Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Building, EDSA, Greenhills, City of Mandaluyong

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SEC Opinion No. 05-03
Share issuance from original authorized capital stock; voting requirement.

Madam:

This refers to your letter dated 8 March 2005 requesting confirmation of your opinion that the issuance of additional shares out of the unissued portion of the authorized capital stock of the corporation requires only the board of directors approval.

Based on the facts presented it appears that PNPI corporation is duly registered under Philippine laws. It intends to issue shares out of the unissued portion of its authorized capital stock to its existing stockholders to wit: Eastern Peninsula Capital Resources, Inc., New Manila Properties Inc. and Pacific Nickel Holdings Limited.

It further appears that in its Shareholders' Agreement of 18 January 1998 the following terms and conditions on voting requirements and pre-emptive rights are explicitly provided:

"4.01 High Vote Requirements

> "Subject to the approval of the SEC, the affirmative vote of four out of five directors and of stockholders of the Company representing more than seventy (70%) of the outstanding capital stock of the Company may be necessary for the following corporate actions :
>
> (a) creation or issue of any new shares or loan or other obligation convertible into shares of stock of the Company.
>
> xxx xxx xxx

10

"4.02. Pre-emptive right.
"xxx xxx xxx

(b) Each holder of common stock shall be entitled to pre-emptive right as to all issues of common stock, whether such issues are to be made out of present authorized capital stock or out of a proposed increase of authorized capital stock or from treasury. xxx. "

The twin issues raised in the instant query can be broken down as follows:

(a) whether or not the issuance of additional shares sourced from the authorized capital stock partake the nature of the creation or issue of any new shares.

(b) whether or not such issuance requires the high vote requirement of the board of directors and stockholders.

The answer can be found in the following pronouncements.

Well-settled is the rule that "[I]ssuance of shares out of the unsubscribed shares of authorized capital stock of the corporation may be exercised by the Board of Directors thru a Board Resolution without need of stockholders' approval." (Ltr. to Atty. Aaron B. Bautista, July 28, 1994, SQB Dec.'94 p.78).

"While under the Corporation Code the performance of the corporate functions pertaining to the management of the corporation is vested upon the Board of Directors, there are certain corporate transactions which the Code expressly requires for their validity the concurrence of the votes of the stockholders by prior action or subsequent ratification. However, in the case of issuance of additional shares out of the unissued authorized capital stock of a corporation, the power to approve the same is not expressly granted to the stockholders." Hence, said corporate transaction need not be approved by the stockholders. (Ltr. to Felixberto T. Rulona, Voice Express Corporation, dtd. January 12, 1995).

The aforesaid SEC rulings find support in the Supreme Court pronouncement that there is no pre-emptive right as to additional issues of originally authorized stocks in the following language:

> The general rule is that pre-emptive right is recognized only ***with respect to new issue of shares, and not with respect to additional issues of originally authorized shares.*** This is on the theory that when a corporation at its first inception offers its first shares, it is presumed to have offered all of those which it is authorized to issue. An original subscriber is deemed to have taken his shares knowing that they form a definite proportionate part of the whole number of authorized shares. When the shares left unsubscribed are later reoffered, he cannot therefore claim dilution of interest.(Benito v. SEC, July 25, 1983, 123 SCRA 722, 726).

Thus, the high voting requirement for stockholders under Sec. 4.01 (a) of the Shareholders Agreement aforequoted is inapplicable to the case under consideration.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

8