

Good Transmission Makes Good Neighbors: The Case for Easing Permitting Processes to Encourage Cross-Border Power Infrastructure Between Mexico and the United States

Barriers to cross-border transmission on the United States–Mexico border, including labyrinthine permitting processes, have long impeded the development of valuable border-region power infrastructure. The historical origins of the electric power regulatory system offer some guidance for why the presidential permitting system exists in its present, tangled form. Recently, legislators have renewed efforts to amend cross-border infrastructure approval. Though these attempts have failed, a new set of legislative proposals has been making its way through the chambers and has a high chance of achieving success. This Note discusses these topics and closes by advocating for Congress to ease cross-border infrastructure permitting processes to benefit the economies and peoples on both sides of the United States–Mexico border.

Introduction

Nearly half-an-hour into the third presidential debate between Donald Trump and Hillary Clinton, Trump accused Clinton of wanting “open borders” with Mexico. When a moderator asked Clinton to clarify her position, Clinton, perhaps deflecting, insisted that what she referred to was not immigration, but energy: “We trade more energy with our neighbors than we trade with the rest of the world combined. And I do want us to have an electric grid, an energy system that crosses borders. I think that will be of great benefit to us.”¹ Lately, this sentiment has gained traction—not just on the political stage, but in executive orders; proposed bills to Congress; and agreements between the United States, Canada, and Mexico. There is good reason for a change. Currently, cumbersome permitting processes stymie the growth of power infrastructure along the United States–Mexico border.

Easing the permitting process would lead to great benefits for both the United States and its southern neighbor. Indeed, the change would lead to the growth of power infrastructure, economic development in the border regions, electric grid security and stability, cheaper electricity prices, and economically efficient generation and capacity along the United States–

* Thank you to my peers on *The Texas Law Review*. I am grateful for your conversation, your editing, and above all, your friendship.

1. NBC News, *The Third Presidential Debate: Hillary Clinton and Donald Trump (Full Debate)*, YOUTUBE (Oct. 19, 2016), <https://www.youtube.com/watch?v=smkyorC5qwc> [<https://perma.cc/VS4U-AJY9>].

Mexico border.² As such, this Note advocates that Congress ease permitting processes in order to encourage economic flourishing and improved relations with Mexico.

On the northern border of the United States, a history of grid interconnections between Canada and the United States has already developed into a robust, fully integrated system that provides grid reliability, security, and cost-saving benefits. Though the United States is a net importer of Canadian-generated electricity, the power flows both ways—providing for stability in times of emergency but also efficiency in day-to-day operations—a policy that has benefited both countries and served as a model of cooperation worldwide.³

The border between Mexico and the United States stands in stark contrast to the border between Canada and the United States. Transmission between the border states of Mexico and the United States is nearly nonexistent, and the great majority of the connections that do exist operate via low-voltage ties.⁴ This disparity continues despite the enormous opportunity for development.

In 2013, revolutionary changes to Mexico's constitution opened Mexico's wholesale electricity market to greater private and foreign investment.⁵ In the same wave of legislation, the Mexican government set a goal of generating 35% of its power from clean energy sources by 2024, and 50% by 2050.⁶ Meanwhile, across the border, Texas's "wind boom" increased clean, wind-generated energy capacity from just over 4,000 MW to more than 21,000 MW in 2017⁷—and Texas rivaled Spain for the title of sixth-largest wind-power generator in the world.⁸ This technological progress

2. U.N. DEP'T ECON. & SOC. AFFAIRS, MULTI DIMENSIONAL ISSUES IN INTERNATIONAL ELECTRIC POWER GRID INTERCONNECTIONS 61 (2005), <https://sustainabledevelopment.un.org/content/documents/interconnections.pdf> [<https://perma.cc/6FZN-7RYU>] (indicating that increased competition between domestic and foreign firms in the market could lead to a "reduction in the price of electricity for end users," resulting in further economic benefits and more robust local economies).

3. *Canada Week: Integrated Electric Grid Improves Reliability for United States, Canada*, U.S. ENERGY INFO. ADMIN. (Nov. 27, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=8930> [<https://perma.cc/C5GQ-LRWK>].

4. *Mexico Week: U.S.–Mexico Electricity Trade Is Small, with Tight Regional Focus*, U.S. ENERGY INFO. ADMIN. (May 17, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11311> [<https://perma.cc/LV9W-2KXV>].

5. Richard H. K. Vietor & Haviland Sheldahl-Thomason, *Mexico's Energy Reform*, 4, 10 (Harv. Bus. Sch., Working Paper No. 717-027, 2017), <https://www.hks.harvard.edu/hepg/Papers/2017/Mexican%20Energy%20Reform%20Draft%201.23.pdf> [<https://perma.cc/MA4X-6BFA>].

6. *Id.* at 4.

7. *U.S. Installed and Potential Wind Power Capacity and Generation*, WINDEXCHANGE (2017), http://apps2.eere.energy.gov/wind/windexchange/wind_installed_capacity.asp [<https://perma.cc/P6LQ-DZWJ>].

8. Richard Martin, *The One and Only Texas Wind Boom*, MIT TECH. REV. (Oct. 3, 2016), <https://www.technologyreview.com/s/602468/the-one-and-only-texas-wind-boom> [<https://perma.cc/W3XK-TULH>].

was not perfect, however, as supply occasionally outpaced demand, which caused electricity prices to go negative.⁹ The confluence of developments on the United States–Mexico border has allowed the opportunity for interconnection to ripen on the vine. Nevertheless, cumbersome permitting processes have stymied potential growth.

This Note advocates for easing permitting processes to encourage growth and investment in infrastructure, grid security and stability, and economically efficient generation and capacity along the United States–Mexico border. Part I will begin by presenting the history of U.S. cross-border electricity trade, the development of cross-border transmission and facility permitting—including its origins in hydroelectric power regulation—and the blurred boundaries between congressional and executive powers that have been a part of this permitting process since its inception. Part II will discuss the present state of the permitting process, developments in the electricity markets in Mexico and the United States that make border interconnection both more viable and more attractive, and existing proposals and efforts to ease permitting in the region. Finally, in Part III, this Note will apply the analysis of congressional and executive powers in Part I to propose how Congress can reform permitting processes to effectively encourage cross-border interconnection on the southern border.

I. The History of Cross-Border Electric Transmission Facility Regulation

Two matters are of interest when analyzing the subject of cross-border presidential permitting in the power sector: (1) the origins of this regulation in hydroelectric power statutes, and (2) the blurred lines between congressional and executive power for promulgating and enforcing presidential permits.

