Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC-OGC Opinion No. 23-03
Re: Implications of RA 11659 on a freight forwarding company engaged in domestic operations

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Dear Atty. Flores:

This refers to your letter dated 10 August 2022 requesting the Commission's opinion regarding the implications of Republic Act (RA) No. 11659 which amended Commonwealth Act (CA) No. 146, or the Public Service Act, as amended[1], on your client, a freight forwarding/logistics company engaged in domestic operations ("Company X").

Specifically, you are requesting for an opinion from the Commission on the following queries:

1. "With the amendment of CA No. 146, and the exclusion of freight forwarding/logistics companies in the list of public service companies considered as public utilities, are freight forwarding/logistic companies – upon the effectivity of RA No. 11659 – now exempt from observing the 60-40 rule such that at any time, the foreign equity participation may be increased to exceed the 40% ceiling, even up to 100% foreign ownership?

2. "As **part** of Company X's range of services as a freight forwarding company, it operates yellow plated trucks-for-hires, categorized as public utility vehicles. Does this fact convert the entire business operations of Company X, and Company X itself, as a public service/utility firm under the law and therefore still covered by the 60-40 Filipino/foreign equity rule?

3. "If Company X is still considered a public utility firm because of the operation of yellow-plated trucks-for-hire, it is considering shutting down or permanently closing this aspect of its business by amending its Articles of Incorporation such that it will be specifically mentioned in the amendment that the business of Company X **excludes** the business of operating public utility vehicles. Upon the SEC's approval of this amendment, does Company X, *ipso facto*, and without complying with any other/further requirement, cease to be considered a public utility firm such that it will be allowed to have 100% foreign ownership at any time thereafter?"

FIRST QUERY

We answer the ***first query*** in the affirmative, with qualification.

A **"freight forwarder"** is defined by the Supreme Court in the case of ***Unsworth Transport International (Phils.), Inc. vs. CA***[2] as follows:

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[1] Entitled "AN ACT TO REORGANIZE THE PUBLIC SERVICE COMMISSION, PRESCRIBE ITS POWERS AND DUTIES, DEFINE AND REGULATE PUBLIC SERVICES, PROVIDE AND FIX THE RATES AND QUOTA OF EXPENSES TO BE PAID BY THE SAME, AND FOR OTHER PURPOSES" (November 7, 1936).
As Amended by RA 2677, entitled "AN ACT TO AMEND SECTIONS TWO, THREE, FOUR, TEN, THIRTEEN, AND FOURTEEN OF COMMONWEALTH ACT NUMBERED ONE HUNDRED FORTY-SIX, AS AMEN OTHERWISE KNOWN AS THE PUBLIC SERVICE ACT, AND FOR OTHER PURPOSES" (June 18, 1960).

[2] G.R. No. 166250, 26 July 2010, citing Chemsource, Inc. v. Hub Group, Inc., 106 F. 3d 1358, C.A. 9 (Cal.) (2002).

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> "xxx The term "**freight forwarder**" refers to a firm holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and, in the ordinary course of its business, (1) to assemble and consolidate, or to provide for assembling and consolidating, shipments, and to perform or provide for break-bulk and distribution operations of the shipments; **(2) to assume responsibility for the transportation of goods from the place of receipt to the place of destination**; and **(3) to use for any part of the transportation a carrier subject to the federal law pertaining to common carriers**.
>
> A freight forwarder's liability is limited to damages arising from its own negligence, including negligence in choosing the carrier; however, where the forwarder contracts to deliver goods to their destination instead of merely arranging for their transportation, it becomes liable as a common carrier for loss or damage to goods. A freight forwarder assumes the responsibility of a carrier, which actually executes the transport, even though the forwarder does not carry the merchandise itself." *(Emphasis supplied and citation omitted)*

Before RA No. 11659

In a previous opinion[3], citing ***Albano vs. Reyes***[4], the Commission opined that a **freight forwarder is an operator of a public utility**, which is a "business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service." As its name indicates, the term implies public use and service to the public.[5]

In connection with this, Article XII of the 1987 Constitution provides that at least sixty percent (60%) of the shareholdings of a corporation operating a public utility must be owned by citizens of the Philippines, to wit:

> "**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 and underscoring supplied)*

Conversely, foreign equity participation in a public utility is limited to forty percent (40%).

By virtue of the said provision, the Commission provided the following rules in determining the applicability of the constitutional prohibition on corporations engaged in the business of freight forwarding:

1. A corporation engaged in purely local cargo and freight forwarding activities must be at least 60% owned by Filipino citizens;[6]
2. A corporation engaged in mixed local and international cargo and freight forwarding activities must be at least 60% owned by Filipino citizens;[7] and
3. A corporation engaged in purely international cargo and freight forwarding activities may be wholly-owned (100%) by foreigners.[8]

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[3] SEC-OGC Opinion No. 19-52 dated 18 November 2019 addressed to Procy Fernandez, citing Albano vs Reyes.
[4] G.R. No. 83551, 11 July 1989.
[5] SEC-OGC Opinion No. 21-08 dated 29 October 2008 addressed to Atty. Agerico T. Paras.
[6] *Supra* note 3.
[7] *Supra* note 3, citing Department of Justice Opinion No. 98 penned by Justice Secretary Raul Gonzales on 09 November 2004.
[8] *Ibid*, citing SEC-OGC Opinion No. 17-14 dated 17 November 2017 addressed to Valdecantos & Valencia Law Office; SEC-OGC Opinion No. 16-08 dated 20 April 2016 addressed to Takuma Yamaguchi; SEC-OGC Opinion No. 08-21 dated 29 October 2008 addressed to Atty. Agerico T. Paras; SEC-OGC Opinion No. 10-30 dated 15 November 2010 addressed to Mr. Arvin D. Delima.

