Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

September 19, 2019

SEC-OGC Opinion No. 19-42
Re: Nationality Requirement for Transport Network Company

TIONGCO SIAO BELLO LAW OFFICES
Units 2104 to 2105, Robinson's Equitable Tower
4 ADB Avenue, Ortigas Center, Pasig City

Attention: ATTY. JOYCE G. JUCUTAN
ATTY. NIKKA M. BACCAY

Attorneys:

This refers to your letter dated 26 April 2019 requesting an opinion on whether Velox Technology Philippines, Inc. (Velox Philippines) is compliant with the foreign equity limits under Section 11, Article XII of the 1987 Constitution.

Based on your letter, Velox Philippines is an applicant for accreditation as a Transport Network Company (TNC) with the Land Transportation Franchising and Regulatory Board (LTFRB). After submission and pending approval of the application, the Department of Transportation (DOTr) issued Department Order (DO) No. 2018-12 dated 11 June 2018 classifying TNCs as public utilities. To comply with the mandate of the said DO and in accordance with Section 11, Article XII of the 1987 Constitution, Velox Philippines undertook ownership restructuring.

Pursuant to such restructuring, Velox South-East Asia Holdings Pte. Ltd. (Velox SEA), a foreign Singaporean corporation and a stockholder of Velox Philippines, sold 245,000,000 of its common shares in the latter to Pace Crimson Ventures Corporation (PCVC), a wholly-owned Filipino corporation. After the sale, PCVC also subscribed to 955,000,000 common shares from the unsubscribed portion of the authorized capital stock of Velox Philippines. After the said purchase and subscription, and based on the Amended 2018 General Information Sheet (GIS) of Velox Philippines, which you attached, PCVC now has a total of 1,200,000,000 common shares or 60% ownership in Velox Philippines. Meanwhile, Velox SEA's common shares were reduced to 799,999,995 or 39.99% ownership in Velox Philippines, as follows:

Stockholder	Shares Subscribed	Amount Subscribed	Percent of Ownership
PCVC	1,200,000,000	Php 12,000,000.00	60%
Velox SEA	799,999,995	7,999,999.95	39.99%
5 Individual Stockholders	5	0.05	0.01%
Total	2,000,000,000	Php 20,000,000.00	100%

Hence, your query.

I. RULES ON CORPORATE NATIONALITY

Section 11, Article XII of the 1987 Constitution provides:

> "SECTION 11. **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**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. 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 ours)

In this regard, the operation of public utilities was placed under List A, Item 18 of the 11th Foreign Investment Negative List (FINL)[1], wherein only up to 40% foreign equity is allowed.

Under the Foreign Investment Act (FIA) of 1991[2], a corporation is deemed to be a "Philippine National" if it is organized under the laws of the Philippines of which at least 60% of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines[3].

A. Base of 60%-40% under Jurisprudence and SEC Memorandum Circular No. 8, Series of 2013

In the 2011 case of *Gamboa vs. Teves,* [4] the Supreme Court ruled that the term **'capital'** in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus, in that case, only to common shares, and not to the total outstanding capital stock (which in that case comprised of common and non-voting preferred shares).

Subsequently, the Commission issued **SEC Memorandum Circular No. 08,**

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[1] Executive Order No. 65, Promulgating the Eleventh Regular Foreign Investment Negative List
[2] Republic Act (R.A.) No. 7042 approved on 13 June 1991
[3] Section 3, R.A. No. 7042
[4] *Heirs of Gamboa v. Teves*, G.R. No. 176579, 28 June 2011

Series of 2013 (SEC-MC No. 8), which was upheld by the Supreme Court in the 2016 case of *Roy vs. Herbosa*[5]. SEC-MC No. 8 uses the two-tiered test in determining compliance with the required percentage of Filipino ownership. **Under the two-tiered test, the 60% required Filipino ownership shall be applied to BOTH: (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.**

B. Control Test (Prevailing mode of determining Filipino ownership)

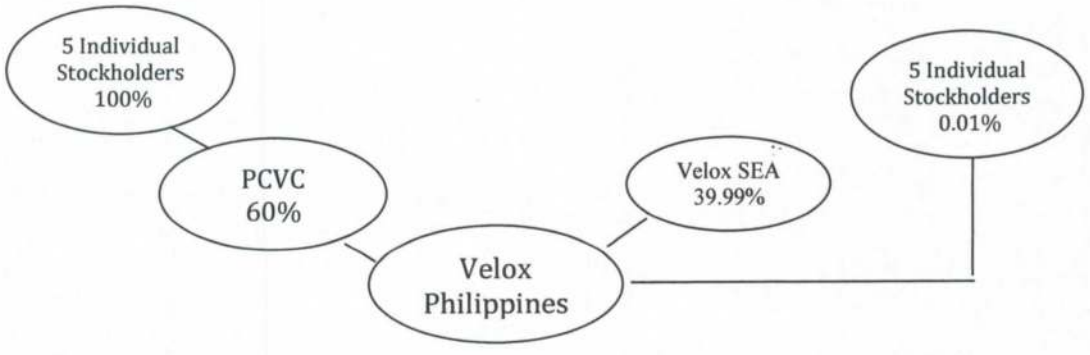
In the Philippines, there are two acknowledged tests in determining the nationality of a corporation which has corporate stockholders: (i) the Control Test and (ii) the Grandfather Rule.