A. *Origins of Electricity Regulation in Hydroelectric Power*

The first electricity regulations originated in the growth of hydroelectric power: from the prohibition against using navigable waters of the United States for hydroelectric dams without a license, electric power became formally regulated by the federal government in 1920, when Congress passed the Federal Water Power Act (FWPA).¹⁰ The FWPA—to be administered by the Secretaries of War, Agriculture, and the Interior—created the Federal

9. Daniel Gross, *The Night They Drove the Price of Electricity Down*, SLATE (Sept. 18, 2015), http://www.slate.com/articles/business/the_juice/2015/09/texas_electricity_goes_negative_wind_power_was_so_plentiful_one_night_that.html [<https://perma.cc/LM39-WXUE>]. This phenomenon also frequently occurs in California on the spot market thanks to a great increase in utility-scale photovoltaic capacity. Chris Namovicz, *Rising Solar Generation in California Coincides with Negative Wholesale Electricity Prices*, U.S. ENERGY INFO. ADMIN. (Apr. 7, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=30692> [<https://perma.cc/TH5R-6FC6>].

10. Federal Water Power Act, Pub. L. No. 66-280, 41 Stat. 1063 (1920) (recodified as amended at 16 U.S.C. §§ 791–828 (2000)).

Power Commission (FPC), and gave it authority to permit the generation of hydroelectric power.¹¹ The birth of the FPC did not presage a future of efficient permitting; with the new regulations, the FPC received more applications than it could address and left many of the permits undecided.¹² But what is of greatest interest in these origins is the emphasis on the power-generating source. Before the advent of modern travel—the shipment of goods and the transportation of people via cars, trucks, and planes—maintaining the navigability of waterways was a key component in a well-functioning society and economy. Regulatory bodies had to account for competing claims to maximize the efficient, shared use of waterways.

As such, it makes sense that the origins of the power-market regulation originated in dam permitting.¹³ But it is arguable that this origin influenced the development of a blanket cross-border regulation that failed to consider the effects of a similar permitting process on the southern border.

The New Deal Era Congress passed sweeping legislation in 1935 under the Public Utilities Holding Company Act (PUHCA), which in part amended the FWPA.¹⁴ One of the focuses of Part II of PUHCA, also known as the Federal Power Act (FPA), was to fill regulatory “gaps” associated with interstate wholesale electricity.¹⁵ Perhaps influenced by the spirit of the times, legislators writing the FPA also chose to fill regulatory gaps that had *not* been disputed—and for the first time, the FPC was authorized to demand and enforce a cross-border transmission facility permitting process.¹⁶

These regulations were practical enough. They required that electric energy should not be transmitted to a foreign country without an order from the FPC. The regulations also stated that the FPC would grant such an order to an applicant as long as it did not find that “the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of

11. *Id.*

12. Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission, 1920–1977*, 4 FED. HIST. J. 61, 64 (2012).

13. Even in its time, the Federal Water Power Act received flak from critics for its potential to dampen the growth of hydroelectric power and for jurisdictional issues between federal and state governance. *See, e.g.*, Moses Hooper, *Some Views Respecting the Federal Water Power Act*, 8 MARQ. L. REV. 1, 7 (1923) (arguing that Congress overreached its authority by regulating water-powered facilities—even those on streams—when it was only empowered to pass regulation that directly affected the *navigability* of waters, resulting in a negative effect on development of hydroelectric power in the region).

14. Federal Power Act, ch. 687, § 33, 49 Stat. 838, 838 (1935) (amending § 201).

15. *Id.* § 213, 49 Stat. 838, 847–48 (amending § 201(b)). For an analysis of the history behind these gap-filling efforts, see Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEXAS L. REV. 399, 408–10 (2016) (analyzing the case that spurred gap-filling legislation, *Pub. Utils. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 84 (1927), which barred receiving or forwarding states from regulating the price of electricity sold between their states).

16. *See* Rossi, *supra* note 15, at 400–10.

facilities subject to the jurisdiction of the [Federal Power] Commission.”¹⁷ This legislation, part of an act that amended the FWPA, surely contemplated transmission on the Canada–United States border, and not the effects such a permitting system would have in the South. Notably, these restrictions, passed by a Congress not known for its regulatory laxity, were less stringent than today’s—indeed, they were essentially permissive. Now, obtaining cross-border transmission facility permits can take several years and cost millions of dollars.¹⁸

B. Constitutional Issues Between Executive and Legislative Branch Authority

In 1953, acknowledging the FPA’s grant of authority to the FPC to authorize transmission from the United States to a foreign country, President Eisenhower issued an executive order that delegated his own authority to grant permits for electric transmission facilities to the Secretary of Energy.¹⁹ As such, Congress had delegated its authority to the President, who had in turn delegated that authority to an agency that Congress has created.

The executive order stated that the Secretary of Energy could issue a presidential permit upon finding that the permit was “consistent with the public interest” and had “obtain[ed] the favorable recommendations of the Secretary of State and the Secretary of Defense thereon”²⁰ If the Secretary of Energy, the Secretary of State, and the Secretary of Defense could not come to an agreement, the permit would then be submitted to the President for a decision.²¹ This authority was later delegated to the Department of Energy (DOE) in 1977, but its requirements remained essentially the same.²²

17. Federal Power Act, ch. 687, § 213, 49 Stat. 803, 848–49 (amending § 202(e)).

18. See, e.g., BI-NAT’L ELEC. TRANSMISSION TASK FORCE, ARIZ.–MEX. COMM’N ENERGY COMM., BI-NATIONAL ELECTRICITY TRANSMISSION OPPORTUNITIES FOR ARIZONA AND SONORA 4, 43 (2013) [hereinafter TRANSMISSION TASK FORCE] (describing how the permitting process for an interconnection project between Nogales, Arizona, and Nogales, Sonora took over five years and cost \$9 million to complete, even though the project was never completed).

19. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953); see ADAM VANN & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R43261, PRESIDENTIAL PERMITS FOR BORDER CROSSING ENERGY FACILITIES 3 (2013).

20. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953).

21. *Id.*

22. See 42 U.S.C. § 7172(f) (2012) (limiting FERC’s permit-issuing abilities); VANN & PARFOMAK, *supra* note 19, at 3–4 (noting that when the FPC was eliminated, its permitting functions were transferred to the DOE).

