

FREEDOM FROM DEBT COALITION, AKBAYAN CITIZENS' ACTION PARTY, ALLIANCE OF PROGRESSIVE LABOR, MARIO JOYO AGUJA, ANA THERESIA HONTIVEROS-BARAQUEL, RENATO B. MAGTUBO, EMMANUEL JOEL ...*G.R. No. 173044. December 10, 2007*

Ponente: SANDOVAL-GUTIERREZ, J.

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Before us for resolution is the instant Petition for Certiorari and Prohibition (with prayer for the issuance of a temporary restraining order and a writ of preliminary injunction) assailing (a) Resolution No. 2004- 201 of the Metropolitan Waterworks and Sewerage System (MWSS) Board of Trustees, respondent; and (b) Resolution No. 04-006-CA of the MWSS Regulatory Office (MWSS-RO), another respondent, both dated July 30, 2004.

The facts as culled from the petition are:

Respondent MWSS is a government corporation created in 1971 under Republic Act No. 6234,[1] as amended, for the purpose of owning and/or having jurisdiction, supervision and control over all waterworks and sewerage systems in Metro Manila and the provinces of Rizal and Cavite.

In 1995, the government embarked upon the privatization of the waterworks and sewerage system of MWSS. Among the range of privatization options, MWSS chose to enter into concession arrangement with private entities. The area of Metro Manila was divided into two (2) concession areas – Service Area East and Service Area West.

After a process of public bidding and selection, the Service Area East was awarded to Manila Water Company, Inc., while the Service Area West was awarded to Maynilad Water Services, Inc.

On February 21, 1997, respondent MWSS executed separate Concession Agreements with the Manila Water Company, Inc. and Maynilad Water Services, Inc. (the concessionaires). Each Concession Agreement is effective for a 25-year period, or from August 1, 1997 to May 6, 2022, subject to early termination. Under the Concession Agreements, the concessionaires act as contractors to perform certain functions, and as agents to exercise certain rights and powers for the operation of the waterworks and sewerage system. The concessionaires are required to expand the supply of water coverage and sewerage services, provide uninterrupted water supply, and increase water pressure during the concession period. The ownership of the facilities and movable properties existing at the beginning of the concession period remain with respondent MWSS.

As consideration for the performance of their obligations, the concessionaires are empowered to charge and collect water and sewerage services based on standard rates. Article 9[2] of the Concession Agreements provides *inter alia* that the standard rates may be adjusted from time to time subject to the limitation that the concessionaires' rate of net return shall not exceed twelve percent (12%) per annum, as required in Section 12[3] of the MWSS Charter (R.A. No. 6234).

On August 3, 2000, the MWSS Board of Trustees, pursuant to Article 13.2[4] of the Concession Agreements, passed Resolution No. 277-2000 directing the Commission on Audit (COA) to conduct a rate audit of the concessionaires' operations for the purpose of ensuring that their rate of return does not exceed the 12% cap mandated in Section 12 of the MWSS Charter.

On September 15, 2003 and December 2, 2003, the COA submitted to the MWSS its two audit Reports with a finding that from January 1 to December 31, 1999, the Maynilad Water Services, Inc. had a net Rate of Return (ROR) of 7.71%, while the Manila Water Company, Inc. had an ROR of 40.92%. The pertinent portions of the COA Reports state:

Report No. 2000-38 (for Maynilad Water Services, Inc. [MWSI])

Result of the Audit

The audit, after considering the adjustments for rate determination, resulted in an actual rate of return of 7.71% during the period January 1 to December 31, 1999 on MWSI's invested capital of P3.999 billion inclusive of Concession Fees of P3.36 billion pertaining to completed projects. The return is 4.29% below the allowable Rate of Return Base (RORB) of 12%.

x x x

Report No. 2000-39 (for Manila Water Company, Inc. [MWCI])

Result of the Audit

The audit, after considering the adjustments for rate determination, resulted in an actual rate of return of 40.92% during the period January 1 to December 31, 1999 on MWCI's invested capital of P971.93 million inclusive of Concession Fees of P556.12 million pertaining to completed projects. The return is 28.92% above the allowable RORB of 12%.

x x x

According to the COA Reports, "in the rate determination, only those properties acquired, owned, and actually used in the operation of the concessionaires were included in the computation of the invested capital."

