These elections, to the president's own surprise, resulted in important changes in the lower chamber of Congress. MORENA, the president's party, lost the required qualified majority³⁴ to achieve any constitutional reform. Because changes to the energy sector were a priority of the López Obrador administration, it is perplexing that the president waited until after the midterm elections to push it through; he could have easily passed the reform prior to the midterms when his party held a two-thirds majority. Perhaps he was overconfident that his party would maintain a qualified majority in the Chamber of Deputies, or that it would even grow its numbers. But because that was not the case, he was forced to pressure an emboldened opposition to vote in favor of his bill.³⁵ It could also be that, as far-fetched as it may sound, his intention to amend the Constitution was a political move, not a genuine effort to change the industry model.

Regardless, to this day, several industry organizations in Mexico as well as the U.S. government estimate that total losses are at least \$10 billion in direct investment from U.S. companies alone.³⁶ Aside from these economic costs, there are the political costs. Although the president claims that foreign entrepreneurs and other wealthy Mexicans are not his voters and that he is unconcerned about the political costs of his policies, it is unlikely that he will strengthen his political leverage by alienating them. Historically, industrialists in Mexico have proven to have significant bargaining power when it

³³ Jon Martín Cullell, "Las claves de la ley eléctrica de López Obrador: un golpe a las renovables sin efectos inmediatos," *El País*, April 8, 2022, <https://elpais.com/mexico/2022-04-08/las-claves-de-la-ley-electrica-de-lopez-obrador-un-golpe-a-las-renovables-sin-efectos-inmediatos.html>.

³⁴ Payan and Grunstein, "Powerless: López Obrador's Failed Electricity Reforms."

³⁵ Ibid.

³⁶ This figure was stated in a letter by U.S. Trade Representative Katherine Tai to her peer in Mexico, Tatiana Clouthier, and it refers only to U.S. investment. "AMLO's energy policies put US \$10 billion in investments at risk, US warns," *Mexico News Daily*, April 5, 2022, <https://mexiconewsdaily.com/news/amlos-energy-policies-put-us-10-billion-in-investments-at-risk-us-warns/>.

comes to policy creation and implementation.³⁷ Additionally, the opposition saw an opportunity to set some political limits as well. President López Obrador stated that he would not allow his reform to be negotiated and watered down by political bargaining with the opposition. This hardened position, however, meant that his initiative's standing with the PRI, PAN, and PRD, whose votes he now needed, was precarious from the beginning. As the vote on the constitutional reform in the lower chamber approached, all three parties (PRI, PAN and PRD),³⁸ plus the MC, formed a legislative coalition and voted against it—handing the president a major political defeat. When the bill was submitted, only PAN and the PRD were categorically opposed. Again, the PRI was the weakest link, but in the end, it too helped defeat the bill.³⁹

What Was in the Constitutional Reform Bill?

As for its contents, the reform can be summarized as follows: The CFE was to become the dominant, if not monopolistic, utility company in Mexico by the application of the following restrictive measures. First, *at least* 54% of national power generation was to be produced by the CFE, while including the participation of *not more than* 46% of private companies.⁴⁰ Both the CFE⁴¹ and *Petróleos Mexicanos* (Pemex) would go from being considered state-owned companies to becoming agencies with constitutionally protected autonomy.⁴² This change would have been significant when establishing relationships with third parties, as contractual engagements with government agencies

³⁷ See Ricardo Tirado, “El Poder de las Cámaras Industriales,” Doctoral Dissertation, Foro Internacional Colmex, 2006, <https://forointernacional.colmex.mx/index.php/fi/article/view/1796>.

³⁸ Payan and Grunstein, “Powerless: López Obrador's Failed Electricity Reforms.”

³⁹ Méndez, “Ordena el PRI votar contra la reforma eléctrica.”

⁴⁰ This percentage was established in the proposal to reform Article 25 of the Constitution.

⁴¹ As it was greatly empowered by this reform, the CFE is the most likely government organization to nullify and revoke the permits. If it is approved as is, it will go from being a state-owned company to a “super-agency” enabled by the Constitution to set its own rules, regulate others, and pick companies that will be able to be part of the 46% of the generation allowed by private companies. In this scheme, the CFE will be the one to choose its generators directly without a competitive process, while other players will be expunged from the electricity market. See Joel Tonatiuh Vázquez Pérez, Adrián García Gómez, and Carlos Vázquez Vidal, “Iniciativa de Reforma Constitucional en Materia Eléctrica: Potenciales consecuencias en las finanzas públicas,” Centro de Investigación Económica y Presupuestaria, AC, <https://ciep.mx/lKmW>.

