BOT AND MARINA: PROBLEM AREAS AND OTHER INQUIRIES

By

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Introduction

It is a marvel of our maritime history that shipping service, for all its importance to the economy, is being treated with incomprehensible ambivalence. Although this type of common carrier has been in operation long before the turn of the century [1] and some of its aspects (e.g. rates, tonnage) were duly comprehended by earlier regulatory law,[2] the policy over it had been one of less restraint. The archipelagic nature of our country made imperative this policy to encourage the growth of an infant industry. In the 1920s this service was brought under full jurisdiction of the existing public utility law [3] — only to be taken out a few years thereafter. Thus, this type of service was then placed in 1936,[4] or for almost forty years, outside the ambit of our regulatory laws. But about a decade ago, it was again returned within the jurisdiction of these laws.[5]

And it appears that in its new found zeal to fully supervise and control this service, the government seems to be over-doing it by allowing two distinct agencies to undertake the task. These are the Board of Transportation (BOT) and the Maritime Industry Authority (MARINA). Consequently, there have been occasions for these bodies to be providing similar reliefs or sanctions in shipping matters. This practice has resulted in duplication or overlapping of powers and functions, as well as problem areas. Perhaps, this possible confusion prompted the move in the middle of 1981 to give to MARINA sole jurisdiction over shipping service by removing from the BOT its franchising powers over this service and vesting the same upon the former.[6]

Thus. the ambivalence persists. In any case, it is the main burden of this paper to define these problem areas, look into their legal bases and examine whether the alleged duplication of powers and functions of the

* A.B. '62 (UP) — LLB'66 (UP).

1 The Escaño Shipping Lines has been in operation since 1865.

2 Act No. 520 (1902); Act No. 1507 (1906); Act No. 1779 (1907).

3 Act No. 3108 (1923), Sec. 13.

4 Com. Act No. 146 (1936), Sec. 13 as amended.

5 Pres. Decree No. 1 (1972).

6 This plan along with the proposed merger of the BOT and the BLT (Bureau of Land Transportation) seems to have been shelved for the moment.

two agencies lies in the precise provisions of their respective charters or only in the interpretation and implementation of the same. The rest of this inquiry shall be on other related matters as well as on recent developments in maritime regulations.

Background

It is noteworthy that the very first public utility case decided in 1914 by our Supreme Court involved a shipping vessel — *F.C. Fisher vs. Yangco Steamship Co.*[7] Important principles were drawn from this case. Its interesting basic issue was whether a self-propelled vessel may refuse to carry dynamite, powder and other explosives which may endanger the vessel and its passengers. Subsequent shipping cases, which were relatively few, either touched on the vessel's obligation to fix a time schedule,[8] to carry mails,[9] to file an Annual Report,[10] call on a particular port,[11] or impose reasonable rates.[12] There were also cases on the inclusion of a port in its route.[13] But there were no decisions involving contested grants of Certificates of Public Convenience (CPC) for the operation of shipping vessels, unlike land transportation cases which abound in our jurisprudence.

This was so because, as earlier suggested, shipping service, except in the matter of rates, had been occasionally "de-regulated" in its history to entice more people to venture into the business. This policy may be easily gleaned from one of the first public utility laws during the American regime, Act No. 520 of the Philippine Commission, approved on November 17, 1902. This law created the first regulatory body, the Coastwise Rates Commission. It was noted that "the sphere of action of that body was very limited, such that it only had under its control insular marine transportation, and its functions were circumscribed to the classification of vessels, merchandise, passengers and the fixing of maximum rates."[14] It is obvious that the need to issue CPCs for vessels had not yet occurred in the mind of the legislators. In fact, subsequent public utility laws failed to make provisions on the matter.

But when Act No. 3108 was approved on March 12, 1923, the Public Service Commission was created and it included shipping vessels within its franchising powers. However, in a matter of thirteen years or so in 1936 when Commonwealth Act No. 146, which superceded Act No. 3108, was

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[7] 31 Phil. 1 (1914).

[8] *Yangco vs. BPUC, 31 Phil.* 535 (1915); *Yangco vs.BPUC,* 36 Phil. 116 (1917); *Ynchausti Steamship Co. vs. PUC,* 44 Phil. 363 (1923);

[9] *Joaquin de Villata vs. Stanley,* 32 Phil. 541.

[10] Compania General de Tobacos en Pilipinos vs. BPUC, 34 Phil. 136 (1916).

[11] *Yangco vs. BPUC,* 36 Phil 116.

[12] *Yangco vs. PUC,* 40 Phil. 648 (1920); *Ynchausti Steamship Co. vs. PUC,* 42 Phil. 621 (1922). *Steamship Association vs. PUC,* 43 Phil. 328 (1922); *Madrigal y Compania, vs. Cui,* 44 Phil. 111 (1922).

