POWER

CLIENT ALERT

JUNE/2019

ANEEL ISSUES NEW RESOLUTION ON IMPOSITION OF PENALTIES

Morbi On June 18, 2019, ANEEL – National Electric Energy Regulatory Agency published Normative Resolution No. 846/2019, which sets forth new rules for the imposition of penalties to power sector entities and revokes Normative Resolution No. 63/2004.

The new resolution shall come into effect 6 months as of publication – save for articles 41 to 44, which govern the payment of fines in installments and shall be immediately enforceable.

The new rule is a reiteration of the general systematic for inspections and imposition of penalties already set forth by Normative Resolution No. 63/2004, with some relevant modifications:

i. The infractions subject to fines are now coalesced in 5 groups (where it used to be 4) according to seriousness, with penalties corresponding to 0.125%, 0.25%, 0.5%, 1% and 2% of the Net Operational Revenue;

ii. The basis for the application of the fines ceases to be the Gross Operational Revenues with the deduction of ICMS and ISS and becomes the Net Operational Revenue (NOR) defined in accordance with the PSAM – Power Sector Accounting Manual, which allows, other than the decision of said taxes, of regulatory duties and charges the company may be subject to;

iii. Specific provision for the imposition of positive and negative covenants as a form of penalty. We understand that such covenants may have a precautionary nature, since the duty to correct and remediate infractions is already assumed by regulation in general. The lack of timely compliance with the covenants may cause the imposition of daily fines, limited to 30 days of accrual and to a total of 2% of the NOR;

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iv. The expansion of the number of entities to be affected by the prohibition to participate in public tenders or enter into agreements with ANEEL (where it used to be only the entity and respective controlling shareholders): controlling shareholders, shareholders and controlled, ligated or related entities, which must be listed in the act imposing the penalty;

v. The provision of aggravating circumstances of specific recidivism, lack of timely compliance with determinations from the notice instrument (NI) and record of unappealable penalties, which shall cause the basis for the calculation of the fines to be increased in 40%, up to 15% and between 1 and 5%, respectively;

vi. In respect to power distribution concessionaires, it was included in group IV (fines of up to 1% of NOR) the lack of fulfillment of service requests (new connections etc.) in accordance with deadlines and other legal and contractual conditions; and

vii. The fines may be reduced in 95%, in case there is the spontaneous cessation and remediation, including compensation of damages, of the infraction prior to the commencement of an inspection proceeding by ANEEL; in 50% in case that occurs in the deadline determined by the NI; and in 25% in case the entity waives the right to appeal and timely pays the penalty in one single installment.

Veirano Advogados' Power Practice has deep expertise in the Brazilian power sector and regulations, being able to help you better understand the modifications under discussion and its possible implications.

We are at your disposal if you have any questions or need additional information.

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