Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 23-09
Re: Eligibility of Logistics Company to be Converted into 100% Foreign-Owned Corporation

12 May 2023

OTT Logistics Philippines Inc.
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Attn: Mr. John Kristopher Cruz

Dear Sir:

This refers to your e-mail dated 14 November 2022 requesting for the Commission's opinion on whether OTT Logistics Philippines Inc. ("OTT"), a logistics company, is eligible to convert to a 100% foreign owned corporation under Republic Act No. 11659 (RA No. 11659) which amended Commonwealth Act No. 146 or the Public Service Act,[1] and whether it needs to increase its authorized capital stock (ACS) of Php 15,000,000.00 for purposes of such conversion.

As mentioned in your e-mail, OTT is a logistics company and an importer of goods. The company now intends to be 100% foreign-owned.

Based on your submitted amended Articles of Incorporation (AOI), OTT is primarily engaged in logistics and warehouse services. It undertakes the business of trucking services such as but not limited to hauling, carrying, distributing, delivery, loading, and unloading of all classes of goods & merchandise and other products as may be permitted by laws and render other services incidental or related to the aforesaid purposes. Further, it is also engaged in importing, buying and selling, distributing, marketing on wholesale basis all kinds of goods, wares, and merchandise of every kind and description, as secondary purposes.[2]

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[1] R.A. 11659, An Act Amending Commonwealth Act No. 146, otherwise known as the Public Service Act, as amended, 21 March 2022
[2] OTT's Amended Articles of Incorporation:
SECOND: That the primary purpose for which such corporation is incorporated:
To engage in logistics and warehouse services; to undertake in the business of trucking such as but not limited to hauling, carrying, distributing, delivery, loading and unloading of all classes of goods & merchandise and other products as may be permitted by laws and render other services incidental or related to the aforesaid purposes. SECONDARY PURPOSE: To engage in the business of importing, buying & selling, distributing, marketing on wholesale basis in so far as may be permitted by law, all kinds of goods, wares and merchandise of every kind and description; to enter into all kinds of contracts for the import, purchase, acquisition, sale at wholesale and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, commissions merchants, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products whether natural or artificial, without acting as investment adviser or fund manager of an investment company, close-end or open-end investment company, investment house, transfer agent, commodity/ financial futures exchange/ broker/ merchant, financing company, and time shares/ club shares/ membership certificates issuer or selling agents thereof; to engage in the acquisition, servicing, maintenance, purchase or sale of Radio Communication Equipment (Wireless Data Network Equipment), parts and accessories; to engage in the business of customs clearance or brokerage. *(as amended by Board Resolution dated September 4, 2019.)*

Before the passage of RA No. 11659

Before the enactment of RA No. 11659, the term 'public utility' was not exactly defined under the law. The old Public Service Act, which was formerly used as reference, enumerates a list of 'public services' without defining what a 'public utility' is.

Nonetheless, the Court, in the case of *JG Summit Holdings, Inc. v. Court of Appeals, et al.*, defined public utility as follows:

> "A **'public utility' 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.'** x x x As its name indicates, the term "public utility" implies public use and service to the public. **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**. 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]

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%).

After the passage of RA No. 11659

With the passage of RA No. 11659, the concept of public utility is now well defined as it now limits the scope of 'public utility' to public service companies involved **in distribution and transmission of electricity, petroleum and petroleum products pipeline transmission systems, water pipeline distribution systems, wastewater and sewerage pipeline systems, seaports and Public Utility Vehicles (PUVs).**[4]

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[3] As cited in SEC-OGC Opinion No. 18-15 addressed to Donato and Zarate dated August 24, 2018.

[4] Section 4 (d) of RA No. 11659. 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.**

In relation thereto, the concept of PUV is defined under 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."

Logistics Services

To reiterate, per OTT's submitted amended AOI, its logistics services **include the business of trucking such as but not limited to hauling, carrying, distributing, delivery, loading and unloading of all classes of goods & merchandise and other products as may be permitted by laws and render other services incidental or related to the aforesaid purposes**.