⁴² Ibid.

are very different from those between companies.⁴³ Between companies, there is room for bargaining, but when entering into a contract with an agency, it must be by way of an administrative contract in which there is no margin for negotiation, as many such provisions are “public policy” and must be a part of the contract.

Second, the CFE would have been vertically reintegrated, reversing the legal separation of the CFE into affiliate companies (e.g., generation, distribution, retail, etc.), which was the outcome of the 2013 reform.⁴⁴ Having one integrated company would have created barriers to entry for other players, as the CFE's generation facilities would have enjoyed preference for its transmission lines, leaving lesser capacity to other generators. This would hinder competition in the electricity industry as no other utility company may be vertically integrated by law, since transmission and distribution lines can only be owned by the CFE.

Third, the reform proposed the elimination of all energy regulatory agencies, which is consistent with both the ideological penchants of the president and his desire to strengthen Pemex and the CFE. The constitutional reform bill, in fact, proposed that the regulatory powers currently held by the CRE and the National Hydrocarbons Commission (CNH) be exercised directly by the Department of Energy (SENER), which would have given the state-owned energy agencies preferential treatment as industry players, in addition to blurring all distinctions between policy, law, regulation, and market participation.

Finally, the regulatory bodies were not the only ones to be eliminated under the proposed constitutional reform. One of the most alarming aspects of this power sector reform was the escalation of the attacks on private projects. While the earlier legislative reform allowed the cancellation of self-use permits, which were deemed illegal, the constitutional reform would have allowed the early termination of any type of generation permit held by private investors for the same arbitrary reasons.⁴⁵ Worse, the reform offered no clarity as to who would be the authority in charge of initiating permit cancellation procedures or the reasons why a permit could be deemed illegal. Another critical aspect, which aggravates the legal uncertainty for companies, was the absence of clear rules of procedure that lead to termination. In all, the change would have been terrible for the sector.

⁴³ Ana Lilia Moreno, “La reforma energética de México: 3 riesgos para los inversores,” *America's Quarterly*, February 7, 2022, <https://www.americasquarterly.org/article/la-reforma-energetica-de-mexico-3-riesgos-para-los-inversores/>.

⁴⁴ The proposed amendment was to Article 25 of the Constitution.

⁴⁵ Moreno, “La reforma energética de México.”

A Plateau: An Open Parliament Discussion

Once this constitutional reform proposal was presented to Congress, there was a reasonable expectation that the PRI, which had spearheaded the 2013 reform, would refuse to vote in favor of it, given that it would mean the dismantling of a policy it supported under President Peña Nieto. But it was not altogether clear that they would go against it. At first, as already mentioned, opposition to the reform came from PAN and the PRD, but not from the PRI. From the beginning, the PRI stated that it was open to negotiation on the terms of the reform, although the reasons behind this willingness are unknown. It was not until April 10, 2022, a week before the discussion in the Chamber of Deputies, that the PRI leadership summoned all its party members and instructed them to vote against the reform.

Despite President López Obrador's statement that not a comma could be changed to the proposal, his political party understood that it would need some opposition votes if it was to pass. Thus, with the understanding that they did not have the votes required, MORENA (the president's party) sought to buy time to negotiate with the opposition. In January of 2022, the Joint Commission of Political Coordination of the Chamber of Deputies issued a call for an "open parliament" debate engaging individuals from academia, NGOs, industry and any other interested parties.⁴⁶ The open parliament discussions lasted nearly two months and comprised 26 panels, which covered a rather wide scope of topics—from very technical ones, such as the cost-benefit analysis of the CFE's power production contracts, to highly ideological issues, such as the relationship between a heightened national identity and the social merits of supporting the CFE over any other company.⁴⁷

The announced purpose of the open parliament panels was to engage civil society with legislators to enrich decision-making by providing technical information. But several observations can be made about the usefulness of these discussions. For one, it is questionable how "open" it really was, as no open call for public participation was made, nor was there any established or transparent procedure to be chosen as a panelist. Most participants were invited to make statements. For this reason, there were marked differences in the levels of expertise shown by the panelists. While some presentations were supported by well-grounded arguments and solid data, others were used to deliver political messages and even to attack specific people.⁴⁸

⁴⁶ Cámara de Diputados, "Foros de Parlamento Abierto," <https://www.diputados.gob.mx/parlamentoreformaelectrica/foros.html>.