[13] *National Coal Co. vs. PUC,* 47 Phil. 356 (1925); *Phil. Ship Owners Association vs. Cui,* 48 Phil. 377 (1925).

[14] ROSAL, THE PUB'IC SERVICE COMMISSION 8 (1940).

passed, there was again a change of policy. The proviso of Sec. 13 (a) of this Commonwealth Act No. 146 specifically states that the Commission "shall have no authority to require steamboats, motorships and steamship lines whether privately owned or owned or operated by any Government-controlled corporations or its instrumentality, to obtain certificate of public convenience or to prescribe their definite routes or lines of service." This was the state of the law for almost forty years until Presidential Decree No. 1 was issued on September 24, 1972.

Under the decree, the Integrated Reorganization Plan (IRP) was declared "part of the law of the land." In the IRP, the Public Service Commission was abolished and on its stead, three specialized regulatory boards were created.[15] The more popular among these new agencies is the Board of Transportation (BOT). The BOT took over the functions of the defunct Commission in the area of transportation — with the expanded jurisdiction over shipping services. While previously there were doubts regarding the extent of its regulatory powers over shipping services, under the IRP the BOT may not only prescribe rates, but may also grant CPCs to motor vessels, amend their routes and fully regulate their operations. These powers are expressly provided in said law:

"The functions of this Board (BOT) whichever is applicable in a specific transportation area, are as follows:

> a) Issue Certificates of Public Convenience for the operation of public land, water and air transportation utilities and services; ...
> b) Establish, prescribe and regulate routes, zone and/or areas of operation of particular operators of public land, water and air service transports; and determine, fix and/or prescribe fares, charge and/or rates pertinent to the operation of such public utility facilities and service..."[16]

For sometime, these functions were performed with alacrity by the BOT on the basis of its own proceedings, records and investigations, without coordinating with other agencies.

However, wih the creation of the MARINA in 1974 under Pres. Decree No. 474 and with the signing of an agreement between the BOT and MARINA on August 10, 1976, later superseded by the second agreement of February 26, 1982, the adjudicatory and regulatory processes underwent drastic changes. Consequently, it has become apparent that in the granting

[15] The three specialized regulatory boards that succeeded the Public Service Commission are the Board of Transportation, the Board of Communication (later abolished by Executive Order No. 546 (1979), which created the National Telecommunications Commission) and the Board of Power and Waterworks (also later abolished by the Pres. Decree No. 1206 (1977) which created the Board of Energy).

[16] Integrated Reorganization Plan (hereinafter referred to as IRP), Part X, Art. III, Sec. 4.

of applications for franchises [17] or CPC for the operation of vessels, the MARINA must first provide the requisite technical basis thereof.

Problem areas

This development has given rise to some problem areas. It appears that, in their sincere desire to serve the public interest, the MARINA and the BOT jointly exercised some powers and functions probably on the belief that they are both categorically or by necessary implication empowered by some legal authority or by their respective organic laws. Let us discuss and analize these powers and functions and see whether there are any legal basis for such duplications of activities of these agencies.

A) *Provisional authority or special permit.* This is "an immediate grant of temporary operating rights to an applicant during the pendency of his application for Certificate of Public Convenience." [18] Ordinarily, it is the BOT that issues provisional authorizations which are usually good for a period of one year. Considering the huge investments in the purchase of a vessel, immediate operation of the same becomes of utmost urgency. Thus, it has come to pass that even the MARINA started issuing Special Permits (mostly for thirty days) for vesels after their applications are forwarded to said office for "endorsement" or "market and economic evaluation."

The Provisional Authority issued by the BOT is similar in effect to the MARINA Special Permit in the sense that both allow the immediate operation of the vessel applied for while the basic application is pending.

Many however, have serious misgivings about MARINA's exercise of this power. From a study of the charter of the MARINA, Pres. Decree No. 474, there is indubitably no grant of power to issue this kind of permit. Perhaps, this doubt must have led the MARINA in the later part of 1981 to stop the issuance of its Special Permits. On the other hand, this type of temporary authorization has been traditionally the prerogative of the BOT, which finds support in our law and jurisprudence. As a quasi-judicial body, this is inferable from its basic authority under Commonwealth Act No. 146, as amended, and the Integrated Reorganization Plan, — to issue or grant the longer or more permanent permit — the Certificate of Public Convenience. Numerous Supreme Court decisions [19] recognizing or upholding the Spe-

[17] "Franchise" has a technical meaning but it is used interchangeably with CPC in this article.

[18] For a more extended study of provisional permits, see 55 Phil. L.J. 68 (1980).

