Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

November 28, 2007 at 5:20 P.M.

OGC Opinion No. 07-18
November 28, 2007

AYESSA M. PEÑARANDA 29 NOV 2007

Mr. Rafael C. Bueno, Jr.
Upper Penthouse 808 Bldg.
Meralco Avenue, corner Gen. Lim St.,
San Antonio Village, Pasig City

Sir:

This pertains to your letter dated November 07, 2007 requesting confirmation that the proposed ownership structure and equity investment of the Consortium of San Miguel Energy Corporation (a Philippine National), TPG Aurora B.V. (a Dutch Company) and TNB Prai Sdn. Bhd. (a Malaysian Company) complies with the ownership requirements for grantees of a public utility franchise.

You mentioned that this request is pursuant to the requirement of the Power Sector Assets and Liabilities Management Corporation ("PSALM") for the ongoing public bidding of the Proposed Privatization By Way of Concession of the Facilities and Assets of the National Transmission Corporation ("Transco").

As stated, each of the members of the consortium intends to acquire equity participation in a special purpose entity (the "Concession Company"), which will be organized in accordance with the Corporation Code of the Philippines and will enter into a Concession Agreement with PSALM and Transco for the construction, installation, financing, management, improvement, expansion, operation, maintenance, rehabilitation, repair and refurbishment of the nationwide transmission and sub-transmission systems in the Philippines.

The proposed equity participation of each of the three members of the Consortium in the Concession Company will be in the following percentage:

San Miguel Energy Corporation	-	60%
TPG Aurora B.V.	-	35%
TNB Prai Sdn. Bhd.	-	5%

You further stated that San Miguel Energy Corporation is a wholly-owned subsidiary of San Miguel Corporation. In turn, at least sixty percent (60%) of San Miguel Corporation's outstanding capital stock and entitled to vote is owned and held by Philippine citizens or nationals. At least 60% of the members of the Board of Directors of each of San Miguel Energy Corporation and San Miguel Corporation are citizens of the Philippines.

The nationality requirement for the operation of public utilities is provided for in Article XII of the Constitution, the pertinent provision of which is quoted hereunder:

> "Section 11. No franchise, certificate, or any form or 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 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. . ." (Emphasis supplied)

The legal capacity of the corporation to acquire franchise, certificate or authority for the operation of a public utility is regulated by the aforequoted Constitutional provision, which requires that at least sixty per centum (60%) of the capital of such corporation be owned by citizens of the Philippines. However, such provision does not qualify whether the required ownership of "capital" shall be that of the voting or non-voting, common or preferred. Hence, it should be interpreted to refer to the sum total of the outstanding capital stock, irrespective of the nomenclature or classification as common, preferred, voting or non-voting.[1]

At any rate, in determining the nationality of a corporation with foreign equity, the Commission, on the basis of the opinion of the Department of Justice Opinion No. 18, s. 1989, dated January 19, 1989, resolved to do away with the strict application/computation of the so called "grandfather rule" (Re: Far Southeast Gold Resources, Inc. FSEGRI), and instead applied the so called "control test" method of determining corporate nationality for purposes of investment in another corporation. Under this test, the nationality of the corporation depends on the nationality of the controlling stockholders. The method as applied in the said case states as follows:

> "Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital, respectively, of which belong to Filipino citizens, all of said shares shall be recorded as owned by Filipinos. But if less than 60%, or say only 50% of the capital stock or capital of the corporation or partnership, respectively, belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging

1 SEC Opinion dated June 02, 2003 addresed to Commissioner Armi Jane R. Borje.

to aliens."

This ruling is now expressly embodied under R.A. 7042, otherwise known as the Foreign Investment Act (FIA) as amended by R.A. 8179, and its Amended Implementing Rules and Regulations, which reads thus:

"Section 3 (a) the term 'Philippine National shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or ***a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines***; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, ***at least sixty-percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines***, in order that the corporation shall be considered a Philippine national."(Emphasis supplied)

Moreover, Section 1 (b) of the Amendments to the Implementing Rules and Regulations of R.A. 7042, as amended by R.A. 8179 provides:

"(b) Philippine National shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which 100% of the capital stock outstanding and entitled to vote is wholly owned by Filipinos; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefits of Philippine nationals; Provided, that where a corporation and its non-Filipino stockholders own stocks in Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. **The control test shall be applied for this purpose."** (Underlining supplied)

Hence, we confirm your view that the test for compliance with the nationality requirement is based on the total outstanding capital stock irrespective of the amount of the par value of shares.[2] Stated otherwise, once it is established that a company is at least 60 % owned by Philippine nationals, it is no longer necessary to conduct any further inquiry as to the owners of the shareholders since the entire company is already considered a Filipino entity.

Accordingly, if the aforequoted statutory provisions are complied with, the consortium referred in your letter may be considered a Philippine National, and therefore, may be deemed to have complied with the ownership requirements for grantees of a public utility franchise.

Finally, please be reminded that the foregoing opinion is based solely on the facts and circumstances disclosed in your request and relevant only to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

For your information and guidance.

VERNETTE G. UMALI-PACO
General Counsel

2 SEC Opinion dated December 22, 2004 addressed to Romulo Mabanta Buenaventura Sayoc & De LosAngeles