⁴⁷ Itzel Arizbeth Castillo, "Realidad rebasa ideología de CFE contra energías renovables: Víctor Ramírez," *MVS Noticias*, May 1, 2021, <https://mvsnoticias.com/podcast/2021/1/6/realidad-rebasa-ideologia-de-cfe-contra-energias-renovables-victor-ramirez-530294.html>.

⁴⁸ Miriam Grunstein, "En Energía: ni Parlamento, ni Abierto, sino todo lo contrario," *Expansión*, January 28, 2022, <https://expansion.mx/opinion/2022/01/27/energia-ni-parlamento-ni-abierto-todo-lo-contrario>.

Another issue was the polarized format of the discussions. From the start, to participate, panelists had to choose between being for or against the reform, with no option to take a moderate or nuanced position.⁴⁹ Panelists had to make categorical statements that could last no longer than 10 minutes, after which questions by legislators followed. In several cases, short presentations provided insufficient elements for a discussion that could not go beyond elementary arguments and superficial analyses of data concerning costs of service, pricing mechanisms, the CFE's revenues, and other relevant numbers.⁵⁰

Finally, the transcription of the open parliament deliberations, comprising almost 3000 pages, is hard to read, making the information of little use to interested parties. Thus, despite the length and the intensity of the sessions, it is questionable whether they actually influenced the outcome of the congressional debate. No minds seem to have swayed based on the open parliament's deliberations. In fact, very little of the technical data presented in the open parliament sessions surfaced during the congressional session on April 17, in which the bill was rejected. Most of the arguments of the legislators were ideological and lacked technical and commercial arguments to support or reject the proposed reform.⁵¹ This leads to serious questions about the true purpose of the open parliament and whether it was useful at all from a rational policy perspective.

The Electric Industry Law in the Supreme Court

Companies and NGOs were not the only ones to file legal actions against the Electric Industry Law. On April 8, 2021, a group of PAN senators filed a constitutional challenge before the Mexican Supreme Court⁵² against these reforms as a result of the law's unconstitutionality.⁵³

They argued that the law restricts participation by private renewable projects, contravening the human right to a healthy environment for Mexicans. It was also argued that it violates Mexico's commitments to the Paris Agreement and other international legal instruments to combat global warming. Moreover, they argued that

⁴⁹ Ibid.

⁵⁰ Jon Martín Cullell, "Parlamento abierto sobre la reforma energética: una lucha por la narrativa sin claro vencedor," *El País*, February 28, 2022, <https://elpais.com/mexico/2022-03-01/parlamento-abierto-sobre-la-reforma-energetica-una-lucha-por-la-narrativa-sin-claro-vencedor.html>.

⁵¹ Ibid.

⁵² Partido de Acción Nacional, "Legisladores presentan Acción de Inconstitucionalidad en contra de las reformas a la Ley de la Industria Eléctrica," PAN LXV Legislatura, Cámara de Senadores, <https://www.pan.senado.gob.mx/2021/04/legisladores-presentan-accion-de-inconstitucionalidad-en-contra-de-las-reformas-a-la-ley-de-la-industria-electrica/>.

⁵³ Ibid.

it is detrimental to the development of dynamic market competition, because it infringes not only on domestic law, but also on international agreements such as the United States-Mexico-Canada Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The lawsuit further claimed that the reform to the Electric Industry Law violates the basic principles of legal certainty, rule of law, and non-retroactive application of a rule.

