

November 30, 2018

The Honorable Chrystia Freeland
Minister of Foreign Affairs
Canada

Dear Minister Freeland:

I have the honor to confirm that, in connection with the signing on this date of the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (the Protocol), the Government of the United States (United States) and the Government of Canada (Canada) have agreed on disciplines related to energy regulatory measures and energy regulatory transparency, contained in the Annex to this letter.

I have the honor to propose that this letter and your letter in reply confirming your Government shares this understanding, shall constitute an agreement between the United States and Canada, which shall enter into force on the date of entry into force of the United States – Mexico – Canada Agreement (the Agreement) and shall constitute an integral part of the Agreement when it enters into force.

Sincerely,

Ambassador Robert E. Lighthizer
United States Trade Representative

ANNEX

ENERGY REGULATORY MEASURES AND REGULATORY TRANSPARENCY

Article 1: Definitions

For the purposes of this Annex:

authorization means a permission, license or similar administrative or contractual instrument by which a competent regulatory authority of a Party entitles a person to exercise a certain economic activity in its territory;

electric transmission facility means a transmission element that is operated at 100kV or higher, or real power and reactive power resources connected at 100kV or higher, that are subject to an energy regulatory authority of a Party's central level of government with respect to tolls, rates, or charges for services provided over those elements. These transmission elements do not include facilities used in the local distribution of electric energy;

energy regulatory measure means a measure adopted or maintained by a Party's central level of government that directly affects the exploration for, or production, storage,¹ transportation, transmission or distribution, purchase or sale, import or export of oil,² natural gas, hydrocarbon gas liquids, coal, electricity, refined petroleum products, biofuels, and uranium, but does not include measures related to energy efficiency;

monetary payment means a payment, in cash or its equivalent in kind, required by law or regulation to be made by a person to a Party's central level of government in connection with an application for or authorization to participate in energy-related activities in its territory;

Party refers to the United States or Canada;

pipeline network means a line transporting oil, natural gas, refined petroleum products or hydrocarbon gas liquids in a Party's territory, or across sub-national or international boundaries, and includes associated facilities such as pumps and other compressor stations and storage tanks regulated by an energy regulatory authority of the Party;

renewable energy means energy derived from natural processes that are replenished at a higher rate than they are consumed. They are virtually inexhaustible. Renewable energy resources include

¹ For greater certainty, storage does not include reservoir water levels for hydro-electric dams.

² For greater certainty, oil includes crude oil, bitumen, condensates, and other oil-derived fuels.

biomass, waste carbon streams, hydro, geothermal, solar, wind, ocean thermal, wave action, and tidal action. Renewable energy also includes renewable fuels and renewable fuel blending components in petroleum-based fuels, such as renewable diesel fuel, fuel ethanol, and advanced and cellulosic biofuels, produced from renewable biomass; and

unduly discriminatory or unduly preferential means differential treatment of like products, or differential treatment of service suppliers, investors, or investments in like circumstances, that constitute arbitrary or unjustifiable discrimination within the meaning of Article XX of the GATT 1994 and its interpretive notes or Article XIV of GATS, as applicable.

Article 2: Scope

This Annex applies to energy regulatory measures proposed, maintained, or adopted by a Party's central level of government.

Article 3: Cooperation

The Parties recognize the importance of enhancing the integration of North American energy markets based on market principles, including open trade and investment among the Parties, to support North American energy competitiveness, security, and independence. The Parties shall endeavor to promote North American energy cooperation, including with respect to energy security and efficiency, standards, joint analysis, and the development of common approaches.

Article 4: Energy Regulatory Measures and Regulatory Transparency

1. Each Party shall maintain or establish regulatory authorities that are separate from, and not accountable to, persons subject to energy regulatory measures.
2. Each Party shall endeavor to ensure that in the application of a energy regulatory measure, a energy regulatory authority within its territory avoids disruption of contractual relationships to the maximum extent practicable, supports North American energy market integration, and provides for orderly and equitable implementation appropriate to those measures.³
3. A Party may require an authorization to participate in energy-related activities in its territory.

³ This paragraph does not apply to a measure related exclusively to the protection of human health or the environment.

4. If a Party requires an authorization referred to in paragraph 3, it shall ensure that information prescribed in its law relevant to the authorization process is published, including:

- (a) the process for applying;
- (b) any monetary payment associated with the application;
- (c) the regulatory authority to which an application or other relevant documentation must be submitted;
- (d) criteria an applicant must meet to obtain an authorization;
- (e) criteria to be considered in determining if an authorization should be granted;
- (f) applicable timelines; and
- (g) a contact point from which applicants can obtain further information on their application for an authorization.

5. Each Party shall endeavor to administer its process for obtaining an authorization referred to in paragraph 3 in accordance with the information published pursuant to paragraph 4.

6. Each Party shall endeavor to ensure that energy-related activities that do not result in a facility exceeding its previously authorized capacity and that are limited to performing maintenance work on, or ensuring the safety of, existing cross-border infrastructure may be undertaken under the initial authorization and shall not require a new authorization.

7. A Party may require a person that has been granted an authorization referred to in paragraph 3 to make a reasonable monetary payment. Each Party shall ensure that the monetary payment and any changes to it are determined in a transparent manner with reasonable advance notice so as to provide legal certainty for the person which has been granted that authorization, in accordance with the applicable law of the authorizing Party. If recovery of administrative costs is provided for in the Party's law, these costs do not have to be determined in advance.

8. Each Party shall provide that the applicant for an authorization referred to in paragraph 3 has a right of appeal or judicial review of the decision concerning the authorization by an authority independent from the authority that issued the decision, in accordance with its law.⁴

⁴ This paragraph does not apply to authorizations for the construction, connection, operation, or maintenance of cross-border infrastructure, including electric transmission facilities and pipeline networks, at international boundaries.

Article 5: Access to Electric Transmission Facilities and Pipeline Networks

1. Each Party shall ensure that a measure governing access to or use of electric transmission facilities and pipeline networks:
 - (a) accords access to those facilities and pipeline networks for the purposes of importation from another Party, that is neither unduly discriminatory nor unduly preferential; and
 - (b) to the extent that tolls, rates, or charges are set, assessed, approved, or subject to oversight by a Party, establish that any tolls, rates, or charges payable for that access are just, reasonable, and neither unduly discriminatory nor unduly preferential.
2. The United States shall ensure that the Intertie Access Policy of the Bonneville Power Administration affords British Columbia Hydro treatment no less favorable than the most favorable treatment afforded to utilities located outside the Pacific Northwest.

Article 6: Relation to other Chapters

For greater certainty, Article 4 (Energy Regulatory Measures and Regulatory Transparency) and Article 5 (Access to Electric Transmission Facilities and Pipeline Networks) are:

- (a) subject to the relevant provisions, exceptions and non-conforming measures of Chapter 14 (Investment), Chapter 15 (Cross-Border Trade in Services) and Chapter 2 (National Treatment and Market Access for Goods), and Article 32.1 (General Exceptions) of the Agreement; and
- (b) to be read in conjunction with any other relevant provisions in the Agreement.