II. The Permitting Process Today

A. *Requirements of the Permitting Process*

Today, applicants who wish to construct and operate cross-border electric transmission facilities must comply with a protracted and elaborate permitting process. First, applicants must apply to the Secretary of Energy for: (1) a presidential permit to construct, connect, operate, and maintain cross-border electric transmission,²³ as well as (2) an authorization to export electricity.²⁴ Additionally, an application for a permit to construct, connect, operate, and maintain electric transmission lines requires evidence supporting “two primary criteria” for proving that the project is “consistent with the public interest”: (1) the impact the project would have on the operating reliability of the United States’ electric power supply, and (2) the environmental consequences of proposed projects under the National Environmental Policy Act of 1969, as amended (NEPA), which requires an environmental assessment.²⁵ At this point, if the DOE determines that the proposal would be a “major Federal action significantly affecting the quality of the human environment,” then, after an environmental assessment has been completed, an environmental impact statement is required.²⁶ The environmental impact statement in turn requires a minimum forty-five-day public comment period.²⁷ The DOE will then issue a “record of decision.”²⁸ This extensive process often takes years.²⁹ If all of these steps proceed without a hitch, the DOE must then obtain concurrence from the Secretary of State and the Secretary of Defense before issuing the permit.³⁰ This first step of the process, at least according to the DOE’s website, can take anywhere from six to eighteen months.³¹ But there are still more requirements.

For an export authorization to export electric energy from the United States to foreign countries, applicants must send their materials to the Office of Electricity Delivery and Energy Reliability, an office of the DOE, and

23. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953), *as amended in* Exec. Order No. 12,038 (Feb. 3, 1978).

24. 16 U.S.C. § 824a(e) (2012); U.S. DEP’T OF ENERGY, *Presidential Permits and Export Authorizations - Frequently Asked Questions*, ENERGY.GOV, <https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulation-6> [https://perma.cc/VPX4-RM3R].

25. U.S. DEP’T OF ENERGY, *supra* note 24.

26. NEPA Cooperating Agency, 40 C.F.R. § 1508.5 (2017); NEPA Environmental Assessment, 40 C.F.R. § 1508.9 (2017).

27. NEPA Timing of Agency Action Rule, 40 C.F.R. § 1506.10 (2017).

28. NEPA Record of Decision in Cases Requiring Environmental Impact Statements Rule, 40 C.F.R. § 1505.2 (2017).

29. *See* TRANSMISSION TASK FORCE, *supra* note 18.

30. U.S. DEP’T OF ENERGY, *supra* note 24; Exec. Order No. 10,485, 3 C.F.R. § 970 (1949–1953).

31. U.S. DEP’T OF ENERGY, *supra* note 24.

submit evidence that, first, the proposed export will not impair the sufficiency of the electric power supply within the United States and, second, that the proposed export will not cause operating parameters on regional transmission systems to fall outside of established industry criteria.³² There must also be NEPA compliance for this export authorization, since approval of a presidential permit constitutes a “major Federal action.”³³ This process, according to the DOE’s website, takes “usually 3 to 6 months.”³⁴ There are still further filing requirements for electricity exporters, including self-certifications and annual reports. The FPA also explicitly provides for state regulation of cross-border transmission so long as the state regulation does not conflict with the FPC’s regulatory powers.³⁵

Because the permitting process is cumbersome, many companies find it easier to simply take over older generation and transmission facilities that have already maneuvered the presidential permitting process. For example, Blackstone LP recently received a presidential permit to export all of its electricity across the border from its generation facility in Mission, Texas to Mexico.³⁶ Commentators noted that Blackstone likely received the permit because the preexisting Frontera facility that Blackstone bought had already received a presidential permit. But even in situations like these, a change in ownership necessitates a new presidential permit.³⁷ For voluntary transfers, the permittee and the entity who wishes to take over the permit and the facility must file a joint application to the Economic Regulatory Administration (ERA) that includes their reasons for requesting the transfer.³⁸ The law also prohibits that any “substantial change” be made to the permitted facility unless ERA has granted its approval.³⁹

Even small modifications made to facilities require new or amended permits.⁴⁰ A good example of what amounts to insignificant, yet for all intents and purposes, “substantial changes” under these regulations is the case of Fraser Papers, Inc. The company owned a pulp facility in Madawasaka, Maine, and a paper-making facility in Canada. In 1945, the then-titled Fraser

32. *Id.*

33. U.S. DEP’T OF ENERGY, *Presidential Permits—Procedures*, ENERGY.GOV, <https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulation-9> [<https://perma.cc/AX73-ZYDH>].

34. U.S. DEP’T OF ENERGY, *supra* note 24.

35. 16 U.S.C. §§ 791–828c (2012).

36. Mark Chediak et al., *Blackstone to Export Texas Power to Newly Opened Mexican Market*, BLOOMBERG (Mar. 24, 2015), <https://www.bloomberg.com/news/articles/2015-03-24/blackstone-to-export-texas-power-to-newly-opened-mexican-market> [<https://perma.cc/QLD4-4P98>].

37. 10 C.F.R. § 205.323(b) (2017) (limiting the transferability and assignability of presidential permits under Executive Order 10,485 and their coordinate facilities).

38. *Id.*

39. *Id.*

40. Presidential Permit, Order No. PP-11-2, Fraser Papers Inc. (U.S. DEP’T OF ENERGY, Sept. 29, 1999).

Paper received a presidential permit to construct two transmission lines that would connect the pulp and paper-making facilities. These lines consisted of a 6.6-kilovolt (kV) transmission line and a 30.6-kV line.

In 1999, when Fraser Papers wished to increase the voltage of the 39.6-kV line to a 69-kV line “without making any physical changes to the transmission line itself,” it was required to seek permission for a permit. Several years later, the company again requested permission to increase the voltage on the 69-kV transmission line to 138-kV. The Secretary of State and the Secretary of Defense then concurred in the amendment of each of these permit applications, noting that the “subject facility does not constitute a major transmission interconnection Therefore, the DOE has determined that amending Fraser’s existing presidential permit . . . would not impair the reliability of the U.S. electric power supply system.”⁴¹

The problem with these requirements is that aside from burdening operating businesses, they can also hamper investment in clean power development at a time when renewables are revolutionizing the industry. For example, the California company Semptra Energy built a wind farm on the high peaks of the Sierra Juárez mountain range of Mexico—what has been considered to be one of the last great undeveloped wind sites in the West—to transmit electricity across the international border to power the city of San Diego.⁴² California had recently scaled up its renewable energy goals, and the site posed a solution to the increased demand for clean energy. Profits from the Mexican wind farm would also provide an economic boost to the small Mexican community that leased the land to wind developers. Indeed, because the wind farm was positioned on communally owned land, locals were set to receive \$2,000 a month in profits—a substantial sum for residents whose primary income came from farming or other agrarian means.⁴³

In 2007, the Energía Sierra Juárez wind farm applied for a presidential permit to construct an electric transmission line across the United States–Mexico border.⁴⁴ The line was short. Only 0.65 miles of the transmission line would be planted on U.S. soil before extending into Mexico, where the line would connect after one mile to an interconnection point.⁴⁵ The interconnection point would be connected via another mile of transmission line to the wind farm. In total, the transmission would extend 2.7 miles—only 0.65 miles on the U.S. side—but the NEPA review took five years to complete. Worse, there were three phases of the wind project. This was only

41. *Id.*

42. T.R. Goldman, *How Mexican Wind Lights San Diego Homes*, POLITICO (Feb. 16, 2017), <http://www.politico.com/magazine/story/2017/02/mexico-wind-farms-renewable-energy-san-diego-border-214789> [<https://perma.cc/VQ2F-7RWY>].