The Control Test or the "liberal rule" states that shares belonging to corporations at least sixty percent (60%) of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality. Under this test, there is no need to further trace the ownership of the 60% (or more) Filipino stockholdings of an investing corporation since a corporation which is at least 60% Filipino-owned is already considered as Filipino.[6]

On the other hand, the Grandfather Rule is the method by which the percentage of Filipino equity in a corporation is computed by *attributing* the nationality of the second or even subsequent tier of ownership to determine the nationality of the corporate shareholder."[7] This rule is only used when doubt exists as to the locus of the beneficial ownership and control, as when these do not in fact reside in the Filipino shareholders but in the foreign shareholders.[8]

II. DISCUSSION: USING THE TWO-TIERED TEST UNDER SEC-MC NO. 08

Based on the Amended 2018 GIS of Velox Philippines, which you attached to your letter, the ownership structure of Velox Philippines is illustrated below:



[5] *Jose M. Roy III vs Chairperson Teresita Herbosa*, G.R. No. 207246, 22 November 2016
[6] *Narra Nickel Mining and Development Corporation, et. al. vs Redmont Consolidated Mines Corporation*, G.R. No. 195580, 21 April 2014, citing DOJ Opinion No. 020, series of 2005.
[7] *Ibid.*,
[8] *Ibid.*

To determine whether the ownership structure of Velox Philippines complies with the foreign ownership limits, the nationality of the abovementioned stockholders (i.e. PCVC, Velox SEA, and the 5 Individual Stockholders) must first be determined.

A. Nationality of Velox Philippines' Stockholders

a) Nationality of PCVC

Based on the 2016 GIS of PCVC, which you attached to your letter, and its latest Articles of Incorporation, which is on file with the Commission, the corporation has an authorized capital stock amounting to PhP 5,000,000.00 divided into 50,000 common shares with a par value of PhP 100.00 per share. Out of this, PhP 1,250,000 representing 12,500 common shares have been subscribed, as follows:

Name	Nationality	Shares Subscribed	Amount Subscribed	Percent of Ownership
Paulo Crispin Ll. Campos, III	Filipino	4,375	Php 437,500.00	35%
Cecilia Ll. Campos	Filipino	3,750	375,000.00	30%
Paulo E. Campos, Jr.	Filipino	3,750	375,000.00	30%
Lourdes E. Campos	Filipino	500	50,000.00	4%
Shirley B. Enobal	Filipino	125	12,500.00	1%

Since all shares are common shares (i.e. shares with voting rights), which thus constitute the totality of the Outstanding Capital Stock (OCS), the two-tiered test is complied with by basing the 60%-40% requirement on the outstanding 12,500 common shares. Here, all of the 12,500 common shares are owned by Filipino citizens. Hence, PCVC is a 100% Philippine national.

b) Nationality of Velox SEA

Velox SEA is a corporation duly organized and existing under and by virtue of the laws of Singapore.[9]

Based on the above information, Velox SEA is foreign-owned. Thus, its 39.99% direct shareholding with Velox Philippines[10] is foreign-owned.

c) Nationality of Individual Stockholders

The five (5) individual stockholders mentioned in the Amended 2018 GIS of Velox Philippines are all natural persons and declared as Filipinos.

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[9] Consistent with the Deed of Absolute Sale of Shares of Stock between Velox SEA and PCVC dated 18 January 2019

[10] Amended 2018 GIS of Velox Philippines

B. Nationality of Velox Philippines

Since all shares of Velox Philippines are common shares (i.e. shares with voting rights), which thus comprise the totality of the OCS, the two-tiered test is complied with by basing the 60%-40% requirement on the outstanding 2,000,000,000 common shares. These common shares are owned as follows:

Stockholder	Shares Subscribed	Amount Subscribed	Percent of Ownership
PCVC (Filipino)	1,200,000,000	Php 12,000,000.00	60%
Velox SEA (Foreign)	799,999,995	7,999,999.95	39.99%
5 Individual Stockholders (Filipino)	5	0.05	0.01%
Total	2,000,000,000	Php 20,000,000.00	100%

As discussed previously, PCVC and the 5 Individual Stockholders are Philippine nationals. Hence, PCVC's and the 5 Individual Stockholders' 60% and 0.01% shareholdings in Velox Philippines, respectively, are investments of Philippine nationals. Velox Philippines is thus 60.01% owned by Philippine nationals, and thus compliant with the foreign ownership limits under Section II, Article XII of the 1987 Constitution.

Further, since PCVC's shareholders are all natural persons, the Control Test and the Grandfather Rule are not applicable as these tests are used to determine the nationality of a corporation (Velox Philippines) with an investor corporation (PCVC) which has corporate stockholders.

It shall be understood 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.[11] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

CAMILO S. CORREA
General Counsel

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