[19] Some cases involving the issuance of Provisional authorities or permits are: *Barredo, et al. vs. Public Service Commission,* 58 Phil. 78 (1933); *Manila Yellow Taxicab, Inc., et al. vs. PSC,* 58 Phil. 899 (1933); *Javellana vs. La Paz Ice Plant and Cold Storage,* 64 Phil. 893 (1937); *Ablaza Transp. Co., Inc. vs. Ocampo,* 88 Phil. 412 (1951); *Silva vs. Ocampo, et al.* 90 Phil. 777 (1952); *Transport Contractors, Inc. vs. PSC,* 95 Phil. 744 (1954); *Arrow Transp. vs. BOT,* 63 SCRA (1975).

cial Permits or Provisional Authorities issued by the Public Service Comission, and later the BOT, serve only to fortify this power. Under Article 8 of the new Civil Code, this jurisprudence from our highest tribunal "shall form part of the legal system of the Philippines."

B) *Hearings.* The BOT being a quasi-judicial body, it usually holds regular hearings in the course of its determination in granting franchises or other reliefs to applicants or party-litigants. In the same token, the MARINA conducts its own "hearings," "conferences" or "consultative meetings" wherein contending parties may testify and present proofs, although the proceedings are rather informal. The incidents may pertain to a contested request for favorable MARINA endorsement or "market and economic evaluation" of a shipping application, amendment of route or time schedule of vessels, investigations of or complaint against a shipping operator, and all other matters or incidents which it may desire to look into.

Under the Public Service Act, the Public Service Commission, now the BOT, is empowered to exercise certain functions "upon proper notice and hearing." [20] On the other hand, while the MARINA charter does not grant said agency any quasi-judicial powers, it nevertheless authorized said agency to conduct "any investigation, inquiry or hearing, or other proceedings held pursuant to this Decree." [21] It is worthy to note that this power is limited to "proceedings held pursuant to this Decree." But this only deepens the confusion, for the coverage of these "proceedings" may include those that are also within the competence of the BOT. Thus, it may happen that for the same application, the MARINA may conduct hearings to determine volume of passengers in the route applied for. This matter will also be taken up in the hearing proper on the same application before the BOT. As it now stands, both agencies can conduct "hearings" simultaneously to determine the basis for the grant of CPCs, amendments of authorized routes or change of schedule of trips of vessels—even for the violations of the terms and conditions of such certificates.

C) *Survey Teams.* It also appears that both agencies can and have been sending survey teams, inspectors or investigators to do ocular inspections relative to matters they inquire into. To illustrate, when an application is furnished to the MARINA for "endorsement" or "market or economic evaluation," the latter may send out its survey team or inspectors to find out the passenger and freight volume in the route applied for. Then during the hearing on the merits of this application before the BOT, the latter is also empowered to send its own inspectors to look into the same matter in said route.

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20 Com. Act No. 146 (1936), as amended, Sec. 16.
21 Pres. Decree No. 474 (1974), Sec. 14.

As far as the BOT is concerned, it has been established that it can investigate, even upon its own initiative "matters under its jurisdiction." [22] On the side of MARINA, the law also allows it to look into "any matter within its jurisdiction." [23] Here again, the possibility of duplication of similar activities is not remote.

D) *Coast Guard.* The existence of legal authority for both agencies in enlisting the assistance of the Philippine Coast Guard (PCG) is another source of problem. The BOT, under the Public Service Act, in the exercise of its authority "shall have the necessary powers and the aid of *public force.*" [24] On the other hand, the MARINA legal authority is more specific since it "shall coordinate with the Philippine Coast Guard in the exercise of supervision and regulation of water transport utilities." [25] This situation was dramatized when in the middle of 1981, MARINA and BOT representatives in Cebu City countermanded each other's orders to the Coast Guard, pertaining to the giving of clearance to a vessel to sail for Masbate island. As far as the PCG is concerned, it would also do well to clarify as to which agency it is directly responsible for enforcement of maritime orders, policies and regulations.

Under the law creating the PCG, it is not subordinate to any specific agency. It is duty bound, among others, "to assist, within its capabilities and upon request of the appropriate authorities, other Government agencies in the performance of their functions within the waters subject to the jurisdiction of the Philppiines." [26]

Hence, under another Memorandum of Agreement dated March 17, 1982, of the BOT, MARINA, the Philippine Port Authority (PPA) and PCG, one of the agreed roles of the latter is "to enforce the orders and decisions of the BOT as may be referred to it by MARINA." But the law creating the Coast Guard as well as previous practice allow the BOT, as any similar government agency, direct access to it (Coast Guard). It seems now that BOT orders or decisions will have to be coursed first through MARINA. It is observed that this set-up may have an effect upon the powers of the BOT. The prompt enforcement or implementation of its orders or decisions may be hamstrung by coursing them through the MARINA when there exists no legal impediment for the BOT to give direct orders to the Coast Guard.