On March 31, 2004, the MWSS Regulatory Office issued a Notice of Extraordinary Price Adjustment (NEPA) to both concessionaires, stating that "pursuant to Article 9.3.1 of the Concession Agreements, the Regulatory Office has determined that Grounds for Extraordinary Price Adjustment (GEPA) have occurred," consisting in a purported "change in law, government regulation, rule or order or interpretation thereof, that affects or is likely to affect the Cash Flow of the concessionaires." According to the NEPA, the "change in law, rule or interpretation thereof" was brought about by the Supreme Court Resolution dated April 9, 2003 in *Republic v. Manila Electric Company (MERALCO)*[5] holding that "income tax payments of a utility are not expenses which contribute to or are incurred in connection with the production of profit of a public utility." The NEPA further stated that "the Regulatory Office shall soon determine the Extraordinary Price Adjustment which shall be made effective January 1st of the Charging Year 2005."

The concessionaires opposed the NEPA and requested that it be set aside on the grounds that (a) they are not public utilities but mere agents and contractors of MWSS by virtue of the Concession Agreements; (b) their income tax payments are considered expenditures under the Concession Agreements; (c) in the case of the Manila Water Company, Inc., the MWSS Regulatory Office had approved its Business Plan dated September 18, 2002 and granted it a Rate Rebasing; and that the said Plan treats income tax payments as expenditures; (d) the premise of the GEPA is that the concessionaires are public utilities; (e) the COA conducted the rate audit on the premise

that the concessionaires are public utilities even if they maintain they are not of such character; and (f) the MERALCO ruling does not involve the GEPA contemplated in clause 9.3.1 (ii) of the Concession Agreements.

On June 2, 2004, the MWSS Board of Trustees, pursuant to Article 12.1[6] of the Concession Agreements, directed its Regulatory Office and the concessionaires to create a Technical Working Group (TWG) which will discuss the issues raised by the concessionaires in order to find a mutually acceptable resolution to avoid arbitration before the Appeals Panel.

Thus, the TWG was created composed of representatives from the MWSS Regulatory Office, the concessionaires, and the MWSS Corporate Office. On July 9, 2004, the TWG invited resource persons[7] to shed light on what should be the status of the MWSS and the concessionaires under the privatization program, as well as the proper interpretation and application that should be given to Section 12 of the MWSS Charter and Section 9.1 of the Concession Agreements insofar as the rate of return set in the Charter and the tariff adjustments are concerned.

On July 27, 2004, the TWG submitted its Report. Among the findings of the TWG, with the assistance of the resource persons, are: (1) the intent of the Concession Agreements is for the MWSS to remain as a public utility providing waterworks and sewerage services, while the concessionaires are its agents and contractors, consistent with the framework of the concession arrangements; (2) it is the MWSS that has the legislative franchise under its Charter, while the concessionaires do not have a franchise; (3) in its operation, the MWSS contracted the services of the concessionaires to perform certain functions and authorized them, by way of agency, to exercise certain rights in performing their obligations; (4) during the bidding and selection of concessionaires, the latter had submitted their bids on the basis of MWSS representation that it would retain its status as a public utility having jurisdiction, supervision and control over all waterworks and sewerage system within Metro Manila, Rizal and Cavite; and (5) based on the framework of the Concession Agreements (specifically on Art. 1 “Definitions”, Art. 2.1 “Grant of Concession”, and Art. 9.4 “General Rate Setting Policy/Rate Rebasing Determination”), the MERALCO ruling has no relevance to the concessionaires’ situation.

