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## Supreme Court Sides with Fox on Private Contracts for Electrical Power

by LADB Staff

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In a victory for President Vicente Fox, Mexico's high court (Suprema Corte de Justicia de la Nacion, SCJN) has ruled that the federal government can continue to award permits to private companies to generate electricity in Mexico. The court decision came in a narrow 6-5 vote, with Chief Justice Mariano Azuela casting the deciding vote.

Fox brought the issue before the courts in response to a report published by the congressional auditing agency (Auditoria Superior de la Federacion, ASF) in May 2004. The report listed "irregularities" in dozens of private permits awarded during the administration of former President Ernesto Zedillo (1994-2000) and during Fox's term in office. The ASF report prompted opposition parties in Congress to attempt to void the private contracts approved during both administrations (see SourceMex, 2004-06-02).

Fox responded by bringing the issue before the SCJN. In the filing, presented to the court in May 2004, the president held that the ASF had no faculties under the Constitution to determine the legality of the contracts.

### *Narrow decision*

A narrow majority of the justices agreed with Fox's position, including Azuela, Sergio Aguirre Anguiano, Margarita Luna Ramos, Juan Diaz Romero, Jose de Jesus Gudino Pelayo, and Guillermo Ortiz Mayagoitia. Speaking for the majority, Diaz Romero said the justices concluded that the ASF, while given great latitude in financial and budget-related recommendations, did not have the right to decide whether an action complied with the letter of the law. "[The ASF] cannot take a position on whether an administrative decision is legal or illegal or whether it complies with the Constitution," Ortiz told reporters.

Five justices, Jose Ramon Cossio, Genaro Gongora Pimentel, Sergio Valls Hernandez, Olga Sanchez Cordero, and Juan Silva Meza, dissented. The dissenters had no comment on their position, except for a brief statement by Justice Cossio. "We feel the ASF does have the right to comment on whether an action is legal," he said. The court ruling applies only to those private companies that generate electricity for their own use or to sell to other private entities.

Private companies generate about 20% of Mexico's electricity, indicate statistics published by the Secretaria de Energia (SENER). In 2001, Fox floated a proposal to allow private companies to sell excess electricity to the Comision Federal de Electricidad (CFE), the largest of the two state-run electric utility companies. The Congress immediately challenged that proposal as unconstitutional (see SourceMex, 2001-07-18).

In 2002, the courts sided with the Congress, forcing Fox to abandon the plan (see SourceMex, 2002-05-01). Government, private providers pleased with court decision As expected, the Fox administration and an association representing private utility companies in Mexico applauded the SCJN decision. "There was uncertainty regarding these electricity contracts, which was a factor that was hindering investments," Energy Secretary Fernando Elizondo said in a radio interview. "Fortunately, this uncertainty has now been removed."

Similar comments came from the Asociacion Mexicana de Energia Electrica (AMEE), which noted that the ASF could not regulate matters involving private contracts. "The only way that the ASF can intervene now is to question any aspects of the budget allocated by Congress to help finance private projects," said AMEE president Eduardo Andrade.

### *Congressional critics worry about precedent*

Sen. Oscar Canton Zetina, a member of the former governing Partido Revolucionario Institucional (PRI), raised concerns that the ruling waters down the effectiveness of the ASF. "This decision is a hard blow against the auditor because it can no longer make legal observations to private companies," said Canton.

Canton and fellow PRI Sen. Manuel Bartlett Diaz have led opposition to efforts by the Fox administration to introduce private capital into Mexico's energy sector. The two senators have joined three colleagues in filing a lawsuit to stop the state-run oil company PEMEX from awarding contracts to private companies to conduct natural-gas exploration and extraction activities in northeastern Mexico.

Known as multiple-service contracts (contratos de servicios multiples, CSM), these instruments were first used by the Fox government in late 2003 (see SourceMex, 2003-07-23). The CSM program initially attracted strong interest, with private companies from several countries participating (see SourceMex, 2003-10-29 and 2004-01-28). The program is going through an uncertain period, however, because of waning interest from foreign companies in bidding for the contracts (see SourceMex, 2005-03-16).

Further uncertainty is tied to a recent ASF report, which cited ambiguities in the legal structure of the contracts. Unlike the pronouncement on the private electricity contracts, however, the congressional auditing agency did not question the constitutionality of the CSMs. Still, the ASF's legal concerns were sufficient for the Fox administration to suspend any decisions regarding multiple-service contracts for natural gas in the foreseeable future.

Sergio Guaso, director of the CSM program, said PEMEX is working to make the necessary corrections to comply with the ASF recommendations. "These types of contracts, of course, are legal," said Guaso. "But we do want to ensure that we cover all the legal loopholes before we place any more natural-gas projects up for auction."

Guaso said the ASF ruling would not affect projects already in place but raised some concerns that the ruling could further dissuade future participants. "[The ruling] represents more 'noise'

for investors," Guaso said. The administration is pushing for a quick clarification of the contract ambiguities, hoping to expand the CSM model to other oil and gas projects.

PEMEX director Luis Ramirez Corzo said the company is especially looking for foreign companies to participate in two exploration and extraction activities. One project involves extraction of deep-sea reserves of natural gas in the Lankahuasa fields in the Gulf of Mexico. The second would involve exploitation of inland reserves of crude oil in the Chicontepec region in Veracruz state. "Even though we believe we are prepared for these projects, we cannot go forward until the market is confident that we have the necessary legal certainty," said Ramirez Corzo. "Only then can we attract private entities to these projects." (Sources: El Financiero, 04/06/05; La Cronica de Hoy, 04/07/05; Agencia de noticias Proceso, Spanish news service EFE, 04/12/05; El Universal, 03/14/05, 04/06/05, 04/13/05; La Jornada, 04/06/05, 04/13/05; La Crisis, Bloomberg news service, 04/13/05)

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