E) *Rates.* Lastly, which agency should determine rates for shipping services is another veritable source of confusion. This has tradi-

22 Com. Act No. 146 (1936), Sec. 17 (a) as amended.
23 Pres. Decree No. 474 (1974), Sec. 12 (e).
24 Com. Act No. 146 (1936), as amended, Sec. 13 (a). Underscoring ours.
25 Pres. Decree No. 474 (1974), Sec. 17.
26 Rep. Act No. 5173 (1967), Sec. 3, par. (o).

tionally been the province of the BOT and its predecessor agencies. In fact, as earlier mentioned, just about the first regulatory body created in 1902[27] was a commission empowered to determine rates. This power was retained by subsequent regulatory agencies up to the present BOT.[28] As a measure of its expertise, it has maintained a Finance and Rate Division to undertake this vital function. Lately, there has been a reorganization within the BOT, the rate-making function being taken over by the Standards Development and Plans Division (SDPD). According to its organization literature, the SDPD, among others, is given the function to "conduct studies aimed at establishing the BOT's position on such matters as fare increases, their causes and effect on the public transport sector." But then again, it *also* appears that the MARINA has its own *separate* rate experts.

Under Sec. 16 (c) of Commonwealth Act No. 146,[29] as amended, the BOT has the power "to fix and determine individual or joint rates" for any public service. In fact, under this section it is specifically authorized to issue provisional approval of rates. For its part, MARINA is only empowered "to prescribe specific policies in the determination of just and reasonable passenger fares, freight rates and other charges relatives to the operation of inter-island vessels." [30] But the latter power was bolstered by the BOT-MARINA Memorandums of Agreement of August 10, 1976 and of February 26, 1982 wherein the MARINA was authorized not only to recommend rate policies, but may even prepare its own rate schedules for adoption by the BOT. In the increase of rates granted to inter-island vessels in early 1981, there was for a time a minor dilemma as to which rate study should be followed, that of the BOT or the MARINA. They were nevertheless reconciled as a compromise.

Analysis

Are there really duplications and overlapping in the powers and functions of the BOT and MARINA? An examination of the legal bases for

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27 Coastwise Rates Commission or "Comision de Tarifas De Cabotaje" under Act No. 502 (1902).

28 Act No. 1779 (1907) created the "Board of Rate Regulation;" Act No. 2307 (1913) authorized the Board of Public Utility Commissioners to fix rates for public utilities under Sec. 13 (c); Act No. 3108 (1923) created the Public Service Commission, also authorized it to fix rates under Sec. 14 (c); Com. Act No. 146 (1936), as amended, continued the existence of the Public Service Commission with the same power to fix rates under Sec. 16 (c); and Pres. Decree No. 1 (1972), adopting the IRP as part of the law of the land, under which was created the Board of Transportation and authorized it to fix rates under Part X, Chap. I. Art. III, Sec. 4 (b) thereof.

29 It has been settled that the elevation of the IRP into law under P.D. No. 1 (1972) did not entirely repeal the Public Service Act or Com. Act No. 146 (1936), as amended. In other words, with the exception of the organizational structure of the new regulatory bodies, the tenure of its officers and those provisions inconsistent with the IRP, the rest of the provisions of Com. Act No. 146 (1936), as amended, are still in effect.

30 Pres. Decree No. 474 (1974), Sec. 6 (d).

their actuations may yield the answer. As in the issuance of Privisional Authority or Special Permit, only the BOT is legally empowered to issue the same. Nowhere in the provisions of Presidential Decree No. 474 is such authority even hinted or inferred. Hence, properly speaking there should be no duplication in this regard because while BOT has the power, MARINA has none.

As to hearing, the BOT conducts the same along the pattern and formalities of ordinary courts of law, whether these hearings are for applications for issuance of CPCs or for violations thereof. Section 16 of Commonwealth Act No. 146, as amended, enumerates the powers that can be exercised by the BOT "upon notice and hearing." This easily lends credence to the contention that conducting hearings is a major preoccupation of the BOT in the performance of its functions. On the part of MARINA, its governing law mentions "hearing," [31] but the same did not specify the matters on which it may conduct such "hearing or other proceedings," except the qualification "held pursuant to this Decree." Since this reference to hearing or other proceedings" appears in the penalty section of the Decree, it only thickens the cloud of ambiguity. Yet this qualification may well set the nature and ambit of MARINA's hearings. Considering the fact that MARINA is not empowered by its law to grant or revoke franchises for vessels, hearings along these areas are not within its competence and, therefore, may not be conducted.

