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OIL AND GAS

New Gas Law enacted

APRIL 18, 2021

The New Gas Law (Law No. 14,134, of April 8, 2021) was enacted, with the perspective of modernizing and accelerating the development of the natural gas sector in Brazil. It replaces the previous Gas Law, of 2009 (Law No. 11,909), criticized for, in one hand, excessive state intervention in the granting of activities, and, on the other hand, insufficient protection to the competition.

See below the main points of the New Gas Law.

Third-Party Access

The New Law establishes that production flow pipelines, natural gas treatment or processing facilities and liquefied and regasification terminals ("Essential Facilities") are subject to third party access. The former Gas Law provided access to transportation pipelines, with supplementary rules in Decree 9,616/2018 creating the possibility of antitrust sanctions in case of denials of access that characterized anti-competitive behavior.

Regarding transportation pipelines, among other changes, we highlight:

- ANP shall regulate and supervise the access of third parties to transportation pipelines;
- ANP may establish access holidays to new pipelines that are not connected into transportation systems;
- Idle capacity may be contracted before all the pipeline available capacity has been contracted; and
- Public calls no longer required for firm contracting of gas.

The facility owner will have preference to use the Essential Facility. Owners, together with interested third parties, shall develop a code of conduct and practice for access, observing industry best practices and regulation. Tariffs will be subject to negotiation, according to criteria previously defined in the code of conduct and practice for access. In case of dispute in the negotiated access, ANP will decide on the matter, unless the parties mutually decide for another means of dispute resolution (such as arbitration). Third party access to LNG terminals in ports must comply with the relevant port regulations.

Authorization Regime to Transport

The previous law provided for a concession regime, preceded by public bidding, for natural gas transportation activities in transportation pipelines of general interest, or authorization, in the case of gas pipelines involving international agreements. No gas transportation pipelines were built under the concession regime. The New Law adopts the authorization regime – far simpler than a concession – for the transportation of natural gas.

Unlike previous bills of law, the New Law adopted a simple authorization regime, without incorporating detailed legal provision as there are in the concession regime or would be typical in public services – which is not the case of gas transportation. This is expected to facilitate the expansion of the national gas pipeline network.

Transport Deverticalization

The New Law prohibits the direct or indirect corporate relationship between natural gas transportation agents and companies or joint ventures operating in exploration, development, production, importation, shipping and trading of gas. The goal is the independence and autonomy of transportation companies towards agents who develop competitive activities in the natural gas industry.

There is a transition regime for existing transportation companies. The New Law allows them to have their independency certified by ANP, according to regulation yet to be issued. The adjustment must be made within three years from the New Gas Law or two years from the regulation by ANP, whichever is the last.

Hiring the Transportation: Entry-Exit, Electronic Platforms, Legacy Agreements

The New Gas Law requires that transportation services be offered under the model of independent hiring of entry and exit capacity. This model will allow redistribution of transportation costs.

The New Law establishes the use of an electronic platform to offer standardized transportation services. Nothing prevents the transfer of capacity (secondary market) from being incorporated into such platform. There is potential to reduce transaction costs and create liquidity in transportation services.

Transportation Agreements executed before the New Gas Law ("Legacy Agreements") shall be adjusted within five years to reflect the new regime for contracting capacity. Notwithstanding this, their revenue must be preserved and ANP shall, when defining or reviewing transportation tariffs, consider compensation for possible losses.

Self-Regulation: Manager of Market Area and Users Council

The New Law establishes that the transportation companies shall create a Manager of Market Area, which will be formed by the transporters that operate at a same market area of capacity. It shall be responsible for: (i) publishing information on Transportation capacity and tariff; (ii)conciliating the maintenance plan regarding the facilities of its market area; (iii) submitting the plan for development of the transportation system for ANP approval; (iv) Submitting the network common codes and the contingency plan, drafted by transporters and shippers for ANP approval; and (v) ensuring the joint, coordinated and transparent operation of the transporters.

From the carriers' perspective, the New Law determines that the carries shall create a Users Council to monitor the performance, operational efficiency and investments by transporters. The Users Council shall prepare, periodically, a report on non-conformities and send it to ANP, for assessment and measures.

