

Sany exec hints lessons learned from Ralls deal to be implemented in pending transaction

 PaRR Strong evidence

An executive for China's **Sany Group** has admitted that its future investments in the US need "better planning" after its acquisition of a wind farm near a military facility in Oregon was blocked by the US government on national security grounds.

Sany executives, who used a US affiliate, **Ralls Corp**, to make the purchase, are currently challenging an order by President Barack Obama to unwind the deal. That order forces the company to divest "all interests" in the property.

During a November district court hearing as part of the appeal, Viet Dinh, an attorney for Ralls, argued that because the US government did not provide details about its decision, the company did not know whether the government used location, height, or type of equipment in making its decision. As a result, Ralls cannot avoid the same risk in other investments, such as one planned for Colorado, Dinh said.

When asked by *PaRR* what lessons the company had learned from the presidential decision and how this would affect its future investments, Wu JiaLinag, deputy general manager of Sany Holding, tacitly acknowledged that the company could have made some errors in its dealing with the Committee on Foreign Investment in the US (CFIUS) -- an interagency committee led by the Treasury Department that regulates foreign investment.

"First of all, we have selected a whole different legal team to represent us," he said. Ralls was previously advised by Steptoe & Johnson and Fredrickson & Byron when filing for the CFIUS review earlier this year. As previously reported by *PaRR*, as recently as July a Sany executive publicly stated he was optimistic that CFIUS would clear the transaction.

After CFIUS moved to block the Oregon investment, Ralls hired Bancroft and Morris, Manning & Martin, a firm with a strong China practice.

The proposition that Ralls had failed to correctly negotiate the legal framework underpinning such investments was echoed by Thad McBride, a partner in Sheppard Mullin in Washington, DC.

While filing with CFIUS is voluntary, McBride told *PaRR* that Ralls had made a mistake by not filing with the committee at the outset.

"If Ralls had gone in voluntarily, as opposed to be asked to come in ... the transaction [with mitigation] might well have been approved," he said.

McBride also counseled companies to communicate with CFIUS, even on an informal basis.

"In our experience with the committee, what tends to be most effective is ample dialogue with CFIUS before a transaction is submitted," he said.

"For a company like Ralls that may be considering multiple transactions that would be subject to review, communication with the committee after the transactions [is also important]," he added.

Although the CFIUS regulations were amended in 2008 to be more specific, it is unlikely that the government will be forced to provide a lot of detail about its decision, McBride said.

“There is still a tremendous amount of discretion that is allotted to the committee ... to form their own opinions about what could constitute a threat to national security,” he added.

Regarding Ralls’ planned investment in Colorado, a former CFIUS official told *PaRR* that any security review of that deal would focus on the particular characteristics of the assets acquired, rather than simply the acquiring company.

The Ralls decision also has altered the calculus companies should make when considering whether to file a pre-investment notice with CFIUS, according to other practitioners in the field.

Historically, lawyers have looked at the industry or technology involved in the transaction when considering whether to file with CFIUS.

“Clearly, physical proximity to military installations is becoming ... a very big issue with deals that have blown up with CFIUS,” Timothy Keeler, a partner with Mayer Brown told *PaRR*.

“The Ralls case, as well as CFIUS’ previous blocking of two gold mine investments in Nevada, have created a third dimension to the inquiry: geographical proximity to national security sensitive sites,” according to Jinshu “John” Zhang, a partner at Reed Smith.

“Since these sites may not be readily identified and it is hard to predict how close is too close, a potential foreign buyer will almost have to file a CFIUS notice before each and every acquisition in order to achieve absolute certainty,” Zhang added.

by Raymond Barrett in Washington DC and Joy C. Shaw in Shanghai