On July 30, 2004, the MWSS Regulatory Office issued the assailed Resolution No. 04-006-CA[8] approving and adopting the findings and recommendations of the TWG, thus:

NOW, THEREFORE, BE IT RESOLVED, as it is hereby resolved:

- The RO hereby APPROVES and adopts all the findings, conclusions, and recommendations of the Joint Technical Working Group as contained in its memorandum to the MWSS Board of Trustees dated July 29, 2004;
- The RO shall consider and treat the Concessionaires as mere agents and contractors of MWSS, which is and still remains to be the public utility. The Supreme Court Decision in the Meralco case is not applicable to the Concessionaires, thus the NEPA Notice dated 31 March 2004 has no further force and effect. The appropriate procedure in the conduct of rate audit of MWSS has been established by the National Water Resources Board (NWRB).
- The RO shall provide COA with a copy of the TWG Report per Assistant Commissioner Cuenco’s request, as well as inform the COA of the appropriate framework for the conduct of the rate audit.
- The RO shall inform the COA of the appropriate framework for the conduct of the rate audit of MWSS such that: a) the rate audit of MWSS as public utility shall observe the procedures/guidelines set out in the MWSS letter to NWRB dated 21 November 1996 and NWRB letter to MWSS dated 02 December 1996, i.e., “The procedure for rate of return (ROR) calculation and, the 12% ceiling shall be applicable to the entire waterworks system, including both the income and assets held respectively by the Concessionaires and MWSS,” and the formula that the ROR is equal to income after interest and taxes divided by the base of Net revalued fixed

assets in operation + 2 months operating capital; and b) MWSS and its Concessionaires shall ensure that actual tariff rates as adjusted by Article 9.1 of the CA shall not exceed the maximum tariff rates consisted with the 12% ROR limit, and in case actual rates exceed the tariff ceiling consistent with 12% ROR limit, RO shall propose a service obligation deferment to adjust actual rates or compute Expiration Payment due to Concessionaires.

The following were also identified as continuing guiding principles:

- Any dispute between MWSS and its Concessionaires on rate audits shall be resolved through Dispute Resolution procedures (Art. 12) set in the CA.
- The Concessionaires, as agents and contractors of MWSS are to submit annual audited Financial Statements (F/S) relating to the Concession. Said F/S, which will be treated as final inputs, shall be consolidated for purposes of rate audit determination as per NWRB guidelines.
- The Concessionaires shall engage an independent Auditor who will be tasked to prepare the audited F/S. The Concessionaires shall ensure that the independent Auditor shall have competence and international experience auditing water projects.
- Prior to the implementation of any Rate Rebasing tariff adjustment for a Rate Rebasing Period, the RO shall:

a)

Determine the indicative tariff consistent with the 12% return limit for said RR period;

b)

Determine the actual RR tariff adjustment consistent with the Concessionaires' Business Plan and ADR as reviewed and approved by RO;

c)

Prepare a "trial or test rate audit" to indicate level and trend of actual rates vis-à-vis the tariff ceiling in each year of the Rate Rebasing.

- The KPI/BEM mutually agreed between the Concessionaires and MWSS/RO shall serve as basis for determining the prudent and efficient expenditures of the Concessionaires. Other mechanism to determine prudence and efficiency will be explored by the RO with the Concessionaires.
- The RO shall take the lead role to conduct a revaluation/reappraisal of the assets of both MWSS and its Concessionaires use for the provision of water supply and sewerage services. This shall be conducted by reputable appraisal firms and shall be done at least once a year.
- The COA (or any Independent Auditor of RO's choice) shall facilitate the consolidation of audited F/S of both MWSS and Concessionaires.
- The audit of MWSS as the public utility by COA shall be based on the framework developed by NWRB. The audit of Concessionaires shall be conducted by an Independent Auditor in accordance with KPI/BEM framework.

On the same day (July 30, 2004), respondent MWSS Board of Trustees, in its assailed Resolution No.

2004-201,[9] approved Regulatory Office Resolution No. 04-006-CA.

On June 29, 2006, the above-named petitioners filed the present petition alleging that they received copies of the two assailed Resolutions only on May 25, 2006;[10] that respondents, in issuing the assailed Resolutions, acted with grave abuse of discretion amounting to lack or in excess of jurisdiction; that the finding by respondents that the concessionaires are not public utilities, but mere agents/contractors of the MWSS, has “the effect of excluding the rates set by such concessionaires from the limitation in Section 12 of R.A. 6234 (MWSS Charter);” and that this, in turn, “will have the effect of increasing the rates that can be charged against them and the subscribers to the water service provided by the concessionaires.”[11]

For their part, respondents, in their Comment, pray for the dismissal of the petition for lack of merit.

