Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

24 August 2018

SEC-OGC Opinion No. 18-15
RE: Cold Storage, cold logistics and distribution as Public Utility; Ownership of Land

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Attention: Atty. Demosthenes B. Donato and Atty. Ma. Connie R. De Gala

Gentlemen:

This is in response to your letters dated March 12 and 16, 2018 requesting for an opinion on whether or not your client, Igloo Supply Chain Philippines, Inc., (Igloo Philippines), is considered engaged in a partially nationalized activity.

In your March 16 letter, you stated that:

> "xxx Igloo Supply Chain Philippines, Inc. (Igloo), is a stock corporation formed, organized and existing under the laws of the Republic of the Philippines xxx created for the primary purpose of engaging in the business of the operation of cold storage facilities, cold logistics and distribution services, value added cold processing and related services."

In the attached Articles of Incorporation of Igloo Philippines, it is stated that its primary purpose is as follows:

> "to engage in the business of the operation of **cold storage facilities, cold logistics and distribution services**, value added cold processing and related services."

You, thus, requested for an opinion from the Office on whether or not Igloo Philippines, in providing logistics services and owning lands and warehouses, is considered as engaged in a nationalized or partially nationalized activity.

The 1987 Philippine Constitution in Section 11 of Article XII imposes a foreign ownership limitation to corporations or associations operating a public utility, to wit:

> **"Section 11. <u>No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens;</u>** xxx The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines" (Emphasis and underscoring supplied).

The Constitution, however, does not provide a definition of public utility. In view of the foregoing, the Supreme Court, in *JG Summit Holdings, Inc., v. Court of Appeals et. al.,* [1] defined public utility as follows:

> "A '**<u>public utility' is a 'business or service engaged in regularly supplying the public with some commodity or service of public consequence</u>** such as **<u>electricity, gas, water, transportation, telephone or telegraph service.'</u>**[2] xxx As its name indicates, the term "public utility" implies public use and service to the public. **<u>The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities</u>**. Stated otherwise, the owner or person in control of public utility must have devoted it to such use that the public generally or that part of the public which has been served and has accepted the service, has the right to demand that use or service so long as it is continued, with reasonable efficiency and under proper charges. Unlike a private enterprise which independently determines whom it will serve, a 'public utility holds out generally and may not refuse legitimate demand for service'.[3]

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[1] *JG Summit Holdings, Inc., v. Court of Appeals et. al.,* G.R. No. 124293, 24 September 2003.

[2] *Ibid,* citing Almario, Generoso O., "Transportation and the Public Service Law," 3rd ed. (1977), p. 267 citing 73 CJS 990-991; Albano *v.* Reyes, 175 SCRA 264 (1989) citing Am Jur. 2d *v.* 64, p. 549; *NAPOCOR v. Court of Appeals,* 279 SCRA 506 (1997).

[3] *Id.* at Note 1, citing *Commonwealth v. Lafferty,* 426 Pa 541, 233 A2d 256.

In the case of *Luzon Brokerage Co., Inc., v. The Public Service Commission,*[4] the term "public utility" has been used interchangeably with the term "public service." According to Section 13(b) of the Commonwealth Act (CA) No. 146, as amended by CA No. 454 (1942) otherwise known as the Public Service Act (Public Service Act), "public service" includes:

> "every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, [warehouse] wharf or dock, **ice plant, ice-refrigeration plant**, canal, irrigation system, gas electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services..."[5] (Emphasis supplied)

It is already settled that the interpretation of "ice plant, ice refrigeration plant" in the Public Service Act includes the manufacturing and sale of ice[6], as well as the provision of cold storage and refrigeration facilities.[7]

The classification of ice plants and cold storage services as a public utility is, however, qualified by its use and service to the public. In *Iloilo Ice and Cold Storage Co., v. Public Utility Board,* the Supreme Court ruled that Iloilo Ice and Cold Storage Co., is not a public utility because factual circumstances show it has constantly sold its services to selected individuals through private contracts one of the provisions of which is the reservation of its right to refuse granting of future services to the said clients;[8] thus, the High Court held:

> Planting ourselves on the authorities, which discuss the subject of public use, the criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission. (U.S. vs. Tan Piaco, supra.) **The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public.** (Thayer and Thayer vs. California Development Company, supra.) **The use is public if all persons have the right to the use under the same circumstances.** (Fall brook Irrigation District vs. Bradley, supra.) **If the company did in**