43. *Id.*

44. Presidential Permit, Order No. PP-334, Energía Sierra Juárez U.S. Transmission, LLC (U.S. DEP’T OF ENERGY, Aug. 31, 2012).

45. *Id.*

Phase I.⁴⁶ Each phase required its own individual NEPA review and impact authorizations.⁴⁷

The wind farm did not begin to produce and transmit power until 2015, and soon after, it faced litigation from environmental groups.⁴⁸ A federal district court ruled that the DOE violated NEPA by not considering in the Final Environmental Impact Statement the environmental effects that the transmission facilities would have on the *Mexican* side of the border,⁴⁹ despite the fact that the Mexican national environmental agency, Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT), had already approved the project.⁵⁰ At this point, Energía Sierra Juárez had already made a twenty-year, \$820-million power purchase agreement with distributor San Diego Gas & Electric.⁵¹ Now, there is a fifty-fifty chance that the district judge will close the 1,200 MW project down until the environmental assessment has been conducted.⁵²

Additionally, there are many authorizations and presidential permits for cross-border transmission facilities that are hanging in bureaucratic limbo: in April 2017, four applications were pending export authorizations (including one from 2004), and seven applications were pending presidential permit approvals (including one from 2010 and several from 2013).

Examining the DOE's list of Pending Presidential Permit Applications and list of Pending Export Authorization Applications also reveals that the time spans of six to eighteen months are more optimistic than a reflection of reality.

These regulations stifle the efficient functioning of business and deny facilities the flexibility to quickly adapt to an electric power market with rapidly changing technology that has in recent years moved towards incorporating clean energy.

Even the DOE, in its Quadrennial Report, acknowledged that the planning and permitting aspects of cross-border transmission are "uniquely challenging" and that these challenges stem, in part, from "permitting-related delays."⁵³ Because, of course, not only do facilities have to comply with

46. *Id.* at 1–2.

47. *Id.*

48. *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 972 (S.D. Cal. 2015); *Protect Our Cmty's Found. v. Chu*, No. 12cv3062 L(BGS), 2014 WL 1289444, at *1–2 (S.D. Cal. Mar. 27, 2014).

49. *Backcountry*, 215 F. Supp. 3d at 978.

50. Jean Guerrero, *First U.S.–Mexico Wind Energy Project Sees Legal Challenge*, KPBS (Oct. 13, 2015), <http://www.kpbs.org/news/2015/oct/13/first-us-mexico-wind-farm-sees-legal-challenge> [<https://perma.cc/5YN5-X98G>].

51. *Id.*

52. Goldman, *supra* note 42.

53. U.S. DEP'T OF ENERGY, *TRANSFORMING THE NATION'S ELECTRICITY SYSTEM: ENHANCING ELECTRICITY INTEGRATION IN NORTH AMERICA*, 2 QUADRENNIAL ENERGY REV. 6–8 (Jan. 2017), [https://energy.gov/sites/prod/files/2017/02/f34/Quadrennial%20Energy%](https://energy.gov/sites/prod/files/2017/02/f34/Quadrennial%20Energy%20Report.pdf)

byzantine federal regulations, they must also navigate the permitting processes of “provincial, local, and tribal governments.”⁵⁴

Speaking before the House Committee on Energy and Commerce, Jim Burpee, President and Chief Executive Officer of Canadian Electric Association, testified about the permitting delays associated with requesting permission for border-crossing transmission facilities on the Canada–United States border.

We wait for presidential permit for an average of 2–1/2 or more years. We have a similar example of basically an ownership change . . . that took 2–1/2 years to get a new presidential permit for a 7–1/2 mile section of transmission line underwater that crosses U.S. territory waters going from south of Vancouver to Vancouver Island. And the Canadian equivalent was 7 months, 3 page[] application on the Canadian side, 62 pages on the American side.⁵⁵

By laying down a blanket permitting process—and then, through later regulation, assuring that it was effectively labyrinthine—overly complicated permitting processes have raised significant barriers to entry where development has not yet justified the cost of transmission. As a result, the southern border area has entered into an endless cycle of stunted development due to a lack of grid reliability and transmission capacity; in turn, only a few companies are willing (or insensible enough) to take the risk of development.

III. Mexico: Past and Present

On the United States–Mexico border, there are only five electric transmission interconnections and eight interconnections used only for emergencies.⁵⁶ On the border between Canada and the United States, over thirty-five transmission connections cross international lines.⁵⁷

There are several reasons why the power market did not develop on the United States–Mexico border as well as it did on the border between the United States and Canada. The first is a matter of population density and energy resources. In Canada, 75% of the population lives within 100 miles

20Review—Second%20Installment%20%28Full%20Report%29.pdf [https://perma.cc/VR23-YQFD].

54. *Id.*

55. *The North American Energy Infrastructure Act: Hearing on H.R. 3301 Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 113th Cong. 138–39 (2013) (statement of Jim Burpee, President & CEO, Canadian Electricity Association).

56. Sapna Gupta, *North American Electricity Primer*, NORTH AM. PROCESS 1 (2016), https://www.northamericanprocess.org/sites/default/files/primer_electricity_-_gupta.pdf [https://perma.cc/MGJ2-4JBE].

57. CAN. ELECTR. ASS'N, *THE NORTH AMERICAN GRID: POWERING COOPERATION ON CLEAN ENERGY & THE ENVIRONMENT* 6, 7 (2016), https://cea-ksiu6qbsd.netdna-ssl.com/wp-content/uploads/2016/01/CEA_16-086_The_North_American_E_WEB.pdf [https://perma.cc/5X2U-D5WX].

of the U.S. border,⁵⁸ and Canada has had access to vast hydropower resources.

