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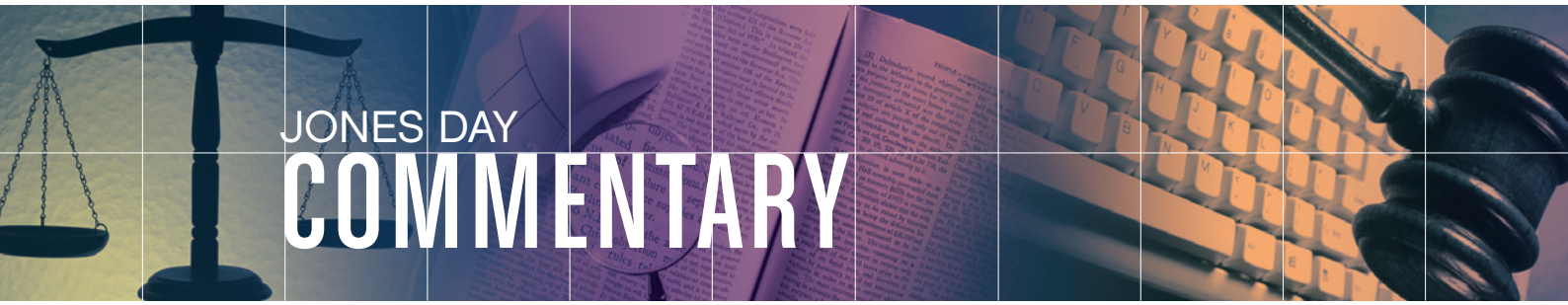

AMENDMENT TO THE ECONOMIC REGIME OF WIND AND THERMOSOLAR PLANTS

On December 8, 2010, Royal Decree 1614/2010 amending the economic regime of wind and thermosolar plants ("Royal Decree") was published in the Official Gazette (*Boletín Oficial del Estado*).

AIM OF THE ROYAL DECREE

The Royal Decree contains various measures that retroactively modify the economic regime of wind and thermosolar installations that are covered by Royal Decree 661/2007, which regulates the production of electricity under the special regime ("RD 661/2007"). These changes, which are the aim of this *Commentary*, complete the modifications recently introduced by Royal Decree 1003/2010, regulating the PV plants, and by Royal Decree 1565/2010, regulating and amending certain aspects of electricity production under the special regime ("RD 1565/2010").[1]

RETROACTIVE MEASURES TO REDUCE THE TARIFF DEFICIT

It is well known that the ultimate goal of the Government's amendments through these three latest royal decrees is reducing the tariff deficit, especially the contribution to it by the economic regime of the renewable plants. To that end, and in view of the magnitude of the deficit, it has not been enough for the Government to reduce the contribution by facilities to be commissioned in the future; it has been necessary to resort to measures that, although formally taken under the review system provided for in RD 661/2007, in practice imply applying retroactive effects to already commissioned facilities. These measures have obtained the green light from the CNE—whose main objection has been in fact the limited savings of these measures—and by the State Council, under the umbrella of the much-discussed case law of the Supreme Court

1 It is important to note that some of the changes introduced by the Royal Decree had appeared, albeit with different wording and effect, in the draft of RD 1565/2010, which the Government had sent to both the Council of State and the Spanish Energy Watchdog *Comisión Nacional de Energía* ("CNE") in late July. However, these changes were subsequently eliminated, granting them an independent process. While the CNE did have an opportunity to discuss these amendments in its report 24/2010, the Council of State did not in its opinion 2264/2010 but in the recent 2408/2010 opinion.

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concerning the "regulatory risk" under the legality test, as illustrated, inter alia, by its recent decision of December 9, 2010.

Although it can be argued that some of the changes introduced by Royal Decree do not meet the requirements established by the Supreme Court case law, it is certain that, beyond a discussion on the legality/illegality of the royal decrees, the developers of plants for which economic viability has been compromised by these modifications (as discussed below)[2] remain free to claim compensation from the Government for damages.