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[4] G.R. No. L-37661, 16 November 1932.
[5] The Public Service Law, Commonwealth Act No. 146, as amended by Commonwealth Act No. 454.
[6] *Iloilo Ice and Cold Storage Company v. Public Utility Board,* G.R. No. L-198857, 02 March 1923.
[7] *Veneracion v. Congson Ice Plant,* G.R. No. L-31213-14, 23 July 1973, citing Republic Act (R.A.) No. 6533, §1; See also R.A. No. 2290, §1; R.A. No. 3238, §1; R.A. No. 4513, §1; R.A. No. 5135, §1; R.A.No. 5936, §1.
[8] *Id.* at Note 6.

> **truth sell ice to all persons seeking its service, it would be a public utility. But if on the other hand, it was organized solely for particular persons under strictly private contracts, and never was devoted by its owners to public use, it could not be held to be a public utility without violating the due process of law clause of the Constitution.** (Producers Transportation Co. vs. Railroad Commission, supra.) And the apparent and continued purpose of the Iloilo Ice and Cold Storage Company has been, and is, to remain a private enterprise and to avoid submitting to the Public Utility law.[9]

Subsequently, the Supreme Court, in *La Paz Ice Plant v. John Bordman*[10], changed its previous findings that Iloilo Ice and Cold Storage Company (renamed as Iloilo Commercial & Ice Co.,) is not a public utility, due to change in factual circumstances, thusly:

> "In the case of Iloilo Ice and Cold Storage Company vs. Public Utility Board... we said that under the established facts and circumstances **the defendants' ice factory was not then a public utility because it was not an enterprise devoted to the public.** But the proven facts in the case before us now conclusively show that the aforesaid factory, after the said decision was promulgated, **has been converted into a public service because, as the defendant Bordman himself admitted, the ice which it produces is sold to the public for a compensation** and for a price which for some time has been the same as that which the plaintiff charged for the ice which it produced." (Emphasis supplied)

In the instant case, Igloo Philippines may not be an ice plant because it does not engage in the manufacture and sale of ice. Igloo Philippines, however, can be classified as an ice-refrigeration plant as it provides cold storage and refrigeration facilities. Philippine laws and jurisprudence provide that ice refrigeration plants are considered public utilities if their enterprise is devoted to the public or their services are sold to the public for compensation. It is noted that Igloo Philippines's purpose clause is couched in general terms, and it allows servicing the public indiscriminately there being no qualification.

The Commission had previously opined that if the enumerated activities in the primary purpose of a corporation are too broad and encompassing making possible the undertaking of mass media[11] or public utility,[12] then such is deemed as nationalized or partially nationalized.

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[9] *Id.* at Note 6.

[10] G.R. No. 43668, 31 March 1938, citing *Iloilo Ice and Cold Storage Company v. Public Utility Board*, G.R. No. L-198857, 02 March 1923.

[11] SEC-OGC Opinion No. 14-11, dated 02 June 2014, addressed to Navarro Amper & Co. c/o Ms. Myra V. Torres and Mr. Richard R. Lapres.

[12] SEC-OGC Opinion No. 14-15, dated 07 July 2014, addressed to Information Capital Technology Ventures, Inc., c/o Ms. Angeline L. Macasaet.

Therefore, considering its general and unqualified business purpose clause, Igloo Philippines is allowed to indiscriminately offer its services to the public for compensation, and should be considered as a public utility. As such, Igloo Philippines is considered engaged in partially nationalized activity and should comply with the afore-said requirements of the Constitution and the Public Service Act.

Lastly but equally important, Igloo Philippines, being an owner of a land, should be considered as a partially nationalized corporation. [13] Section 2-A of the Anti-Dummy Law provides that a corporation having in its name and under its control a property, the enjoyment of which is reserved by the Constitution or the laws of the Philippines to Filipinos, is in effect nationalized.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[14] If upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

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[13] See SEC-OGC Opinion No. 12-11, dated 08 August 2012, addressed to Atty. Zomer A. Ochavillo citing Section 7, Article XII of the 1987 Philippine Constitution and Sections 22 and 23, Commonwealth Act No. 141 of 1936, "An Act to Amend, Compile the Laws Relative to lands of the Public Domain:"
[14] SEC Memorandum Circular 2003-15, No.7