In a previous opinion[5], the Commission opined that any corporation that **operates**, manages, or controls PUVs is considered a public utility. Thus, if a *freight forwarding company* includes in its **operation yellow plated trucks-for-hire**, then the forty percent (40%) foreign equity restriction for public utilities applies.[6]

Based on the foregoing, OTT *may* be considered as operating a PUV under RA No. 11659 as its trucks-for-hire carry goods and merchandise for the public.

Further, it is noted that OTT's purpose clause is couched in general terms without qualification, thus allows servicing the public indiscriminately. 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 public utility, then such is deemed as nationalized or partially nationalized.[7]

Accordingly, OTT *may* be considered engaged in a partially nationalized activity, specifically a public utility, and should comply with the aforesaid requirements of the Constitution, RA 11659 and Executive Order No. 175 or the 12th Foreign Negative List ("12th FINL")[8] (i.e. maximum of 40% foreign equity).

All the above notwithstanding, it is worth noting that under Section 4 of RA No. 11659, and Sections 3, 4 and 6 of its Implementing Rules and Regulations (IRR), the **relevant administrative agency shall have jurisdiction and exercise supervision over the respective relevant public service or public utility, as the case may be. It further mentions that the relevant administrative agency shall not impose nationality requirements on the public service not classified as public utility under its jurisdiction or supervision.**[9]

By reason of the foregoing, we recommend that you coordinate with the National Economic and Development Authority (NEDA) and Land Transportation Franchising and Regulatory Board (LTFRB) as our opinion hereunder is subject to the IRR and the pertinent agency's interpretation of PUV as a public utility.

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[5] SEC-OGC Opinion No. 23-03 addressed to Atty. Bernard Flores dated February 23, 2023.
[6] *Ibid.*
[7] SEC-OGC Opinion No. 18-15 addressed to Donato and Zarate dated August 24, 2018.
[8] List A, No. 18, Up to forty (40%) foreign equity on Operations 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 7718.
[9] Supra, Footnote no. 6, "SECTION 4. Section 13 of Commonwealth Act No. 146, as amended, is hereby further amended to read as follows: xxx (e) Upon the recommendation of the National Economic and Development Authority (NEDA), the President may recommend to Congress the classification of a public service as a public utility on the basis of the following criteria:
xxx
"**All public services, including those classified as public utilities under this Act, shall continue to be regulated and supervised by the relevant Administrative Agencies under existing laws.**
"A public service which is not classified as a public utility under this Act shall be considered a business affected with public interest for purposes of Sections 17 and 18 of Article XII of the Constitution.
"**Notwithstanding any law to the contrary, nationality requirements shall not be imposed by the relevant Administrative Agencies on any public service not classified as a public utility**."; *Also*, Implementing Rules and Regulations of the RA No. 11659. Section 6 Non-imposition of Nationality Requirements- The relevant Administrative Agency shall not impose nationality requirements on the public service not classified as public utility under its jurisdiction or supervision.

Increase in ACS

Subject to the LTFRB's evaluation of OTT's classification, we are of the opinion that OTT is not qualified to be a 100% foreign-owned corporation because it may be considered as a PUV under RA No. 11659. Hence, the second query is already immaterial.

Be that as it may, OTT may or may not increase its ACS of Php15,000,000.00 provided that it complies with the minimum capital requirement under the applicable laws.[10]

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.[11] 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.

Very truly yours,

Romuald C Padilla
General Counsel

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[10] ***For example***, the minimum paid up capital requirement in the subscription of shares of a domestic freight forwarder is Php 250,000.00. However, the minimum paid up capital for international freight forwarders is Php 2,000,000.00. (Revised Rules on Freight Forwarding, PSB Administrative Order No. 06, S. 2005, 23 November 2005); Meanwhile, a domestic market enterprise with more than forty percent equity should have a minimum paid-in capital of US$200,000.00. The term "domestic market enterprise" shall mean an enterprise which produces goods for sale, or renders services to the domestic market entirely or if exporting a portion of its output fails to consistently export at least sixty percent (60%) thereof. (Section 3(e) of Republic Act No. 7942 or the Foreign Investments Act of 1991.)

[11] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.

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