WIND FARMS

Reduction of Premiums. First, article 5.1 of the Royal Decree establishes that from January 1, 2011 until December 31, 2012, premiums of wind farms, including those with an installed capacity exceeding 50 MW covered by Royal Decree 661/2007, will be reduced by 35 percent over those contained in the Order 3519/2009 that revises access fees as of 1 January 2010, in addition to the tariffs and premiums of facilities under the special regime ("Order 3519"). This reduction does not apply to tariffs.

Although the Royal Decree formally introduces these premium reductions under article 44.3 of RD 661/2007, the final paragraph of article 43.3 clearly states that the revisions will not affect those installations with a start-up authorization dated before January 1, 2012. In practice, the Royal Decree constitutes a modification of RD 661/2007. The government could counter this argument by relying on a questionable interpretation of article 44.3 of RD 661/2007, which is that the non-revision of the economic system of installations with start-up authorizations dated prior to January 1, 2012 refers only to the tariff but not to premiums.[3]

Second, as indicated in article 5.2 of the Royal Decree, on January 1, 2013, wind farms will recoup the value of the premiums contained in Order 3519, as well as the corresponding updates, as established in article 44.1 of RD 661/2007. This implies, and is also confirmed by the last sentence of article 5.1 of the Royal Decree, that during 2011 and 2012, the premiums, in addition to suffering said reduction, will not be updated.

Third, the facilities with a definitive start-up authorization dated before January 1, 2008, i.e., those eligible under the First Transitional Provision of Royal Decree 661/2007, will not suffer from premium reductions (last paragraph of article 5.1), even though the premiums established under Order 3519 from January 1, 2013 will be applied to them, in accordance with the provisions of the First Transitional Provision of Royal Decree 661/2007 (last paragraph of article 5.2).

Fourth, article 5.3 of the Royal Decree provides that those facilities that have RAIPRE dated May 7, 2009 will be subject to the review of tariffs and premiums referred to in article 44.3 of RD 661/2007.[4] Those facilities that are pre-assigned under the Fourth Transitional Provision of Royal Decree Law 6/2009, adopting certain measures in the energy sector and approving the social bond ("RDL 6/2009"), will also be subject to the review of tariffs and premiums referred to in article 44.3, provided that they obtained the RAIPRE within 36 months from the date of notification of pre-assignment

Extraordinary Call. In accordance with article 6, an extraordinary call has been established for pre-assignation of 300 MW for those plants that bear the start-up authorization before May 1, 2010, but were not pre-assigned in accordance with the contents of the Fourth Transitory Disposition of RDL 6/2009. The plants that request pre-assignation and provide documentation as proof that they are in compliance with the requirements set out in article 4.3 of RDL 6/2009 will have to choose, before February 9, 2011, between one of the following remuneration options: (i) to sell at market price until December 31, 2011 and,

2 Some of these changes require further development and/or clarification due to the fact that, as discussed in this *Commentary*, their meaning remains unclear.

3 We say "questionable" because, although a similar interpretation was made by the State Council in its 2408/2010 opinion, the referenced paragraph falls under section 3, which refers to "the revision of tariffs, premiums and allowances," which in turn falls under Article 44 titled "revision of tariffs, premiums and allowances."

4 It is possible to interpret that, with this provision, the Royal Decree does not excludes these facilities from the premium reduction of 35 percent provided for in article 5.1 (*i.e.*, article 5.3 of the Royal Decree clearly states, "notwithstanding the provisions of this Royal Decree"), but instead anticipates that the future four-year revisions do not affect them. However, it is not clear that this warranty will be sufficient to prevent the Government from modifying it in the future (*i.e.*, that the revision of premiums, which will take place in 2014, will apply) since the same case law of the Supreme Court, which now calls to justify the changes, retroactively introduces the Royal Decree and could be used in future to argue for a revision of these hours. This can be inferred from the Sate Council 2408/2010 opinion.

from January 1, 2012, to choose the tariff option, receiving that established in RD 661/2007 or (ii) to sell at market price until December 31, 2012 and, from January 1, 2013, to choose the market option completed by the premiums referred to in article 5.2 of the Royal Decree.