By contrast, Mexico's population consolidated around Mexico City, and there was less need to develop the border region for many years. Additionally, though Mexico had access to coal and natural gas resources to generate power, energy sources in Mexico's northern border region such as solar power, an attractive option today, have only recently become economically viable.

Finally, there were governmental differences between Mexico and Canada that made the power market in Mexico less attractive for U.S. generators across the border. In Mexico, the power sector was born through private, and often foreign, investment.⁵⁹ In 1922, the government created the Comisión Nacional de Fuerza Motriz (CNFM) to regulate the power industry, and in 1937 created the Comisión Federal de Electricidad (CFE) to ensure that rural areas unattractive to private investors would nonetheless have electricity.⁶⁰

In 1960, after years of slowly consolidating the power market under the CFE, the government officially nationalized the entire industry.⁶¹ This state of affairs remained the status quo until a half-century later, when in 2013 President Enrique Peña Nieto pushed an overhaul of the energy markets in Mexico, citing stunted development, high energy prices, unmet demand, and a potential for growth through privatization.⁶²

For the electric power market, this development led to a number of changes. First, CFE, which owned 60% of generation capacity and has had a monopoly on transmission and distribution, vertically and horizontally unbundled.⁶³ System operation, which had for many years been the purview of CFE, was given to the Centro Nacional de Control de Energía (CENACE).⁶⁴ Independent Power Producers (IPPs), which operated even before the reform, no longer have to sell all of their power to CFE, and may now sell electricity via long-term contracts on an auction system.⁶⁵ The reform has also created short-term wholesale electricity markets to be calculated hourly for each node of the grid, and this locational marginal

58. U.S. DEP'T OF ENERGY, *supra* note 53, at 6.

59. Alejandra Núñez-Luna, *Private Power Production in Mexico: A Country Study* 3 (The Program on Energy and Sustainable Dev. at Stanford U., Working Paper No. 47, 2005).

60. Lois Swanick, *Comisión Federal de Electricidad*, in *MEXICO AND THE UNITED STATES* 216, 216 (Lee Stacy ed., 2003).

61. *Id.*

62. Richard H. K. Vietor & Haviland Shedahl-Thompson, *Mexico's Energy Reform*, in *HBS CASE COLLECTION* 717-027 1, 3-4 (Jan. 23, 2017).

63. INT'L ENERGY AGENCY, *MEXICO ENERGY OUTLOOK, WORLD ENERGY OUTLOOK SPECIAL REPORT* 92-93 (2016), <https://www.iea.org/publications/freepublications/publication/MexicoEnergyOutlook.pdf> [<https://perma.cc/L6S9-WZPT>].

64. *Id.* at 93.

65. *Id.* at 94-95.

pricing will ideally mean that the lowest cost power is purchased for the grid.⁶⁶

This means that if there is excess electricity generated in the United States' border states, they could get a good price for it on Mexico's market—particularly since peak demand times often differ on the two sides of the border. For example, a study found that peak demand times in Arizona and Sonora differed, in part because of distinct cultural traditions.⁶⁷ In Arizona, the peak demand occurs between 4 and 6 p.m., while Sonora has two peak demand times: 2–4 p.m. and 7–9 p.m.⁶⁸ Estimates of interconnection for one project predicted that, given these demands, Sonora would be transmitting power to Arizona 30% of the time, and Arizona would be transporting power to Sonora 70% of the time.⁶⁹

Other studies have shown that, given these circumstances, there is great potential for cost-saving efficiencies if the two sides of the border are interconnected, in part because of the difference in peak demands. California already has multiple interconnections with Mexico. One study estimated that an 800 MW interconnection between Baja California and California could save \$100 million yearly by reducing marginal costs through trading electricity.⁷⁰ Other states are also seeing the potential for energy exportation. Arizona has begun to develop solar projects in the sun-drenched stretches of the Sonoran Desert, right across from Sonora, Mexico, where there is already an insufficient supply for peak demand in the summers, and population and economic growth are expected to increase demand in the region.⁷¹

As such, there now exists an opportunity for growth that has not been available in nearly a century. Mexico currently has a higher priced market—which means that there is an opportunity for U.S. exporters to send electricity across the border, a development that would both benefit Mexico's economy while lowering costs for energy consumers across the border.⁷² Indeed, Blackstone Group LP cited the price differential of consumer power in Mexico compared to Texas as its reason for applying to export electricity across the border.⁷³ In 2016, the wholesale price of electricity in Mexico was

66. *Id.* at 95.

67. TRANSMISSION TASK FORCE, *supra* note 18, at 3.

68. *Id.*

69. *Id.* at 45.

70. Ryan Triolo, *Integración Eléctrica en la Región Fronteriza: Beneficios y Barreras*, 79 *ENERGÍA A DEBATE* 26, 27 (2015).

71. TRANSMISSION TASK FORCE, *supra* note 18, at 2, 5.

72. U.N. DEP'T ECON. & SOC. AFFAIRS, *supra* note 2, at 61 (stating that increased competition between domestic and foreign firms in the market could lead to a “reduction in the price of electricity for end users”).

73. Kristen Mosbrucker, *Mission Gas-Fired Plant Will Pump Electricity into Mexico*, *MONITOR* (Sept. 29, 2014), http://www.themonitor.com/news/local/mission-gas-fired-plant-will-pump-electricity-into-mexico/article_005badd4-476d-11e4-a986-0017a43b2370.html [https://perma.cc/X6AZ-JPYC].

between \$48/MWh and \$60/MWh, while in the Texas grid, managed by the Electric Reliability Council of Texas (ERCOT), the wholesale prices averaged \$22/MWh.⁷⁴ Though ERCOT has been historically reluctant to interconnect with other systems since it seeks to avoid FERC regulation, ERCOT's interconnection with Mexico would not subject it to FERC regulation since cross-border electric trade is not interstate commerce falling under the jurisdiction of the FPA.

Additionally, there are a great number of benefits that both the United States and Mexico could receive by increasing cross-border electrical infrastructure, including greater reliability of the grid; reduced capital, operations, and generation capacity costs; and the opportunity to meet clean energy standards.