Tariffs – Tariff Cap

ANP, after carrying out a public consultation, will establish the maximum permitted revenue for transportation, as well as the criteria for readjustment, periodic review and extraordinary review, under the terms of the regulation. This revenue is not guaranteed by the Federal Government. Transportation tariffs will be proposed by the transporter and approved by the ANP, after public consultation, according to criteria previously established by it.

Tariff shall reflect (a) costs, expenses and investments, (b) fair remuneration of the investment on the assets authorized by ANP (the regulatory base of assets).

This is a tariff regulatory framework that has similitudes to the energy transmission sector, besides other network industries developed under a natural monopoly.

Definition of Transportation Pipelines

The New Law defines transportation pipelines as:

(1) pipelines that start or end in the country's border, directed at importation or exportation of gas (i.e., international pipelines);

(2) interstate pipelines.

(3) pipelines starting or ending at LNG pipelines and connected to other transportation pipelines;

(4) pipelines starting at gas processing facilities and connected to other transportation pipelines;

(5) pipelines that connect a transportation pipeline or storage facility to another transportation pipeline;

(6) those which diameter, pressure and length surpass limits established by ANP.

Pipelines in operation or implementation that fit only in item #6 are grandfathered. Interstate pipelines that connect distribution pipelines may have specific regulation by ANP.

Underground Storage

Granting of underground natural gas storage activities was changed from the concession model, preceded by public bidding, to the authorization model.

The New Law also establishes that ANP will make available (subject to a fee) the geological data of areas with underground gas storage potential.

Import and Export

The New Law transfers the power to authorize natural gas import and export activities from the Ministry of Mines and Energy ("MME") to ANP, which will expedite the procedure.

Trading

The New Law intends to simplify transactions. It ceases to require evidence of gas reserves that will back the supply of gas and provides that gas trading in the organized market shall be made with standardized contracts, pursuant to ANP regulation.

On the other hand, the New Law lists which agents may perform gas trading activities: Local Distribution Companies; Free consumers; Producers; Self-producers; Importers, Self-Importers and Traders.

The New Law brings an additional self-regulation measure when it creates the possibility of a market agent acting as natural gas market manager. For such, the agent must execute a Technical Cooperation Agreement with ANP, which will provide at least for the following obligations:

- Providing ANP with access to all registered natural gas purchase and sales contracts;
- Ensuring that such contracts comply with ANP regulation; and
- Attending to the flow and confidentiality of information between the market management entities and the Market Area Manager.

Local Gas Distribution

The New Law does not regulate local gas distribution companies but aims at their independence from certain agents in the gas chain by creating restrictions for their shareholders. It prohibits those responsible for electing the management of companies active in exploration and production, gas importers, shippers or gas traders to have access to sensitive competitive information, vote at the election or nominate members of the commercial or supply officers or legal representatives of LDCs.

It also authorizes that the MME acts towards the harmonization of the gas industry regulations, including regarding the regulation of free consumers, one of the most sensitive topics of state regulations.

Antitrust Powers to ANP

The New Law has deep concern for competitiveness in the natural gas market, in line with various measures adopted in recent years towards diversification and deverticalization (ex.: Petrobras' Antitrust Settlement).

Besides various changes described above and relevant to free competition, it establishes that ANP shall supervise the natural gas market, adopting mechanisms to encourage competition and reduce the concentration of gas offer. After liaising antitrust authorities, ANP has powers such as: (i) take measures to diversify the offer of gas; (ii) order the capacity release of transportation and outflow pipelines and of processing plants; (iii) require mandatory sales by auctions from traders with a high participation in the market, with initial price, amounts and duration set by ANP; and (iv) restrict the sale of gas between producers in the production areas.

Final Notes

The New Gas Law was long awaited and is received with enthusiasm. There is potential for a vibrant new gas market. However, interpretation of the new rules, implementation of the law via ANP regulation and self-regulation and improvements to tax legislation will be fundamental steps in achieving its potential.

The Oil and Gas team of Cescon, Barrieu, Flesch & Barreto is available to discuss topics regarding Law No. 14,134. Access here its full content.

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