Limitation of Premium Entitled Hours. By way of paragraphs 2 and 4 of article 2 of the Royal Decree, the number of hours with the right to obtain premiums are limited to 2,589 hours/year, but only if the average annual hours of all of the plants with final RAIPRE, and without taking into consideration the plants that were subject to a substantial modification after December 9, 2010, exceed 2,350 hours/year.[5] That is to say, if 2,350 hours/year are not surpassed, the hourly limitation will not be applicable. For those plants that had RAIPRE on May 7, 2009 and for those pre-assigned in accordance with the Fourth Transitory Disposition of RDL 6/2009 (provided that these obtained the RAIPRE within 36 months from the date of notification of pre-assignment and that they are not subject to a substantial modification), the values of 2,350 and 2,589 hours/year will not be revisable "during their operational life."[6]

It may be argued that RD 661/2007 does not recognize a developer's right to a minimum of hours of production and that the Government supports this limitation. However, the fact remains that article 17, letters a) and b); and article 24.1 of RD 661/2007, developing article 30.2.a of the Electricity Act 54/1997, recognize the right of producers within the special regime to transfer all the electricity produced, under the sole condition that its absorption into the network is technically feasible. In addition, it is worth noting that this system presents some level of uncertainty, which in turn hinders its financial planning, as the developer will not know if it exceeds the average (article 2.6 of Royal Decree) until the next year, which will be when CNE claims the refund of the premiums the developer received for the equivalent hours.

THERMSOLAR PLANTS

Suspension of the Market Option. Firstly, with regard to this technology, article 3.1 of the Royal Decree prevents plants from opting for the market option during their first year of operation; in other words, they are forced to choose the regulated tariff option. Those facilities with a start-up authorization obtained prior to December 9, 2010 will move onto the fee option from January 1, 2011 until December 31, 2011. However, these facilities will be allowed to increase their fuel use from 10 percent, as established under article 2.2 of RD 661/2007, to 15 percent as provided in article 2.3 of the Royal Decree.

Secondly, in accordance with article 4 of the Royal Decree, those installations that have the RAIPRE dated May 7, 2009 will be excluded from the system of revision of tariffs and premiums under article 44.3 of RD 661/2007, applying the comment made previously on the modification established in last paragraph of article 44.3 of RD 661/2007.[7] The same applies to those that are pre-assigned pursuant to the Fourth Transitional Provision of RDL 6/2009, provided that they obtained the RAIPRE[8] within 36 months from the notification of pre-assignment.

Limitation of Premium Entitled Hours. For thermosolar technology, as well as for wind farms, pursuant to paragraphs 2 and 3 of article 2 of the Royal Decree, numbers of hours with the right to obtain premiums are limited from 2,350 to 6,450 hours/year, depending on the technology used. Also for this technology, the hours are not reviewable "during its operational life" for those facilities with a RAIPRE dated May 7, 2009 and for those indicated under the Fourth Transitional Provision RDL 6/2009, provided that they have obtained the RAIPRE[9] within 36 months from the notification of pre-assignment, restating here the comments made previously with respect to wind technology.

5 While this limitation of hours is, on paper, a substantial alteration, it should be noted that CNE in its 24/2010 report expressed doubts about the real impact of the practice, stating, "There is evidence to suggest that in the past seven years the proposed limitation would not have been applied and in 2010, despite having been a windy year, it would be at the limit of application" (p. 24).

6 As indicated above, it is unclear whether the statement in the Royal Decree regarding the maintenance of these values throughout the operational lifetime of the facility is sufficient to prevent the Government from modifying it in the future, since the same case law of the Supreme Court, which now calls to justify the changes and retroactively introduces the Royal Decree, could be used in the future to argue for a revision of these hours. This can be inferred from the State Council 2408/2010 opinion.

7 However, although this provision is similar to those established regarding wind farms, it should be indicated that the Royal Decree does not contain any review of the economic system of solar thermal installations in accordance with article 44.3 of RD 661/2007. Therefore, given that the changes of the economic system under article 3 of the Royal Decree were introduced, one could assume that the Government has not considered said review necessary, since the object of article 4 is to exclude the facilities identified herein from the next four-year review.

8 However, the deadline to obtain the RAIPRE extends to December 31, 2013 for the facilities caught by Phase 4 under the Agreement of the Ministers Council of November 13, 2009.

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