The constitutional challenge to the Electric Industry Law filed by PAN senators was discussed and voted on April 5 and 7, 2022, in a plenary session of the Mexican Supreme Court. According to the rules, for a law to be declared unconstitutional as a result of a legitimate challenge to it, eight out of the court's 11 justices have to agree.⁵⁴ The prior-to-the-vote review and ruling recommendation of a challenge to a law is usually assigned to one of the justices according to an order of burden distribution stipulated in the court's internal administrative rules. This review has originally been assigned to Justice Fernando Franco. But as a result of the end of his term (justices serve for a total of 15 years in Mexico's Supreme Court), the review was handed over to the justice who replaced him, Loretta Ortiz Ahlf, who happens to be President López Obrador's most recent appointment.⁵⁵ The review took a year, which created great uncertainty and heightened expectation, given the interests that the ruling could impact. In effect, both domestic and international investors eagerly awaited the ruling, as \$44 billion worth of direct investment was at risk.⁵⁶ While waiting for the ruling, uncertainty in the electricity sector continued to increase due to additional appointments of Supreme Court justices made by President López Obrador. The president's appointees revealed his apparent preference for loyalty and ideology above competence and neutrality. In fact, the justice in charge of reviewing the case and drafting the recommendation ruling, Loretta Ortiz Ahlf, was a member of the president's party, MORENA, and a former Congress woman who voted against the 2013 energy reform. It was generally believed that her recommendation would validate the changes to the Electric Industry Law by declaring them constitutional. A similar case is that of Justice Yasmín Esquivel Mossa, the president's appointee and a member of his close circle of partisans. However, the most controversial of all members of the

⁵⁴ See Article 43 of the Regulatory Law and Sections I and II of Article 105 of the Constitution.

⁵⁵ Senado de la República, "Designa el Senado a Loretta Ortiz Ahlf como ministra de la SCJN," Senado de la República, Comunicación Social LVX Legislatura, November 23, 2021, <https://comunicacionsocial.senado.gob.mx/>.

⁵⁶ See the conference with Carlos Salazar Lomelín, chairman of the Coordinating Council of Entrepreneurs (CCE), in Alejandro Alegría, "Se pone en riesgo el capital privado, afirma el CCE," *La Jornada*, October 6, 2021, <https://www.jornada.com.mx/2021/10/06/politica/007n2pol>.

Supreme Court is Chief Justice Arturo Zaldívar, whose independence from the president has been questioned publicly due to his close relationship with López Obrador. Despite not being appointed by López Obrador, Justice Zaldívar did become chief justice in 2019 with the president's full approval.⁵⁷ Thus, it was likely that his vote would be in favor of declaring the law constitutional, either in whole or in part.

The justices that had been appointed during previous administrations—Luis María Aguilar Morales, Javier Laynez Potisek, Jorge Mario Pardo Rebolledo, Alfredo Ortiz Mena, Alberto Perez Dayan, and Norma Lucía Piña Hernández—were expected to rule against the constitutionality of the law, or at a minimum, to rule against the changes made by legislators that had been proposed by the president. Some hard-to-predict votes were those of Justices Margarita Ríos Farjat and Juan Luis González Alcántara Carrancá, who, despite having been presidential appointees, have so far shown significant independence in different rulings.⁵⁸

In view of the complex composition of the Supreme Court, it was unlikely that there would be a clear division between those for and against the reforms. This added to the uncertainty, as many waited for the final ruling. The streaming of the sessions served as evidence that, in the mind of most justices, there were more doubts than certainties regarding the validity of the changes to the Electric Industry Law. In the end, there was no consensus among the justices for or against the reform as a whole, and the procedure resulted in the dismissal of the lawsuit—with no ruling on the substantive content of the law itself. That is, the lack of the required majority of votes one way or the other left the changes to the law standing by default, as if it had never been challenged by the Senate. If anything, the justices only agreed to disagree.

Powerless: The Defeat of the Constitutional Reform in Congress

The constitutional reform voted down on Easter Sunday 2022 was the peak of the president's attempts to modify the electricity sector in favor of the CFE, to the exclusion of private companies, and to empower the state with more centralized controls. As previously discussed, regulatory agencies, which until this administration had enjoyed at least some independence from the president, such the CRE and the CNH, would have been eliminated had the constitutional reform bill passed. Further, Pemex and the CFE, instead of being state-owned companies, would have become self-regulated state agencies, with legal force to impose conditions on their contractual parties and even other government organizations.⁵⁹ On the private side, the CFE would have harnessed at least 54% of the power generation, and as a result, private permits “found to be illegal” would have had to be terminated to make space

⁵⁷ José María Lujambio and Antonio Riojas, “Alta tensión en la Suprema Corte,” *Nexos*, April 4, 2022, <https://eljuegodelacorte.nexos.com.mx/alta-tension-en-la-suprema-corte/>.

