



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 6, 2022

The Honorable Tracy O. King
Chair, House Committee on Natural Resources
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Opinion No. KP-0410

Re: Whether the Lone Star Infrastructure Protection Act prohibits a business or government entity from entering into an agreement to provide utility service to a factory owned by a company that meets one of the criteria under the Act (RQ-0443-KP)

Dear Representative King:

You ask whether “the Lonestar Infrastructure Protection Act (“the Act”) prohibits a business or government entity from entering into an agreement to provide utility services to a factory owned by a company that meets one of the criteria under the Act.”¹

The Eighty-seventh Legislature adopted 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., ch. 975, 2021 Tex. Gen. Laws 2535 (S.B. 2116 preamble). The author’s stated purpose of the bill was to block “foreign power access to our critical infrastructure.”² The Act added chapter 113 to the Business and Commerce Code (applicable to business entities) and chapter 2274 to the Government Code (applicable to governmental entities).³ The Act prohibits certain types of contracts with companies under certain circumstances:

¹Letter from Honorable Tracy O. King, Chair, House Comm. on Nat. Res., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 17, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0443KP.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 Honorable Donna Campbell, Author, Senate Comm. on Bus. & Com.), available at https://tlc.senate.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., ch. 445, 2021 Tex. Gen. Laws 880 (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., ch. 561, 2021 Tex. Gen. Laws 1126 (S.B. 398) (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; *see also* TEX. GOV'T CODE § 2274.0102 (substantively identical provision applicable to governmental entities).

Relevant to your question, for the Act to apply, the agreement at issue must give a company “direct or remote access to or control of critical infrastructure.” TEX. BUS. & COM. CODE § 113.002(a)(1); TEX. GOV’T CODE § 2274.0102(a)(1). The Act defines “critical infrastructure” as “a communication infrastructure system, cybersecurity system, electric grid, hazardous waste treatment system, or water treatment facility.” TEX. BUS. & COM. CODE § 113.001(2); TEX. GOV’T CODE § 2274.0101(2). The utility services at issue in your request, including “electricity, sewer, waste treatment, internet, telecommunication, culinary water and water treatment services,” will require a utility provider to use critical infrastructure to provide services to a consumer, in this case the factory you ask about. Request Letter at 1, 2. An electricity provider will use the electric grid to transfer electricity to the factory, and a water utility will use a water treatment facility to purify water before passing the water to the factory. But the utilities’ use of critical infrastructure to provide services to an end-user does not inherently result in the utility consumer itself obtaining access to the critical infrastructure.

The Act does not define “access” or “control.” “Words not statutorily defined bear their common, ordinary meaning unless a more precise definition is apparent from the statutory context or the plain meaning yields an absurd result.” *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). To determine a term’s common, ordinary meaning, courts “typically look first to dictionary definitions.” *Id.* The term “access” is commonly defined as “the means of approaching or entering a place.” NEW OXFORD AMERICAN DICTIONARY 9 (3d ed. 2010); *see also* BLACK’S LAW DICTIONARY 16 (10th ed. 2014) (defining “access” as a “right, opportunity, or ability to enter, approach, pass to and from, or communicate with”). The term “control” is defined as “the ability to manage a machine, vehicle, or other moving object. NEW OXFORD AMERICAN DICTIONARY 378 (3d. ed. 2010).

A prior opinion of this office addressed whether the Act prohibited an interconnection agreement between a transmission service provider and an electricity generator that was a wholly or majority-owned subsidiary of a Chinese-headquartered corporation. *See* Tex. Att’y Gen. Op. No. KP-0388 (2021) at 3. The electricity generator in that scenario sought an interconnection agreement to transfer electricity to the electric grid. *Id.* The opinion concluded that because the electricity generator would obtain the ability to connect to and supply electricity to the electric grid, which the statute defines as critical infrastructure, the interconnection agreement gave the company “direct or remote access to critical infrastructure” and was therefore implicated by the Act. *Id.* at 3, 6.

In contrast, the scenario you describe does not appear to involve the factory’s own use of critical infrastructure, but instead only the utility provider’s use of that infrastructure to deliver utility services. *See* Request Letter at 1–2. Receiving utility services from critical infrastructure does not equate to gaining access or control, and the provision of standard utility services, by itself, does not grant an entity the ability to enter and use critical infrastructure or to manage it. “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.” Tex. Att’y Gen. Op. No. KP-0388 (2021) at 5. While it is possible that a specific contract for utility services could grant unique access to critical infrastructure, under normal circumstances, such service would not amount to access such that the Act would apply.

You also ask whether the construction and maintenance of new infrastructure such as additional power lines, water pipes, sewer pipes and other infrastructure to provide such services constitutes an agreement that grants the “direct or remote access to or control of critical infrastructure in this state.” Request Letter at 2 (quoting TEX. BUS. & COM. CODE § 113.002(a)(1)). Significant growth within a geographic area will likely require the construction of new infrastructure as you describe. Nothing in the Act prohibits construction or maintenance of new infrastructure to facilitate the provision of additional utility services. Such construction and maintenance of new infrastructure would not implicate the Act unless the new infrastructure provided a factory like that you describe with “direct or remote access to or control of critical infrastructure,” as discussed above. TEX. BUS. & COM. CODE § 113.002(a)(1); TEX. GOV’T CODE § 2274.0102(a)(1).

S U M M A R Y

The Lone Star Infrastructure Protection Act prohibits contracts or other agreements with certain foreign-owned companies in certain circumstances in connection with critical infrastructure in this State. For the Act to apply, the agreement at issue must give a company direct or remote access to or control of critical infrastructure. An agreement to provide standard utility services, by itself, does not grant an entity the ability to access critical infrastructure as contemplated by the Act. 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.

Very truly yours,

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

KEN PAXTON
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