Upon the effectivity of RA 11659

Public Utility

RA No. 11659 limited the definition of "**public utility**" as follows:

> "**SEC. 4**. Section 13 of the Commonwealth Act No. 146, as amended, is hereby further amended to read as follows:
>
> xxx
>
> "(d) **Public Utility**. – Public utility refers to a public service that operates, manages or controls for public use any of the following:
>
> "(1) Distribution of Electricity;
> "(2) Transmission of Electricity;
> "(3) Petroleum and Petroleum Products Pipeline Transmission Systems;
> "(4) Water Pipeline Distribution Systems and Wastewater Pipeline Systems, including sewerage pipeline systems;
> "(5) Seaports; and
> "**(6) Public Utility Vehicles.**
>
> xxx" *(Emphasis supplied)*

With the passage of RA No. 11659, the definition of **public utility** is now **limited** to the **enumerated six (6) public services** which are operated, managed, or controlled for public use. The President, however, may, upon recommendation of the National Economic and Development Authority (NEDA), recommend to Congress the classification of other public services as additional public utility.[9]

The above is reflected in List A, Item 18[10] of Executive Oder No. 175, Series of 2022, otherwise known as the *"12th Regular Foreign Investment Negative List"* (12th FINL) to emphasize the forty percent (40%) foreign equity restriction over public utilities.

Relative thereto, "**Public Utility Vehicles (PUV)**", which is expressly classified as a public utility under RA No. 11659, is defined in Section 2(k) thereof as "internal combustion engine vehicles that **carry** passengers and/or **domestic cargo for a fee, offering services to the public, namely trucks-for-hire, UV express service, public utility buses (PUBs), public utility jeepneys (PUJs), tricycles, filcabs, and taxis**: *Provided,* That transport vehicles accredited with and operating through transport network corporations shall not be considered as public utility vehicles."

A freight forwarder may be an operator of a public utility

Thus, a freight forwarding company is not a public utility per se, but may be considered as a PUV, thus a public utility, *if* its activities ***include*** carrying and/or transporting domestic cargoes from the place of receipt to the place of destination for a fee, to the public, namely trucks-for-hire, UV express service, public utility buses (PUBs), public utility jeepneys (PUJs), tricycles, filcabs, and taxis. In this case, the 40% foreign equity restriction over public utilities shall apply.

SECOND QUERY

We answer the ***second query*** in the ***affirmative***.

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[9] RA No. 11659, Section 4.

[10] 12th FINL, issued on 27 June 2022.
"LIST A: FOREIGN OWNERSHIP IS LIMITED BY MANDATE OF THE CONSTITUTION AND SPECIFIC LAWS
xxx
Up to forty percent (40%) foreign equity
xxx
18. Operation of public utilities (Section 11, Article XII of the Constitution; Section 13 of CA No. 146, as amended by Section 4 of RA No. 11659; Section 2[a], 2[b] and 2[m]of RA No. 7718)" (Citations omitted)

Any corporation that **operates**, manages, or controls PUVs is considered a public utility. Thus, if the freight forwarding company includes in its **operation** yellow plated trucks-for-hire, then the forty percent (40%) foreign equity restriction for public utilities applies.

THIRD QUERY

As to your third query, as long as the corporation is not a public utility, as above discussed, both in paper and in actual operations, then our answer is in the affirmative.

All the above notwithstanding, **it is worth noting that the Implementing Rules and Regulations (IRR) of RA No. 11659 is yet to be issued**. As stated in Section 30 of the same law, all administrative agencies in Section 3[11] thereof shall, ***in coordination with the NEDA***, promulgate the IRR to implement the provisions of the law within six (6) months from effectivity.[12]

By reason of the foregoing, and considering that the IRR is yet to be issued, we recommend that you coordinate with NEDA as our opinion hereunder is subject to the IRR and the pertinent agency's interpretation of PUV as a public utility.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts, circumstances and documents disclosed/submitted, and should be considered 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.[13] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Very truly yours,

ROMUALD C. PADILLA
General Counsel

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[11] RA No. 11659, "Section 3. *Recognition of Transfer of Jurisdiction to Various Administrative Agencies.* — All references to the Public Service Commission in Commonwealth Act No. 146, as amended, shall pertain to any Administrative Agency to which the powers and duties of the Public Service Commission were transferred by subsequent laws, such as but not limited to:
(a) Civil Aeronautics Board (CAB);
(b) Civil Aviation Authority of the Philippines (CAAP);
(c) Department of Energy (DOE);
(d) Department of Environment and Natural Resources (DENR);
(e) DICT;
(f) Department of Transportation (DOTr);
(g) Energy Regulatory Commission (ERC);
(h) Land Transportation Franchising and Regulatory Board (LTFRB);
(i) Land Transportation Office (LTO);
(j) Local Water Utilities Administration (LWUA);
(k) Maritime Industry Authority (MARINA);
(l) Metropolitan Waterworks and Sewerage System (MWSS);
(m) National Telecommunications Commission (NTC);
(n) National Water Resources Board (NWRB);
(o) Philippine National Railways (PNR);
(p) Philippine Ports Authority (PPA); and
(q) Toll Regulatory Board (TRB).

[12] *Ibid*, Section 30.
[13] Section 7, SEC Memorandum Circular 2003-15, 16 December 2003.