⁵⁸ *Ibid.*

⁵⁹ Moreno, “La reforma energética de México.”

for the CFE's expansion. To add to legal uncertainty, in the bill submitted by the president, there is no mention of which specific agency would be in charge of terminating those permits and contracts. As the reform ended up in defeat, the CRE, it is to be assumed, would be the agency in charge of terminations instead of either SENER or the CFE.

Besides causing a sharp decrease in competition and empowering the CFE with self-regulation and probably the legal power to terminate permits and contracts, there is a consensus among analysts who critiqued the reform that the CFE's older plants, as they exist today, would have been unable to meet Mexico's increasing electricity demand. Several of these facilities were even shut down during the previous presidential administration because of their environmental and economic costs.⁶⁰

The question of why the president waited until the second half of his term to try to make these substantial changes to the energy sector also remains. His decision to wait forced him to try a range of actions—from an administrative order to a legislative change to a proposed constitutional amendment. Why not start with the constitutional amendment in the first place? As Payan and Grunstein state, “It remains a puzzle why the president did not present his proposal to change the constitution during the first three years of his six-year term, when he had the votes needed in Congress to pass such a bill. Regardless, he waited until April of 2022, after the 2021 midterm election had deprived him of the right numbers in the lower house of Congress.”⁶¹ It is hard to understand the president's decision, but there are several hypotheses, already mentioned above, that could help explain this. As time goes by, it is likely that there won't be any changes to the electricity sector during this administration—which only adds uncertainty to an already complicated scenario.

One explanation for the president's decision to wait is that the ruling of the Supreme Court regarding the constitutional challenge filed by the Senate was unlikely to gather eight votes to declare the law unconstitutional, and the president knew that. These amendments were already sufficiently restrictive to hinder the operations of private generators by applying the dispatch order that gives preference to the CFE in any event. Or, more alarmingly, investors would be scared away anyway by the continuous threat of the CRE to terminate contracts and permits. With or without a constitutional amendment, the powers given by the Electric Industry Law to both the CRE and the CFE would render their operations inviable. In other words, although it is true that companies can still bring challenges before federal courts, there may come a time when desertion is a better option than litigation, either in domestic courts, commercial arbitration, or, in the more serious cases, by way of investor-state arbitration.⁶²

⁶⁰ Víctor Florencio Ramírez Cabrera, “El imposible despacho eléctrico,” *Nexos*, March 11, 2021, <https://www.nexos.com.mx/?p=54032>.

⁶¹ Payan and Grunstein, “Powerless: López Obrador's Failed Electricity Reforms.”

⁶² Although the risk of desertion is plausible, Payan and Grunstein believe that “Most companies that have already invested in the power sector in Mexico will likely go into a holding pattern

Without a constitutional change, however, the law may be reversed more easily in the future. Even if a MORENA candidate wins the next presidency, it is unlikely that it will control Congress to the extent it did during the 2018-2021 period. Thus, if a coalition is pieced together to reverse the legal restrictions set in the Electric Industry Law—as it did to stop the constitutional change—a significant rebalance of power is possible by removing the ability of the CRE and the CFE to act arbitrarily against private companies. Also, López Obrador's commissioners will not hold their positions forever. Within the next five years, a complete rotation of these officers will take place. In the future, Mexican policymakers should seek stricter measures to force commissioners to abide by the rule of law.

Even so, until the legislative changes to the Electric Industry Law are reversed, and regulatory commissions are strengthened to resist presidential coercion, Mexico cannot be considered a safe haven for investment in the power industry. Clearly, the Easter Sunday vote was a severe political defeat for López Obrador and his ambition to recapture control of what was becoming an increasingly competitive market until 2018. But what's more important is the fact that the opposition united solidly against his reform, which speaks of a disciplined vote. This sets the stage for the 2024 presidential election, which may be more competitive than anticipated just a few months ago. As López Obrador cannot stand for reelection, his party's candidate will likely have to contend with a poor record in nearly every single policy issue in Mexico today.⁶³

until López Obrador is out of office in October 2024; some who may have been interested in investing in Mexico may either go elsewhere or also wait out the administration." Ibid.

⁶³ Ibid.