

Client Alert

May 2020

White House Issues Executive Order on Securing the US Bulk-Power System

On May 1, 2020, the White House issued an executive order on securing the United States bulk-power system (the Order), finding that foreign adversaries are creating and exploiting vulnerabilities in the US bulk-power system (BPS) and determining that unrestricted foreign supply of BPS equipment constitutes an “unusual and extraordinary threat” to national security. The Order imposes restrictions on certain transactions involving BPS equipment in which foreign adversaries of the United States have an interest.

The Order authorizes the Secretary of Energy to identify existing BPS equipment that poses a security threat and to recommend measures to mitigate such threats. It establishes a task force to protect the United States from national security threats to energy infrastructure by developing federal energy infrastructure procurement policies and procedures.

Prohibited Transactions Under the Order

The Order cites physical and cyber threats from foreign adversaries to the BPS, defined in the order as including “(i) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (ii) electric energy from generation facilities needed to maintain transmission reliability.” It seeks to address those threats by prohibiting certain transactions involving the supply of BPS equipment used in the United States. In particular, the Order prohibits any “acquisition, importation, transfer, or installation of any bulk-power system electric equipment” (collectively, transactions) by any person involving property in which “any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the equipment).”

BPS equipment is defined broadly under the Order to include “items used in bulk-power system substations, control rooms, or power generating stations, including reactors, capacitors, substation transformers, current coupling capacitors, large generators, backup generators, substation voltage regulators, shunt capacitor equipment, automatic circuit reclosers, instrument transformers, coupling capacity voltage transformers, protective relaying, metering equipment, high voltage circuit breakers, generation turbines, industrial control systems, distributed control systems, and safety instrumented systems.”

The prohibition applies to transactions that are initiated after the date of the Order (May 1, 2020), and for which the Secretary of Energy (the Secretary) has determined the following:

- the transaction involves BPS equipment “designed, developed, manufactured, or supplied” by foreign adversaries (i.e., by persons “owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary”); and
- the transaction either (a) poses an “undue risk of sabotage to or subversion of” the BPS, (b) poses an “undue risk of catastrophic effects on the security or resiliency” of US critical infrastructure or the US economy or (c) otherwise poses an unacceptable risk to US national security or the security and safety of US persons.

The prohibition applies regardless of any contracts, licenses or permits granted prior to the date of the order, unless otherwise provided by statute or in regulations or other direction or authorization issued pursuant to the Order.

Rules and Regulations Implementing the Order

The Order authorizes the Secretary to adopt rules and regulations implementing the Order, and directs other agencies to take “all appropriate measures within their authority” to implement the Order.

The rules and regulations issued under the Order may determine that particular countries or persons constitute “foreign adversaries” exclusively for purposes of the Order. The Order defines a “foreign adversary” as a “foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or its allies or the security and safety of United States persons.” Those regulations also may identify particular equipment or countries for which BPS-related transactions “warrant particular scrutiny.”

Finally, the regulations may establish procedures for licensing transactions that would otherwise be prohibited under the Order, and procedures for negotiation of agreements to mitigate concerns related to the risks identified in the Order.

In short, the Order grants the Secretary broad authority to develop rules and regulations that identify the equipment and sources of equipment that are subject to the Order, and to develop procedures that could allow such transactions, including potential transaction modifications to address security concerns. These rules and regulations are to be issued within 150 days of the issuance of the Order.

Securing Existing BPS Equipment

Although the Order’s primary focus is on future transactions, Section 2(d) of the Order provides an avenue for addressing potential threats to the BPS posed by existing equipment. The Secretary, in consultation with other relevant department and agency heads, is required to identify existing BPS equipment “designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary” that poses a security threat of the type identified in the Order, and to develop recommendations to “identify, isolate, monitor, or replace such items as soon as practicable, taking into consideration overall risk to the bulk-power system.”

Task Force on Federal Energy Infrastructure Procurement

The Order establishes a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (the Task Force), aimed at working to protect the United States from national security threats by coordinating federal procurement of energy infrastructure, and by information sharing relating to risks and risk management. The Task Force is to be chaired by the Secretary and composed of the heads of various relevant departments and agencies (including Defense, Interior and Homeland Security).

Among the Task Force’s prescribed duties are (i) the development and submission to the Federal Acquisition Regulatory Council (the FAR Council) of recommended energy infrastructure procurement policies for federal agencies, to ensure an integrated consideration of national security concerns at the federal level, and (ii) consultation with existing coordinating councils for the electricity and oil and natural gas subsectors, and on the development of those policies.

Finally, although the distribution system is not included within the definition of BPS, and therefore distribution system equipment is not directly within the scope of the Order, the Order recognizes that attacks on the BPS could originate from the distribution system, and requires the Task Force to engage with distribution system industry groups in a manner consistent with law and national security. The order defines BPS facilities to extend to lines rated at 69kV and above.

The Task Force is required to submit annual progress reports until it issues its final recommendations to the FAR Council, and the FAR Council is required to consider proposing an amendment to the Federal Acquisition Regulation within 180 days of receiving the Task Force's recommendations.

Contacts

Kevin W. Jones
kjones@HuntonAK.com

Paul M. Tiao
ptiao@HuntonAK.com

Frederick R. Eames
feames@HuntonAK.com

Matthew A. Stuart
mstuart@HuntonAK.com

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.