The instant petition must fail.

First, petitioners failed to resort to the appropriate remedy. Under Section 12 of the MWSS Charter, it was the defunct Public Service Commission[12] which had the exclusive original jurisdiction over all cases contesting the rates or fees of water and sewerage services, thus:

Sec. 12. Review of Rates by the Public Service Commission.- The rates and fees fixed by the Board of Trustees for the System (MWSS) and by the local governments for the local systems shall be of such magnitude that the System's rate of net return shall not exceed twelve percentum (12%), on a rate base composed of the sum of its assets in operation as revalued from time to time plus two months' operating capital. Such rates and fees shall be effective and enforceable fifteen (15) days after publication in a newspaper of general circulation within the territory defined in Section 2(c) of this Act. The Public Service Commission shall have exclusive original jurisdiction over all cases contesting said rates or fees. Any complaint against such rates or fees shall be filed with the Public Service Commission within thirty (30) days after the effectivity of such rates, but the filing of such complaint or action shall not stay the effectivity of said rates or fees. The Public Service Commission shall verify the rate base, and the rate of return computed therefrom, in accordance with the standards above outlined. The Public Service Commission shall finish, within sixty (60) calendar days, any and all proceedings necessary and/or incidental to the case, and shall render its findings or decisions thereon within thirty (30) calendar days after said case is submitted for decision.

In cases where the decision is against the fixed rates or fees, excess payments shall be reimbursed and/or credited to future payments, in the discretion of the Commission. (Underscoring supplied)

Indeed, petitioners have a plain and speedy remedy in the ordinary course of law as prescribed in Section 12 above. They cannot avail of certiorari as a substitute for that plain and speedy recourse. The writ of certiorari and prohibition may be availed of only when “there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law.”[13]

Second, even assuming that petitioners may resort to certiorari and prohibition, their petition, however, suffers from a fatal defect, i.e., it failed to implead the two concessionaires who are certainly indispensable parties. Indispensable parties are those which have such interest in the controversy that a final adjudication of the case would certainly affect their rights, so that the court cannot proceed without their presence.[14] Thus, their non-inclusion in the petition for a writ of certiorari would render the said petition defective.[15]

Third, the petition is barred under the doctrine of hierarchy of courts. Such doctrine is one of the structural aspects intended for the orderly administration of justice. This Court has concurrent original jurisdiction with the Regional Trial Court and the Court of Appeals in the issuance of the extraordinary writ of certiorari and prohibition. However, in availing of such extraordinary writ, petitioners do not have the complete liberty or discretion to file their petition in any of these courts. In the absence of special reasons, they cannot disregard the

doctrine of the hierarchy of courts in our judicial system by seeking relief directly from this Court despite the fact that the same is available in the lower tribunals in the exercise of their original concurrent jurisdiction.[16]

Significantly, the petition raises issues of fact which cannot be addressed to this Court. For instance, in determining whether the concessionaires are public utilities or mere agents of MWSS, there must be an examination of the intention of MWSS and the concessionaires at the time of the bidding process, negotiation, and execution of the Concession Agreements. Certainly, this matter is a factual issue requiring presentation and evaluation of evidence such as bidding documents, memoranda, and the testimonies of the participants of the bidding and contract negotiations. Moreover, petitioners maintain that the assailed Resolutions could authorize the increase of water rates beyond the 12% rate of return limit. While such claim is purely speculative in nature, it would nonetheless require a very complicated and technical computation of the current rate of return – which entails a determination of income, the valuation of assets, which assets are to be included in the computation, and other factual factors. Again, these matters are beyond the Court’s function as it is not a trier of facts.

While petitioners claim that the assailed Resolutions are “in flagrant violation of the Constitution and statutory provisions defining public utilities,” however, they failed to cite any Constitutional provision being violated.