Hence, if such guidelines are observed there may be no duplication in this regard. Besides, what the MARINA actually conducts is not a hearing in the ordinary legal sense of the term. It is more of a "consultative meeting" or "conference" [32] in the manner of an informal legislative inquiry, with emphasis on official documents and statistical data. For example, in the case of a contested request for favorable MARINA endorsement, the opposing parties and their witnesses state their respective allegations with ample emphases on their documentary evidence. The MARINA investigator or hearing officer may propound clarificatory questions and the opposing party by himself or through counsel may direct questions to the other party also. But as stated earlier, this inquiry is usually held with an eye on the documentary exhibits, statistical reports and economic evaluations.

As regards the use of survey teams, the investigation by the MARINA under its charter or "any matter within its jurisdiction" [33] allows a wide range of inquiry. And these surveys may be directed to those which relate to applications for shipping service, which the BOT may also conduct during the actual hearings of these applications. However, in the Memorandum of Agreement of February 26, 1982 both agencies agreed that "In

[31] Pres. Decree No. 474 (1974), Sec. 14.
[32] This is how MARINA hearing officers describe the proceedings they conduct.
[33] Pres. Decree No. 474 (1974), Sec. 12 (e).

all applications and petitions filed before the BOT, the findings and recommendations of the MARINA shall be adopted by the BOT." Thus, the BOT may just avail of the data and findings gathered by the MARINA, if the matter under inquiry has already been investigated by the latter. In this regard, the MARINA has since the later part of 1981, been required to submit along with its usual one sentence Endorsements, upon request by the BOT, the supporting data for the same. This arrangement was intended to obviate duplications of surveys.

With respect to the Coast Guard, it was not intended to be the sole enforcement arm of any agency. Under the law creating it, the Philippine Coast Guard is not a subordinate office of any agency.[34] It is merely duty bound, among others, to assist within its capabilities and upon request of the appropriate authorities, or any other government agencies in the performance of their functions. In the light of this consideration, there should be no "issue" here as to which of the two agencies exercises immediate executive ascendency over the Coast Guard. However, under Commonwealth Act No. 146, as amended, Sec. 13 (a) the BOT may enforce its orders through the "aid of the public force." On the other hand, MARINA under Presidential Decree No. 474, Sec. 17, has specific authority to "coordinate with the Philippine Coast Guard in the exercise of supervision and regulation of the operation of water transport facilities." But under the BOT — MARINA Memorandum of Agreement of February 26, 1982, the MARINA seems to have more immediate access to the Coast Guard since it (the MARINA) has agreed to be the "enforcement staff" of the Board of Transportation.

And on the subject of rate-making, there should actually be no conflict because this function pertains to the BOT by clear mandate of the law. The MARINA, under Presidential Decree No. 474, Sec. 6 (d) may only prescribe "specific policies" for rate determination. If it can now prepare new rate schedules for adoption by maritime public utilities under the Memorandum of Agreement, the same is still recommendatory, which the BOT may adopt, or reject. In other words, rate-making has been and still is a function pertaining to the BOT. If the MARINA also makes its own rate study, the same is merely for the purpose of assisting the BOT.

Memorandums of Agreement of 1976 and 1982

When the MARINA was created under Pres. Decree No. 474 of 1974, the policy enunciated therein was "to accelerate the integrated development of the Maritime Industry of the Philippines." Its area of administrative responsibility virtually runs the entire gamut of maritime activities, from shipbuilding to prevention of marine pollution of waterways. It must have been with this in mind that on August 10, 1976 an important document, earlier mentioned, was signed entitled: "Memorandum of Agreement between

[34] Rep. Act No. 5173 (1967).

the Maritime Industry Authority and the Board of Transportation." This Agreement categorically admits that "certain powers given respectively to the said government agencies (BOT and MARINA) over the shipping industry appear to be overlapping" and to preclude overlapping of functions, "these agencies have agreed to a 'working arrangement'." This Agreement postulated that the MARINA "shall serve as the technical staff" of the BOT for water transportation with the following functions: determine the basis for the grant of CPCs and amendment thereto, recommend reasonable rates, determine necessary trade routes, compile complete statistical data and set standards on equipment of water transport utilities. It finally agreed that MARINA's data and strandards "shall be deemed indisputable save only when challenged on grounds of lack or excess of jurisdiction."

For more than five years this Agreement governed the activities of both agencies. However, their incumbent officers still felt a need for a more categorical delineation of functions. Eloquent proofs of this are the existence of problem areas where powers and functions seem to overlap or be duplicated. In other words, there still exists an inter-agency penumbra where either of the two offices can act or provide reliefs with seemingly plausible legal justification for their respective actions.