Not only have the benefits of cross-border interconnection been demonstrated on the Canada–United States border, but the trend is also catching on worldwide. Examples of other existing and planned international cross-border interconnection projects include the Bangladesh–India Electrical Grid Interconnection, the Sweden–Finland interconnection, and most recently, a France–Spain underground interconnection, which according to its developers, will “lead[] to greater security and stability in the two systems,” which will work to “improve the quality of power supply . . . and allow the integration of a greater volume of renewable energy into the grid, especially wind energy.”⁷⁵

However, growth and development of cross-border transmission in the United States and Mexico are greatly impeded by the permitting process on the U.S. side of the border. Several case studies indicate the extent of these problems. The Bi-National Electricity Transmission Task Force published a white paper that included a case study indicating its frustration with the extensive permitting process. The paper stated that in 2000, Tucson Electric Power Company (TEP) wanted to make a 345-kV interconnection between Nogales, Arizona, and Nogales, Sonora.⁷⁶ Then the permitting process began.

First, TEP had to get a Certificate of Environmental Compatibility from the Arizona Corporation Commission to approve the transmission route. This took a year. Then, TEP had to file for an Environmental Impact Statement to receive a presidential permit from the DOE. This took four and a half years because the U.S. Forest Service, the U.S. Bureau of Land Management, and several other agencies had to change the route. At the end of the process, the Environmental Impact Study was a whopping 353 pages in length.⁷⁷ TEP

74. U.S. DEP'T OF ENERGY, *supra* note 53, at 6–12.

75. *Spain–France Underground Interconnection*, RED ELÉCTRICA ESPAÑA, <http://www.ree.es/en/activities/unique-projects/new-interconnection-with-france> [https://perma.cc/58U9-79KR].

76. TRANSMISSION TASK FORCE, *supra* note 18, at 43.

77. U.S. DEP'T OF ENERGY, DOE/EIS–0336, TUCSON ELECTRIC POWER COMPANY SAHUARITA–NOGALES TRANSMISSION LINE FINAL ENVIRONMENTAL IMPACT STATEMENT 1.5, 2.2.104 (2005).

spent \$9 million alone on the permitting process, and the project was never completed.⁷⁸

Though U.S. procedures have made it burdensome to get permission to export electricity, Canada made a net revenue of \$2.8 billion Canadian dollars in 2015 from exporting 68.4 terawatt-hours (TWh) of excess electricity to the United States.⁷⁹ The United States, in return, only exported 8.7 TWh to Canada.⁸⁰ Acknowledging these economic benefits then begs the question of what can be done to improve these processes.

IV. The Architecture of Abundance

A. *Jurisdictional Uncertainty*

Commentators who have examined the authority of the executive branch to regulate cross-border electric transmission have done so in part through statutory analysis comparing Executive Order 10,485, which governs electric power and natural gas facilities and takes its authority from both the FPA and the Natural Gas Act of 1977, to Executive Order 11,423 and Executive Order 13,337, which govern petroleum pipeline facilities, but do so without referencing any constitutional authority.⁸¹ Between these orders, there is a disparity in the origins of power that enables the President to control the permitting process. Since presidential power is derived from the Constitution itself or is granted by Congress through legislation, it is worth noting the difference between these orders as it may provide insight into the reasoning—or lack thereof—behind this presidential authority, and the opportunity to change the permitting process.

Under the Constitution, Congress is granted the power “[t]o regulate Commerce with foreign Nations.”⁸² With this plenary power, Congress has three options: (1) to use this power; (2) to delegate this power; or (3) to abstain from the use of this power altogether.⁸³ Several courts, asked to determine the legitimacy of the President’s authority to issue presidential permits in cross-border facilities, have decided in favor of the President’s

78. TRANSMISSION TASK FORCE, *supra* note 18, at 43.

79. 2015 *Electricity Exports and Imports Summary*, CAN. NAT’L ENERGY BOARD (June 2, 2017), <https://www.neb-one.gc.ca/nrg/sttstc/lctrcct/stt/lctrcctysmmr/2015/smmry2015-eng.html> [<https://perma.cc/Q8Q4-7AV4>].

80. *Id.*

81. VANN & PARFOMAK, *supra* note 19, at 1, 6–7.

82. U.S. CONST. art. I, § 8, cl. 3.

83. Rossi, *supra* note 15, at 404 n.24:

Plenary power is absolute and comprehensive, but an entity with plenary power may or may not choose to treat that power as exclusive. It may choose to delegate power, as Congress often does in areas where it possesses plenary power (such as the Commerce Clause), or not to exercise it at all.

authority, based upon his constitutional authority over foreign affairs⁸⁴ or by Congress's failure to claim exclusive authority over the permitting process.⁸⁵

What the opinions indicate, however, is that should Congress choose to take action, it will have the power to change how permission is granted for cross-border facilities,⁸⁶ particularly since such an action is more accurately described as “foreign commerce” than “foreign affairs.” Such a solution would be helpful, in part because one problem with regulations derived executive orders is that the orders can easily be reversed or modified from one Presidency to the next. Legislation passed through Congress, however, means that it is more likely to be permanent—a situation which would lead to greater certainty for developers.

There are consequences to Congress not creating legislation that would fill this gap—that is, that executive orders have largely shaped the law. This has led to even more uncertainty. For example, in the *Energía Sierra Juárez* case previously mentioned, the Southern California District Court was tasked with determining whether or not, as the Plaintiffs asserted: (1) The DOE had violated the Administrative Procedure Act (APA) by not conducting a proper NEPA environmental review; and (2) whether the APA was at all applicable to the presidential permit process since, as the defendants asserted, “the Complaint . . . challenged presidential action undertaken by the agency pursuant to an express delegation of executive authority, which is not ‘final agency action’ subject to APA review.”⁸⁷ Defendants had support for their contention, since other district courts had held “issuance of a permit by a federal agency pursuant to an executive order is presidential action, not agency action, and therefore not subject to judicial review under the APA.”⁸⁸ Nonetheless, the Court was not convinced of the defendants' arguments, and denied the defendants' motion to dismiss.

In *Detroit International Bridge Co. v. Government of Canada*,⁸⁹ a subsequent case relating to cross-border bridges that have a similar presidential permitting process, the Washington D.C. District Court held that contrary to the rationale in *Protect Our Communities*, presidential authority delegated to an agency was still presidential—and thus not subject to review under the APA. Addressing the policy implication that agencies could avoid judicial review by hiding behind presidential authority, the court in *Detroit*

84. VANN & PARFOMAK, *supra* note 19, at 7 (citing *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1074–75, 1078, 1078 n.5 (D.S.D. 2009)).

85. *Id.* (citing *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1151–52, 1162–63 (D. Minn. 2010)).

86. *Id.* at 8.

87. *Protect Our Cmty's. Found. v. Chu*, No. 12cv3062-L-BGS, 2014 WL 1289444, at *4–5 (S.D. Cal. Mar. 27, 2014).