In *Santiago v. Vasquez, et al.*, [17] this Court held:

x x x. We discern in the proceedings in this case a propensity on the part of petitioner, and, for that matter, the same may be said of a number of litigants who initiate recourses before us, to disregard the hierarchy of courts in our judicial system by seeking relief directly from this Court despite the fact that the same is available in the lower courts in the exercise of their original concurrent jurisdiction, or is even mandated by law to be sought therein. This practice must be stopped, not only because of the imposition upon the precious time of this Court but also because of the inevitable and resultant delay, intended or otherwise, in the adjudication of the case which often has to be remanded or referred to the lower court as the proper forum under the rules of procedure, or as better equipped to resolve the issues since this Court is not a trier of facts. We, therefore, reiterate the judicial policy that this Court will not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts or where exceptional and compelling circumstances justify availment of a remedy within and calling for the exercise of our primary jurisdiction. (Underscoring supplied)

WHEREFORE, we DISMISS the instant petition for lack of merit. No pronouncement as to costs.

SO ORDERED.

Puno, C.J., Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio Morales, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Nachura, and Reyes, JJ., concur.
Quisumbing, J., on leave.

[1] Entitled “An Act Creating The Metropolitan Waterworks And Sewerage System And Dissolving The National Waterworks And Sewerage Authority; And For Other Purposes.”

[2] “ARTICLE 9. RATES AND CONNECTION CHARGES

9.1. Standard Rates/CERA Fee

Subject to the limitation of Section 12 of the Charter, Standard Rates may be adjusted from time to time in accordance with the rate adjustment provisions set forth in Section 9.2, 9.3 and 9.4 below. x x x.” (Underscoring supplied)

[3] “Sec. 12. Review of Rates by the Public Service Commission).- The rates and fees fixed by the Board of

Trustees for the System (MWSS) and by the local governments for the local systems shall be of such magnitude that the System's rate of net return shall not exceed twelve percentum (12%), on a rate base composed of the sum of its assets in operation as revalued from time to time plus two months' operating capital. Such rates and fees shall be effective and enforceable fifteen (15) days after publication in a newspaper of general circulation within the territory defined in Section 2(c) of this Act. x x x." (Underscoring supplied)

[4] "ARTICLE 13. INFORMATION AND REPORTING REQUIREMENTS

x x x

13.2. Audits

Not less frequent than once a year, the Concessionaire's books and records shall be audited by an independent auditor appointed by, or acceptable to, the Regulatory Office, pursuant to internationally accepted accounting practices. In addition, the Regulatory Office may, upon giving not less than 15 days prior written notice to the Concessionaire, require that the Concessionaire's books and records relating to the Concession be audited on an interim basis by the Regulatory Office or by an outside auditor. The Concessionaire shall cooperate fully with all such audits."

[5] G.R. Nos. 141314 & 141369, April 9, 2003, 401 SCRA 130.

[6] "Art. 12.1. The parties hereto agree to use reasonable efforts to resolve any disagreements or disputes concerning the interpretation or implementation of this Concession Agreement through mutual consultation and negotiation."

[7] Gregorio Vigilar, former Secretary of the Department of Public Works and Highways (DPWH), Dr. Angel Lazaro III, former MWSS Administrator, Mark Dumol, former DPWH Chief of Staff, and Atty. Eusebio Tan of the ACCRA Law Office, legal advisor to the MWSS.

[8] Annex "B," Petition, rollo, pp. 41-44.

[9] Annex "A," *id.*, p. 36.

[10] Petition, p. 2; rollo, p. 4.

[11] *Id.*, p. 10.

[12] Now the National Water Resources Board.

[13] Section 1, Rule 65 of the 1997 Rules of Civil Procedure, as amended.

[14] *Amargo v. Court of Appeals*, No. L-31762, September 19, 1973, 53 SCRA 64, 75; Florenz D. Regalado, *Remedial Law Compendium*, Vol. One, Sixth Revised Edition, p. 724.

[15] *Id.*, citing *Republic v. Hon. Roberto Zurbano, et al.*, 105 Phil. 409; *Dacudao v. Hon. Duenas, et al.*, 108 Phil. 94.

[16] Florenz D. Regalado, *Remedial Law Compendium*, Vol. One, Sixth Revised Edition, p. 719.

[17] G.R. Nos. 99289-90, January 27, 1992, cited in Florenz D. Regalado, *Remedial Law Compendium*, *id.*

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