Notes on the Changes in the Procedure for Obtaining Electric Power Generation Authorizations in Brazil

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The technological advances that made it possible to increase electric power generation through wind and solar plants have also brought about a paradigm shift in the Brazilian electrical system: There is a growing integration of wind and solar plants into the system, which previously relied heavily on large hydroelectric and thermal power plants. Data provided by ANEEL shows that as of September 2023 approximately 19% of electric power generated in Brazil now comes from wind and solar sources.

Apart from technological advances, another factor driving the growth of wind and solar sources in the Brazilian electrical system has been government incentives. Various changes were made under article 26 of Law 9.427/1996 to offer discounts in transmission and distribution rates (known respectively as "TUST" and "TUSD" rates) for these alternative sources of electric power generation. One of the last, and perhaps the most significant, of the changes was made by Law 14.120/2021, which fixed an end date for TUSD and TUST discounts for wind and solar projects.

This change led various companies to apply to ANEEL for authorization for solar and wind power generation projects, based on ANEEL's Resolution 876/2020 (REN 876/2020), in a phenomenon that became known as the "Gold Rush," because of the large number of applications for authorization to generate electricity to be traded in the Free Negotiation Power Market (ACL – Ambiente de Contratação Livre).

This rapid expansion in the power generation portfolio has posed challenges for transmission, which has not been able to expand at the same rate as generation. Additionally, in some cases, with a view to securing TUSD and TUST discounts, applicants had not even carried out economic and financial feasibility studies projects before they sought ANEEL's approval for their projects.

Over time, ANEEL realized that many of these projects would not start commercial operation by the dates specified in their authorizations. The Agency therefore issued REN 1.065/2023, establishing the so-called "Day of Forgiveness." This regulation introduced an exceptional mechanism for handling power generation authorizations, involving either an amnesty (cancellation of the authorization and termination of the corresponding CUST[1] agreement) or bringing the authorization into good standing (postponement of the deadline for commercial operation).

Along with the Day of Forgiveness, ANEEL decided to modify certain aspects of applications for alternative source generation authorizations, and the procedure for accessing the transmission system, with a view to ensuring that applicants comply with the commitments made in the authorizations, and to streamline the authorization process.

To this end, ANEEL issued REN 1.069/2023 and REN 1.071/2023. The latter came into effect on October 1, 2023, and revoked REN 876/2020. Among the key changes in the authorization procedure, one of the most significant is that applicants must now demonstrate that they have a valid CUST or CUSD[2] at the time of application.

The new regulation also introduced changes to Module 5 of REN 905/2020, which deals with Transmission Service Rules. According to the new module, performance under CUST agreements signed by generators must commence within 36 months from the signing date, and can be postponed only once, as long as the monthly charge is paid for the extension period.

This is a significant change. Currently, performance of CUST agreements can be postponed indefinitely, as long as a request is made to the National Power System Operator (ONS – Operador Nacional do Sistma Elétrico) by the March 31st prior to the rate cycle for the originally contracted date, and no investments made in connection with the requested access have been put into commercial operation.

Under the new rules in Module 5 of REN 905/2020, when making access requests to the ONS, applicants must provide a financial guarantee proportional to the period covered by the related Access Report.3 Furthermore, when signing the CUST, the applicant must provide a new financial guarantee, in an amount equal to three years of EUST[4] charges.

Although the Access Report financial guarantee will be refunded upon presentation of the CUST guarantees, formerly financial guarantees were not required. This new condition will increase the cost of new projects, although they also make the authorization process more secure, if more stringent.

Another concern arising from these new regulations is that although the deadline for performance under CUST agreements is 36 months from the signing date, REN 1,071/2023 stipulates that all authorizations will now require all generating units of the authorized power plant to be in commercial operation within 54 months from the date the authorization is published. These conflicting deadlines mean that performance of the CUST agreement could begin before the project is operational.

The lack of detail as to the reasons that will justify extending the deadline for commercial operation of the project is another point of concern.

With these new regulations on procedures for power generation authorizations, ANEEL seeks to address past issues, principally by preventing applications for projects lacking technical and economic viability, which could overload the transmission system by forcing it to provide access for projects that might never become operational.

It remains to be seen whether the new regulations will effectively streamline the authorization process, providing greater clarity and legal certainty, and preventing legal disputes arising in part from the regulator’s changes in position on matters such as the deadlines for operation of solar power plants. Another question that only the future can answer is whether the new rules will make the authorization process prohibitively expensive, discouraging new projects in alternative electric power generation.

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NOTES

[1] The "Transmission System Use Agreement" (CUST – Contrato de Uso do Sistema de Transmissão) is the contract entered into between users (generators, distributors, authorized importers and/or exporters of electric energy, as well as consumers) and the National Power System Operator (ONS), representing the transmission companies. The agreement establishes the technical conditions and obligations related to the use of transmission facilities, which are part of the basic network. It includes the provision of transmission services under ONS's supervision, in addition to coordination and control services for the operation of the National Interconnected System – SIN.

[2] The "Distribution System Use Agreement" (CUSD – Contrato de Uso do Sistema de Distribuição) is the contract entered into between users and distributors. This agreement establishes the terms and conditions for using the distribution system, along with the corresponding rights, obligations, and operational requirements of the parties.

[3] The "Access Report" (Parecer de Acesso) is a document issued by the ONS in connection with access applications, and contains information on, and conditions for, access to the transmission system.

[4] "Transmission System Usage Charges" (Encargos de Uso do Sistema de Transmissão) are monthly charges payable to transmission companies for the provision of transmission services, and to the ONS for services rendered, calculated on the basis of contracted transmission system usage.

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