Hence, on February 26, 1982, a second Memorandum of Agreement between the MARINA and the BOT was signed by the respective heads of both agencies. In the first Whereas of its preamble, it again admitted that "certain powers given respectively to the said government agencies (BOT and MARINA) over the shipping industry appear to be overlapping;" that these agencies "desire to work harmoniously to prelude overlapping of functions;" and that the first Memorandum of Agreement of August 10, 1976 is "still inadequate in defining and delineating their respective roles or areas of responsibilities." Thus the said agencies have again agreed to a "working arrangement," to wit:

> "1. The Board of Transportation shall be the franchising government agency and shall have the principal function of issuing CPC to domestic water carriers as expressly provided in the Pres. Decree No. 1, and the Maritime Industry Authority shall serve as the technical, economic and enforcement staff of the BOT for water transportation.
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> 2. The BOT, as the franchising agency, shall accept, receive and docket all applications or petitions together with the pertinent supporting documents.
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> 3. The MARINA as the technical staff of the BOT, shall have the following specific functions as follows:
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> a) To evaluate all applications for Provisional Authority, Certificate of Public Convenience and renewal thereof...
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> b) To evaluate all petitions for permanent replacement or substitution of vessels...
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> c) To evaluate and recommend the reasonable fare rates or increase of fares...

d) To evaluate and recommend the necessary trade routes to be served...

e) To evaluate all petitions for change of route and/or change schedule...

f) To evaluate all petitions for approval of sale/lease of vessels...

g) To evaluate and conduct investigations on all petitions for temporary cessation of operation...

h) To evaluate all petitions for special permits and submit its recommendation therein 'to BOT'...

i) To evaluate and investigate all complaints or petitions for injunction (cease and desist order) filed against any public water transport operator...

4. In all applications and petitions filed before the BOT, the findings and recommendations of the MARINA shall be adopted by the BOT without prejudice to the right of the private parties adversely affected to contest the same during the hearing of the case before the BOT,...

Even from a cursory examination of the first and second Memorandums of Agreement, the basic rationale is still to preclude duplication or overlapping of functions. The functions of the MARINA remain the same except that they are now enumerated in detail and some added functions are also specified. There is now a clearer recognition of the franchising and quasi-judicial prerogatives of the BOT. On the other hand, the role of the MARINA as "technical, economic and enforcement staff" of the BOT, as may be also gleaned from Presidential Decree No. 474, has been re-affirmed.

On the matter of Special Permit under paragraph 3(h), this seems to be already comprehended under paragraph 3(a) of the second Agreement, whereby MARINA was directed to evaluate all applications for Provisional Authority since they are considered the same, especially in legal effect. This Special Permit under paragraph 3(h) could not pertain to special trips of vessels outside its authorized route when chartered or when additional vessels are fielded in a route to cope up with the extraordinary increase of passenger volume on certain occasions. There are emergencies which also require immediate action. If a request for this kind of permit will still have to be evaluated by the MARINA, the BOT approval may not come out in time to meet the emergency. Perhaps, as a reaction to previous issuances by MARINA of Special Permits, which is similar to a thirty-day Provisional Authority, the second Agreement left no room for doubt as to which agency shall evaluate all petitions therefor and which agency shall issue such Special Permits. Thus, it has to be reiterated in paragraph 3(h) of the second Agreement that MARINA shall only "evaluate all petitions for Special Permits and submit its recommendations thereon to the BOT."

Another important feature of the second Agreement is the weight and authority accorded to certain MARINA findings. Under the first Agree-

ment, the MARINA shall determine the basis "for the grant of CPCs and amendments thereto." And its "data and standards" shall be "deemed indisputable" except when challenged on grounds of lack or excess of jurisdiction. This has been repeatedly questioned by lawyers appearing before the BOT, who happened to be on the adverse side of the MARINA findings. The criticism is that for the BOT to almost blindly accept these findings is either to delegate or abdicate its function as a fact-finding body or as a trier of facts. Besides, it is only the legislative body which can fix the weight and sufficiency of evidence.[35]

Thus in the second Agreement there seems to be a slight loosening up but the nature and efficacy of these findings became rather vague. In one instance, it still provides that "on the basis of MARINA recommendations, the BOT shall hear and decide, grant or approve, or deny the application or petition." This seems to give the impression that the MARINA recommendation shall already determine the outcome of BOT proceedings. If the outcome is a foregone conclusion, would it not turn the BOT proceedings into a useless ceremony? However, in another instance, it also assures that these "findings and recommendations" of the MARINA shall be adopted by the BOT without prejudice to the right of the adverse parties to contest the same during the hearings. Which means that they are now merely persuasive or disputable findings.

The basic justification for the re-study of the first Memorandum of Agreement of August 10, 1976 was that it was considered "still inadequate in defining and delineating their respective roles or areas of responsibilities." As to whether the provisions thereof shall be observed by both parties to the Agreement is not hard to discern. In fact the respective BOT and MARINA functions under the Second Agreement, of February 26, 1982, (Annex "A") aside from being a reiteration and amplification of the first, are merely a re-affirmation of the provisions of Presidential Decree No. 1, Presidential Decree No. 474 and the recognized practice of both agencies. The possibility of overlapping has a tendency of obtaining, in view of the comprehensive scope of activities of MARINA, only on shipping matters.

