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ATTORNEY GENERAL OF TEXAS

September 23, 2021

The Honorable Donna Campbell, M.D.
Chair, Committee on Nominations
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0388

Re: Whether the Lone Star Infrastructure Protection Act prohibits a Texas transmission service provider from entering into interconnection agreements with entities owned by citizens of China or headquartered in China or with entities who lease assets from such an entity and related questions (RQ-0425-KP)

Dear Senator Campbell:

You ask about the recently enacted Lone Star Infrastructure Protection Act and whether it prohibits certain types of agreements between specified entities.¹

Earlier this year, the Eighty-seventh Legislature enacted the Lone Star Infrastructure Protection Act (“the Act”) to prohibit “contracts or other agreements with certain foreign-owned companies in connection with critical infrastructure in this state.” Act of May 24, 2021, 87th Leg., R.S., S.B. 2116 (preamble). As author of the bill, you explained your focus was on “blocking foreign power access to our critical infrastructure.”² The Act, which became effective immediately upon enactment, added chapter 113 to the Business and Commerce Code.³ Section 113.002 of that chapter prohibits certain types of contracts with companies under certain circumstances:

¹See Letter from Honorable Donna Campbell, Chair, Senate Comm. on Nominations, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 18, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0425KP.pdf>.

²Lone Star Infrastructure Protection Act: Hearings on Tex. S.B. 2116 Before the Senate Comm. on Bus. & Com., 87th Leg., R.S. (Apr. 20, 2021) (statement of Sen. Donna Campbell, Author, Sen. Comm. on Bus. & Com.), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15776.

³Two other bills enacted during the Eighty-seventh legislative session also added chapter 113 to the Business and Commerce Code. See Act of May 22, 2021, 87th Leg., R.S., H.B. 113 (codified at TEX. BUS. & COM. CODE §§ 113.0001–.0105) (“Peer-to-Peer Car Sharing Programs”); Act of May 25, 2021, 87th Leg., R.S., S.B. 561 (codified at TEX. BUS. & COM. CODE §§ 113.001–.005) (“Sales and Leasing of Distributed Renewable Generation Resources”). This opinion addresses only those provisions enacted pursuant to S.B. 2116.

(a) A business entity may not enter into an agreement relating to critical infrastructure in this state with a company:

(1) if, under the agreement, the company would be granted direct or remote access to or control of critical infrastructure in this state, excluding access specifically allowed by the business entity for product warranty and support purposes; and

(2) if the business entity knows that the company is:

(A) owned by or the majority of stock or other ownership interest of the company is held or controlled by:

(i) individuals who are citizens of China, Iran, North Korea, Russia, or a designated country; or

(ii) a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of China, Iran, North Korea, Russia, or a designated country; or

(B) headquartered in China, Iran, North Korea, Russia, or a designated country.

(b) The prohibition described by Subsection (a) applies regardless of whether:

(1) the company's or its parent company's securities are publicly traded; or

(2) the company or its parent company is listed on a public stock exchange as:

(A) a Chinese, Iranian, North Korean, or Russian company; or

(B) a company of a designated country.

TEX. BUS. & COM. CODE § 113.002. You ask five questions about the applicability of the Act to a proposed project for wind generation in Val Verde County. Request Letter at 3–4. At the outset, we note that your questions relate only to the Act itself, and you do not ask about any federal or other state laws that may apply to the anticipated agreements. We therefore limit this opinion to a

construction of the Act and do not opine on the impact other laws may have on the scenario you describe.

I. A generation interconnection agreement is an agreement relating to critical infrastructure that grants a company direct or remote access to or control of critical infrastructure.

You first ask whether an interconnection agreement is “an ‘agreement relating to critical infrastructure’ that grants a company ‘direct or remote access to or control of critical infrastructure in this state.’”⁴ Request Letter at 4. Entities that generate electric energy must transport that energy to consumers, and they do this by interconnecting the generator to the electric transmission system. Public Utility Commission (“Commission”) regulations require transmission service customers that own electrical facilities in the Electric Reliability Council of Texas (“ERCOT”) region to execute interconnection agreements with the transmission service providers to which their facilities are physically connected. 16 TEX. ADMIN. CODE § 25.195(a) (2021) (Pub. Util. Comm’n of Tex., “Terms and Conditions for Transmission Service”). ERCOT has promulgated a standard generation interconnection agreement to be used by power generation companies, exempt wholesale generators and transmission service providers.⁵ *Id.*

Answering your question first requires addressing whether generation interconnection agreements relate to critical infrastructure. The Act defines “critical infrastructure” to include an “electric grid.” TEX. BUS. & COM. CODE § 113.001(2). The term “electric grid” is not defined by the Act, but it is commonly understood to refer to an interconnected network for electricity delivery from producers to consumers that includes electric power transmission to carry power long distances. *Cf.* WEBSTER’S THIRD NEW INT’L DICTIONARY 1779 (defining “power grid”). As the purpose of an interconnection agreement is to connect an electricity generator to the transmission system in the electric grid, the agreement relates to critical infrastructure as defined in the Act. Furthermore, by granting the generation owner the ability to connect the generator to the transmission system, a generation interconnection agreement gives that company direct or remote access to critical infrastructure and is therefore implicated by the Act.

II. Section 113.002 of the Business and Commerce Code prohibits a generation interconnection agreement between a transmission service provider and a company that is a wholly or majority-owned subsidiary of a Chinese company.

In your second question, you ask whether an interconnection agreement between a transmission service provider and a company that is a wholly or majority-owned subsidiary of a Chinese-headquartered corporation violates the Act. Request Letter at 4. Section 113.002 prohibits certain agreements between a business entity and a company the business entity knows is “owned by or the majority of stock or other ownership interest of the company is held or

⁴You ask specifically about generation interconnection agreements. Request Letter at 1–2. This opinion is therefore limited to those agreements and should not be read to address other types of agreements that may or may not relate to critical infrastructure and grant direct or remote access to or control of critical infrastructure in this State.