88. *Id.* at *6.

89. 189 F. Supp. 3d 85, 104–05 (D.D.C. 2016).

International Bridge replied, “Congress is fully capable of preventing such a result.”⁹⁰

This jurisdictional issue—and the power to grant presidential permits—was largely ignored. Recently, however, the presidential permitting process has been questioned in the above cases and also in congressional hearings. More attention has been brought to the issue because of developments in clean technology, such as wind and solar power, which have led to an increased interest in siting along the border of the United States and Mexico. But what drew the most attention to the issue was the Keystone XL Pipeline case—a controversy that dragged the topic of presidential permitting onto the national stage.⁹¹

B. Congressional Attention

The presidential permitting process was largely ignored until, in 2015, the Department of State, the agency that issues presidential permits for petroleum pipelines, and the equivalent of the DOE for electric transmission lines, denied a presidential permit for TransCanada’s Keystone XL Pipeline after concluding that the project was not in the national interest.⁹² Several bills passed through Congress attempting to amend the presidential permitting process, including Senate Bill 1, the Keystone XL Pipeline Approval Act, which passed through Congress but was vetoed by President Obama the same day it was sent to his office.⁹³ Another bill also passed through Congress, but this one had a broader aim—not just to ease the permitting process on one project, but to eliminate the presidential permitting process altogether.

During the 113th Congress, Representatives Fred Upton, Chairman of the Committee on Energy and Commerce, and Republican Gene Green of Texas presented a bill that the two had coauthored:⁹⁴ the North American Energy Infrastructure Act (NAEIA). The representatives presented the bill with a strikingly bipartisan group of cosponsors: twelve Republicans and eight Democrats. The majority of the cosponsors from border states hailed not from the Canada–United States border but from the Mexico–United States border, indicating that it is, indeed, the southern border that suffers the most from the permitting processes since, in part, they continue a cycle of growth stagnation (where there is no infrastructure, there is no development; where there is no development, there is no need for infrastructure).

90. *Id.* at 105.

91. Aamer Madhani & Susan Davis, *Obama Rejects Keystone Pipeline from Canada to Texas*, USA TODAY (Jan. 18, 2012), <https://usatoday30.usatoday.com/news/washington/story/2012-01-18/obama-rejects-keystone-pipeline/52655762/1> [<https://perma.cc/WGE2-P6R8>].

92. LINDA LUTHER & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R44140, PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 3 (2017).

93. *Id.* at 16.

94. *Hearing on H.R. 3301*, *supra* note 55, at 1 (opening statement of Rep. Ed Whitfield).

Upton, in his opening statement in the hearing before the Committee on Energy and Commerce, characterized the bill as an effort “to construct the architecture of abundance to realize [the] Nation’s newfound energy potential.”⁹⁵ The Bill was sent to the Committee on Energy and Commerce, who recommended that the Bill pass with an amendment.⁹⁶ The primary purpose of the Act was to “establish a more uniform, transparent, and modern process” for developing energy infrastructure—including the transport of oil and natural gas and the transmission of electricity—on the Canada and Mexico borders “in the pursuit of a more secure and efficient North American energy market.”⁹⁷

NAEIA proposed that presidential permits for border-crossing facilities be eliminated entirely and replaced with “crossing certificates.” These crossing certificates would differ from the presidential permits in several ways. First, they would be issued by the Secretary of State for oil pipelines and the Secretary of Energy for electric transmission facilities, and would not require the complete concurrence of the Secretary of State, the Secretary of Energy, and the Secretary of Defense.⁹⁸

The bill also removed any requirements for public notice or comment.⁹⁹ Significantly, the permitting process would have a time cap; agencies would be required to issue the certificates within 120 days of the findings of the NEPA review.¹⁰⁰ Moreover, granting a permit to a cross-border facility would no longer be considered a “major Federal action” that automatically triggered NEPA review.¹⁰¹

And in this bill too, there was a subtle linguistic shift relating to the emphasis on the “public interest”: past legislation had required the applicant seeking a permit to prove that the project was either in the public interest or consistent with the public interest. In this new legislation, the default position was toward granting the certificate, rather than denying it, unless the facility “[wa]s *not* in the public interest.”¹⁰² This is a subtle, but significant change. Instead of laying a positive burden on the applicants, they were free to operate as they wished so long as the crossing did not hurt the public interest.¹⁰³

95. *Id.* at 5 (statement of Rep. Fred Upton).

96. H.R. REP. NO. 113-482, pt.1, at 1 (2014).

97. North American Energy Infrastructure Act, H.R. 3301, 113th Cong. (2013).

98. *Id.* § 3(b)(1)–(2).

99. *See id.* § 8(b)(1) (the only mention of notice of any rule changes in the Act is the requirement that the Act itself be published in the Federal Register within 180 days of its enactment).

100. *Id.* § 3(b)(1).

101. *See* LUTHER & PARFOMAK, *supra* note 92, at 4 (explaining that a “major Federal action” includes any project that requires federal agency approval via permit or otherwise); *see also id.* § 3(b)(1) (saying that NEPA or other necessary permit approval *shall* be granted unless it somehow runs contrary to public interest).

102. H.R. 3301 § 3(b)(1) (emphasis added).

103. This distinction drew dissent among some representatives advocating for the bill, including California Representative Jay McNerney, who stated that he “didn’t understand why

The bill also nixed electric transmission facilities' requirement to get FERC authorization for the crossing.¹⁰⁴

The bill drew the greatest opposition from those who feared, like Representative Henry A. Waxman from California, that the bill would be a “rubber stamp” to tar sands projects like the Keystone XL Pipeline and would increase the risk of projects that adversely affected climate change policies.¹⁰⁵

The bill passed in the House on June 24, 2014.¹⁰⁶ It moved on to the Senate, where it was introduced by Senators Joe Donnelly, a Democrat from Indiana, Lisa Murkowski, a Republican from Alaska, and Joe Manchin, a Democrat from West Virginia.¹⁰⁷ The bill had already passed the House with bipartisan support and had even been recommended by the Committee on Energy and Commerce.¹⁰⁸ The bill was read twice in the Senate on September 16, 2014, and then referred to the Committee on Energy and Natural Resources.¹⁰⁹ It did not make it through the 113th session but had a second life in the 114th.