MARINA Indorsement and Steps in Filing Application

Thus, from the first and second Agreements was born what has been denominated as the *MARINA endorsement*. This is actually nothing but a recommendation of the MARINA on an application for a CPC to operate a shipping service or amendment thereto based on "market and economic evaluation" of the route applied for. It has become standard practice thereafter that every application for shipping service filed with the BOT must secure this Endorsement from the MARINA. Without it, or if the Endorsement is unfavorable, the application is not given due course by the BOT and it usually remains in an inter-agency limbo, to be later denied

[35] FRANCISCO, THE REVISED RULES OF COURT 20, (Vol. VII, part 1).

or dismissed. But if the Endorsement is favorable, a provisional authority is granted in due course, if requested, and final approval, after notice and hearing, also generally follows. Usually this Endorsement is merely a short one paragraph statement concluding "that after a careful market and economic evaluation of this application, this office (MARINA) interposes no objection thereto" or "recommends disapproval on said request", as the case may be. With this, the burden and forum of administrative determination seems to have shifted from the BOT to the MARINA. Hence, under the present set-up, the steps in the prosecution of an application for CPC to operate a shipping service may be outlined as follows:

> 1. Furnishing a copy of application with copies of supporting documents to the MARINA;
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> 2. Payment of filing fee and filing of the original of said application, with supporting documents, with the BOT, after showing proof of service to MARINA;
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> 3. Evaluation, investigation and recommendation or Endorsement by MARINA;
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> 4. If the MARINA Endorsement or recommendation is unfavorable, it seems that under the second Agreement, the application may be set for hearing for the purpose of dismissing or denying the same. But since the party adversely affected (which is the applicant) can contest the findings and recommendation, he will be given opportunity to present evidence against the same;
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> 5. If the Endorsement is favorable or MARINA has no objection to the application, the application is given due course at the BOT;
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> 6. With favorable Endorsement and if the application is uncontested, the BOT either issues a provisional authority or sets the application for hearing. If the application is contested, it is set for hearing, and oppositor can challenge said Endorsement during hearing;
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> 7. After hearing, if the application is contested, the BOT may either grant or deny the same as the evidence may warrant; and if uncontested, usually a franchise or CPC valid for fifteen years is granted by the BOT.

Opinion of the Minister of Justice

Aware of seemingly conflicting provisions in the law governing these agencies, the MARINA Administrator in May, 1978, sought the opinion of the Secretary (now, Minister) of Justice on the extent of its powers. The specific queries were:

> "1. Can MARINA establish regional and district offices to discharge the powers and functions of the defunct Water Transportation Division of the Bureau of Transportation?
>
> 2. Can MARINA compel shipping companies and their vessels to follow their authorized schedule of trips?
>
> 3. Can MARINA apprehend and punish (sic) violations of the Public Service Act, the orders, rules and regulations of the Bureau [Board] of Transportation?"

All questions were answered by the Secretary of Justice in the affirmative in a letter-opinion dated July 10, 1978. The authority for the uniform reply was the MARINA Charter—Presidential Decree No. 474. For query number 1, Sec. 16 (b) of said Decree was relied upon, providing for the transfer of powers and functions over maritime shipping of the Bureau of Transportation to the MARINA. For query number 2, Sec. 4 of said Decree was cited, to the effect that the MARINA shall supervise and regulate maritime activities. And for query number 3, Sec. 12(1) also of the said Decree provided that the MARINA is empowered "to implement the rules and regulations issued by the BOT."

The opinion seems to have settled the issues, except for the fact that the above-mentioned functions are *still exercised* by the BOT with equally explicit legal provisions in support therefor. Again, this failed to solve the confusion and the problem of duplication of functions. As to query number 1, except on the matter of creation of regional offices, the BOT maintains supervision and control over maritime shipping as its Water Transportation Division has never been abolished and the BOT Chairman is also the Chairman of this Division at the BOT.[36] This point is further discussed in the later portion of this paper. As to query number 2, the BOT under Section 17(a) of the Public Service Act was also empowered "to enforce compliance with any standard, rule, regulation, order or other requirement of this Act or the Commission [BOT]". As to query number 3, the power of the BOT is even more specific, for under Sec. 16(n) also the same Act, it can suspend or revoke any CPC for violation or wilful refusal "to comply with any order, rule or regulation," and under Sec. 21 again of the same Act, every public service violating any CPC, orders, decision, or regulation of the BOT shall be subjected to fines. Finally, the position that the BOT is the more appropriate agency to undertake the functions referred to in query numbers 2 and 3 is clearly reaffirmed by the terms of the second BOT-MARINA Memorandum of Agreement of February 26, 1982.