⁵*See* ERCOT Standard Generation Interconnection Agreement, <http://www.ercot.com/content/services/rq/re/ERCOT%20SGIA.pdf> (“SGIA”).

controlled by . . . a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of China, Iran, North Korea, Russia, or a designated country.”⁶ TEX. BUS. & COM. CODE § 113.002(a)(2)(A)(ii). A corporation is generally understood to have the nationality of the state under the laws of which the corporation is organized. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987). Thus, the parent owner as you describe it would appear to be a Chinese company. Section 113.002 would therefore likely prohibit a generation interconnection agreement between a transmission service provider and the described parent owner’s wholly or majority-owned subsidiary.

III. Under the standard generation interconnection agreement required by ERCOT, a company entering into the agreement with a transmission service provider must “own and operate” the proposed generation resource, and a lessee without an ownership interest would not satisfy such a requirement.

In your third question, you describe a scenario where a company that is a wholly or majority-owned subsidiary of a Chinese-headquartered corporation constructed a power generation facility itself but subsequently leased the generation assets to a business entity without any ties to China, and the lessee then entered into an interconnection agreement with a transmission service provider. Request Letter at 4. In briefing provided in response to your request, ERCOT advises that the scenario you describe would likely violate ERCOT rules and protocols.⁷ ERCOT protocols, which are subject to Commission oversight and review, provide the framework for the administration of the Texas electricity market. *Pub. Util. Comm’n v. Constellation Energy Commodities Grp., Inc.*, 351 S.W.3d 588, 594–95 (Tex. App.—Austin 2011, pet. denied). Courts will give serious consideration to an agency’s interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule. *R.R. Comm’n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011).

Under the standard generation interconnection agreement promulgated by ERCOT and required by Commission rules, the company entering into an interconnection agreement with a transmission service provider must “own and operate” the proposed generation resource. SGIA at 3 (“Generator represents that it will own and operate the Plant.”). In the scenario you describe, the company entering into the interconnection agreement would be the lessee of the generation resource but would not appear to own it. Transmission service providers using ERCOT facilities must comply with all applicable provisions of the ERCOT protocols. 16 TEX. ADMIN. CODE § 25.198(c) (Pub. Util. Comm’n of Tex., “Initiating Transmission Service”). While we do not resolve fact issues in the opinion process, the scenario you describe may violate ERCOT protocols, and a court would likely conclude that it is not allowed under Texas law.

⁶The Legislature gave the Governor authority, after consulting with the Homeland Security Council, to designate additional countries determined to be a threat to critical infrastructure. *See* TEX. BUS. & COM. CODE § 113.003.

⁷*See* Brief from Chad V. Seely, Vice Pres. & Gen. Counsel, ERCOT, to Honorable Ken Paxton, Tex. Att’y Gen. at 5–6 (Aug. 27, 2021) (on file with the Op. Comm.).

IV. A land lease agreement between a generation resource developer and a landowner would likely permit direct or remote access to or control of critical infrastructure such that it would be prohibited by the Act in the circumstances you describe.

In your fourth and fifth questions, you ask whether a land lease agreement between a generation resource developer or transmission service provider and a wholly or majority-owned subsidiary of a Chinese-headquartered landowner is an agreement relating to critical infrastructure that grants a company direct or remote access to or control of critical infrastructure in this State. Request Letter at 4. The lease arrangement as you describe it involves a landowner that is a wholly-owned subsidiary of a Chinese corporation leasing the property at issue for the express purpose of establishing wind generation facilities that will be interconnected to the grid. *Id.* Thus, the agreement you describe “relates to” critical infrastructure in this State. *See* TEX. BUS. & COM. CODE § 113.002(a).

The extent to which any specific agreement grants direct or remote access to or control of critical infrastructure will depend in part on the terms of the contract at issue. *See* Tex. Att’y Gen. Op. No. GA-0725 (2009) at 1 (“This office does not construe particular contracts or contract provisions.”). But a landowner may be unlikely to release all rights of possession or entry to a generation resource established on its property. Furthermore, even if carefully crafted contract terms restrict the landowner’s access to or control of the critical infrastructure, a breach of that contract could result in circumstances that allow for access that the Act was intended to prevent. A landlord retains access rights as governed by the lease agreements and upon voluntary or involuntary termination of the lease. Given a landowner’s prevailing rights in such circumstances, it is possible that a land lease agreement between a generation resource developer and the landowner would allow for the possibility of direct or remote access to or control of critical infrastructure such that it would be prohibited by the Act.

S U M M A R Y

The Lone Star Infrastructure Protection Act, found in chapter 113 of the Business and Commerce Code, prohibits contracts or other agreements with certain foreign-owned companies in certain circumstances in connection with critical infrastructure in this State. Whether federal law separately implicates the ability of entities to enter into such contracts is a question of fact and not addressed by this opinion.

Under the Act, a generation interconnection agreement is an agreement relating to critical infrastructure that grants a company direct or remote access to or control of critical infrastructure. Section 113.002 prohibits a generation interconnection agreement between a transmission service provider and a company that is a wholly or majority-owned subsidiary of a Chinese company.

Under the standard generation interconnection agreement promulgated by ERCOT, a company entering into the agreement with a transmission service provider must own and operate the proposed generation resource, and a lessee without an ownership interest would not satisfy such a requirement.

A land lease agreement between a generation resource developer and a landowner could permit direct or remote access to or control of critical infrastructure such that it would be prohibited by the Act in the circumstances you describe.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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