Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

25 November 2016

SEC-OGC Opinion No. 16-29
RE: Election of Foreign Stockholder as President of a Renewable Energy Company

ATTY. RUSSEL S. ALABADO
Alabado and Partners Law Offices
3rd Floor Builder's Center Building
170 Salcedo St., Legaspi Village,
Makati City

Dear Atty. Alabado:

This refers to your letter dated 4 February 2016 requesting for an opinion as to whether or not a foreign stockholder can be elected as President of a Renewable Energy Company, 60% of which is Filipino-owned.

You stated that Austworks Corporation ("Austworks") is registered in the Commission with SEC Registration No. CS201500442 and is venturing into Renewable Energy, particularly Energy From Waste projects. You further averred that Austworks is currently 88% owned by Australian stockholders. Fully aware that Department of Energy Circular No. DC2009-07-0011 (Guidelines Governing A Transparent and Competitive System of Awarding Renewable Energy Service/Operating Contracts and Providing for the Registration Process of Renewable Energy Developers) [DOE Circular No. DC2009-07-0011] requires a Renewable Energy company to be a Filipino corporation at least sixty percent (60%) of its capitalization being owned by Filipinos, Austworks will restructure its capitalization and invite Filipino investors to comply with the 60% Filipino-ownership requirement.

Moreover, you disclosed that after such restructuring, Austworks intends to elect, as its President, one of its Australian stockholders. Hence, the instant query as to whether or not an Australian stockholder may be elected as President of Austworks.

You opine that Austworks' activity relating to Renewable Energy is not among those enumerated in the Negative List, and therefore, the prohibition on

electing a foreigner as President of a domestic corporation engaged in a partly nationalized activity as applied in SEC-OGC Opinion No. 11-37 dated 1 September 2011 does not apply to Austworks.

We opine otherwise.

The Articles of Incorporation of Austworks states that its primary purpose is *"to engage in and conduct the general business of development, utilization, and installation or renewable energy resourses (sic) such as biomass, solar, wind, hydropower, geothermal and ocean energy sources, application of hybrid systems and other emerging renewable energy technologies in the Philippines for the generation, transmission, distribution, sale and use of electricity and fuel generated from renewable energy resources, including importation and local acquisition, assembly or manufacturing of equipment, materials, tools and other accessories for installation or use in the utilization of renewable energy resources."* Indubitably, Austworks is engaged in the exploration, development, and utilization of natural resources, which is a partly nationalized activity.

Article XII, Section 2 of the 1987 Constitution provides:

> Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, **all forces of potential energy**, fisheries, forests or timber, wildlife, flora and fauna, **and other natural resources are owned by the State.** With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. **The State** may directly undertake such activities, or **it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens.** Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant. Xxx (emphasis supplied)

Pursuant to the above-quoted Constitutional provision, the 10th Foreign Investment Negative List (FINL)[1] limits foreign participation in the exploration, development, and utilization of natural resources to a maximum of 40% equity. In the same vein, DOE Circular No. DC2009-07-0011, requires applicants for the issuance of a Renewable Energy Service/Operating Contracts to be a Filipino or a Filipino corporation at least sixty percent (60%) of its capitalization is owned by Filipinos.[2] Such requirement finds support in the afore-quoted provision of the

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[1] No. 17, E.O. No. 184

[2] DOE Circular No. DC2009-07-0011, Part I, Section 6 (a)

Constitution as expressed in the DOE Circular No. DC2009-07-0011's first Whereas Clause, to wit:

> "WHEREAS, pursuant to Article XII, Section 2 of the 1987 Philippine Constitution, all forces of potential energy and other natural resources within the Philippine territory belong to the State and their exploration, development and utilization shall be under the full control of the State."

In view of the foregoing premises, Austworks' intended act of electing an Australian stockholder as its President is governed by Section 2-A of the Anti-Dummy Law[3]. The Commission previously held that the afore-quoted provision of law prohibits aliens from being appointed to management positions as president, vice-president, etc. of corporations engaged in wholly or partially nationalized activities[4] or in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.[5] The rationale behind Section 2-A of the Anti-Dummy Law, specifically the prohibition on the election or appointment of foreigners in management positions is to prevent the circumvention of the nationalization laws[6].

Consequently, Austworks cannot elect one of its Australian stockholders as its President because it is engaged in a partially nationalized activity wherein election of foreigners in management position is expressly prohibited by law.

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[3] Commonwealth Act No. 108, **"Section 2-A.** *Unlawful use, Exploitation or enjoyment* — **Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens**, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by a the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner **permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee** or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: And provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities."

[4] SEC Opinion dated 27 July 1990 addressed to Philippine Association of Service Exporters, Inc. citing SEC Opinions dated 14 June 1982, 1 July 1983, 15 May 1985, 26 April 1989.

[5] SEC-OGC Opinion No. 12-01 dated 31 January 2012 citing SEC Opinion dated 8 December 1995, addressed to Mr. K.J. Mctavish.

[6] SEC-OGC Opinion No. 12-01 dated 31 January 2012 citing DOJ Primer on the Employment of Aliens under the Anti-Dummy Law.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances.[7] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

[7] SEC Memorandum Circular 2003-15, No. 7.