The bill was introduced in the 114th congressional session as Senate Bill 1228¹¹⁰ and recommended for the Senate Committee on Energy and Natural Resources, to be heard five days later on May 14, 2015.¹¹¹ Unfortunately, this Committee had no Senate representation from any of the southern border states besides Arizona,¹¹² which has no existing electric transmission links to Mexico.¹¹³ California and Texas, those states most keen on cross-border transmission facilities, had no representatives on the Committee at all. The Committee on Energy and Natural Resources hearing—which was set to address energy infrastructure as a whole—hardly touched on the issue. In a

projects that are not in the public interest should be approved” and believed that, contrarily, energy projects should be in the “broad public interest.” *Hearing on H.R. 3301, supra* note 54, at 3–4 (statement of Rep. Jay McNerney).

104. H.R. 3301 § 6.

105. *Hearing on H.R. 3301, supra* note 54, at 8–9 (statements of Rep. Jay McNerney and Rep. Henry A. Waxman).

106. North American Energy Infrastructure Act, H.R. 3301, 113th Cong., 160 CONG. REC. H5687–88 (2014) (enacted).

107. North American Energy Infrastructure Act, S. 2823, 113th Cong. (2014).

108. #RecordOfSuccess, HOUSE ENERGY AND COMMERCE COMM. (current through Jan. 23, 2018), <https://energycommerce.house.gov/recordofsuccess/> [<https://perma.cc/Z4UD-N8LC>].

109. S.2823 – North American Energy Infrastructure Act, CONGRESS.GOV (Sept. 16, 2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2823/text> [<https://perma.cc/89VT-TA96>].

110. North American Energy Infrastructure Act, S. 1228, 114th Cong. (2015).

111. *See Hearing on Energy Infrastructure Legislation Before the S. Comm. on Energy and Nat. Res.*, 114th Cong. (May 14, 2015).

112. *See id.*

113. *See* Michel Marizco, *Cross-Border Power Grid in the Works for Arizona, New Mexico*, ARIZ. PUB. MEDIA (Aug. 16, 2017), <https://news.azpm.org/p/news-splash/2017/8/16/115386-arizona-mexico-cross-border-power-grid-in-the-works/> [<https://perma.cc/RLU3-SJFY>] (reporting that planning for the power grid between Arizona and Mexico was not finalized until 2017).

287-page document recording the proceedings, the word “border” was mentioned only four times, “Mexico” not once.

Parts of the original NAEIA resurfaced in other iterations, including the North American Infrastructure and Security Act of 2016—a monstrosity large omnibus bill that passed in the Senate 85–12 on April 20, 2016, and in the House 241–178 on May 25, 2016.¹¹⁴ Luckily, it died at the close of the session as the two versions of the bill were being reconciled.¹¹⁵

What began as beautiful legislation intended to ease permitting processes and minimize regulations lost its teeth and became incorporated into a bill that proposed far more red tape than it sought to cut through. The spirit of the original bill—eliminating presidential permits altogether, streamlining permitting processes, and fostering neighborliness that provided benefits on both sides of the border—was destroyed.

In the 115th Session, the bill lives again—and this time, it may prosper. Indeed, H.R. 2883, “Promoting Cross-Border Energy Infrastructure Act,” an act identical to H.R. 3301, passed 254–175 in the House on July 19, 2017.¹¹⁶

There is also reason to believe that this time, when the newest version of the NAEIA passes in the House, it will be approved by the Senate. In 2013, when NAEIA first made its way through Congress, there was a split between the House, which was Republican, and the Senate, which was Democrat.¹¹⁷ Since the bill was largely bipartisan, this should not have been of much significance, but the bill was associated with the Keystone XL pipeline and all of its political baggage. Now that the Trump Administration has approved the Keystone XL by issuing TransCanada a permit on March 23, 2017,¹¹⁸ the bipartisan support that NAEIA had will likely be even stronger, since it is less likely to be lumped in with the Keystone controversy.

Additionally, now that Republicans control both the House and the Senate, it is likely that they will try to use their collective clout to push through NAEIA legislation. A Congress that is trying to please President Trump would do well to support NAEIA, particularly since President Trump has demonstrated his approval of such permit-expediting procedures, both through his approval of the Keystone XL pipeline and the recent Executive Order Expediting Environmental Reviews and Approvals For High Priority

114. *All Information (Except Text) for S.2012—North American Energy Security and Infrastructure Act of 2016*, 114th Cong., <https://www.congress.gov/bill/114th-congress/senate-bill/2012/all-info> [<https://perma.cc/DBL9-UY4L>].

115. *S. 2012 (114th): North American Energy Security and Infrastructure Act of 2016*, GOVTRACK (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/2012> [<https://perma.cc/R2BM-GBG9>].

116. Promoting Cross-Border Energy Infrastructure Act, H.R. 2883, 115th Cong., 163 CONG. REC. H6010, H6023 (2017).

117. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 1 (2014).

118. Notice of Presidential Permit to TransCanada Keystone Pipeline, L.P., Public Notice 9941, 82 Fed. Reg. 16,467 (Apr. 4, 2017).

Infrastructure Projects.¹¹⁹ What's more, these changes would perhaps work in tandem with President Trump's planned renegotiation of the North America Free Trade Agreement (NAFTA).¹²⁰

Though the renegotiation of NAFTA is now politically loaded, in its current form, the NAFTA provisions relating to cross-border electricity trade are outdated, as they still require that any generating facilities selling to Mexico sell all of their output to CFE, a stipulation that would have become moot after Mexico's Energy Reform.¹²¹ Given this set of circumstances, there is a significant chance that NAEIA reform is on the horizon.

Conclusion

Given the case examples presented above, a well-apprised power investor should not touch cross-border infrastructure with a ten-foot pole (nor a 2.7-mile transmission line). The costs are too great, the permitting process too protracted, and the rewards minimal or nonexistent if the project becomes stranded behind miles of red tape. As such, to encourage cross-border development, Congress should seek to ease permitting processes in order to encourage cross-border electric transmission development that will lead to greater grid reliability and cost efficiency as well as improved relations with Mexico. After all, as the great American poet Robert Frost once wrote, "[s]omething there is that doesn't love a wall."¹²² Because it is not good fences, but good transmission, that makes good neighbors.

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119. Exec. Order No. 13,766, 3 C.F.R. § 8657 (2017).

120. Jill Colvin, *Trump: NAFTA Trade Deal a 'Disaster,' Says He'd 'Break' It*, ASSOCIATED PRESS (Sept. 26, 2015), <https://apnews.com/982f8146e10942b2b7f6a07e2077576d/trump-nafta-trade-deal-disaster-says-hed-break-it> [<https://perma.cc/WV3J-HETW>].

121. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 364-68.

122. ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON* 11, 11-13 (Henry Holt & Co. 1917) (1914).