Adjudicatory Powers for MARINA

What ultimately compounds the problem is that in the same opinion, the Secretary of Justice went as far as to concede adjudicatory powers for the MARINA:

> "Since, as already stated, upon the creation of the MARINA by P.D. No. 474, the Water Transportation Division was abolished and its powers and functions pertaining to the development and supervision of Maritime Shipping were transferred to the MARINA, the latter in effect assumed the regulatory and *adjudicatory* functions of the defunct Public Service Commission pertaining to water utilities."[36a]

While it is settled that the opinions of the Secretary of Justice should be given due respect, perhaps in this opinion there was a failure to consider

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[36] Pres. Decree No. 1 (1972); (IRP), Part X, Art. III, Sec. 4.
[36a] Sec. of Justice Op. No. 103, s. 1978. Underscoring supplied.

some pertinent provisions of the Integrated Reorganization Plan (IRP) and Presidential Decree No. 474. At the outset, we can postulate that the MARINA is *not* a quasi-judicial body. Adjudication is still vested by law upon the BOT. Besides, what was "abolished", as contended above, under Sec. 16(b) of Presidential Decree No. 474 was the Water Transportatiin Division pertaining to the Bureau of Transportation. The Bureau was a separate entity under Part X, Chap. 1, Art. VI of the IRP, supposedly created "out of a merger between the present Civil Aeronautics Administration and the Land Transportation Commission" which was not, however, pushed through. There is *another* "Water Transportation Division" pertaining to the BOT which is a separate, distinct, and functioning division up to the present. The BOT Chairman and board members are also sitting concurrently as Chairman and board member, along with others in this Division. Thus, the MARINA cannot in effect assume the regulatory and adjudicatory functions of the Public Service Commission [BOT] pertaining to water transportation because the "Water Transportation Division" of the BOT, as stated earlier, was not the one that was "abolished."[37]

For a clearer picture, we shall reproduce the pertinent provisions of the IRP and Presidential Decree No. 474 of 1974. Under the IRP one of three Specialized Regulatory Boards which replaced the Public Service Commission was the Board of Transportation.

> "4. The Board of Transportation shall be composed of three divisions, namely: Land, Water and Air. The full-time Chairman who shall be of unquestioned integrity and recognized prominence in previous public or private employment and one of the full-time members who shall either be a lawyer or an economist with adequate experience in public utilities regulations shall sit in all Divisions of the Board.
>
> The other members of the three (3) Divisions of the Board are as follows:
>
> Land Transportation
>
> . . .
>
> Water Transportation Division — one full-time member who shall be competent in all aspects of water transportation; and the Assistant Director for Water Transportation of the Bureau of Transportation and the Director of the Bureau of Foreign Trade, as ex-officio members.
>
> Air Transportation Division"[38]

What is noteworthy from the above-quoted provisions is the reference to a member of the Water Transportation Division of the BOT as coming from a "Bureau of Transportation." What is this office? The answer lies in the later provisions of the IRP, to wit:

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[37] Perhaps the word "abolished" is a misnomer because the Water Transportation Division of the Bureau of Transportation, separately created under Part X, Chap. 1, Art. VI, Sec. 3 of the IRP, was never physically organized.

[38] IRP, Part X, Chap. 1, Art. IV, part.4.

Art. VI — Bureau of Transportation

1. The Bureau of Transportation, hereinafter referred to in this Article as the Bureau, is hereby created out of a merger between the present Civil Aeronautics Administration and the Land Transportation Commission and the transfer of functions from other agencies related to Maritime Transportation.

. . .

3. The following are created in the Bureau... e) Water Transportatoin Division, and...

9. The Water Transportation Divisions shall be responsible for undertaking traffic and economic studies for the development of maritime shipping and estimate present and future requirements for port development including navigational aids;"[39]

It is quite clear that there were two Water Transportation Divisions. The first was a division of said agency, under the provisions creating the BOT, and the other under the provisions creating the Bureau of Transportation under Article VI both of Part X, Chapter 1 of the IRP. And while one of these divisions was "abolished," it was not the division under BOT but the one under the Bureau of Transportation. This is expressly stated in the "Miscellaneous Provisions" in the MARINA Charter Reorganizational Changes—

b) Bureau of Transportation—The powers and functions pertaining to the development and supervision of maritime shipping of the *Bureau of Transportation for Water* are hereby transferred to the Authority. Accordingly the *Water Transportation Division of the Bureau* is hereby abolished."[40]

News reports in the latter part of 1981 on possible merger of the BOT and the Bureau of Land Transportation (BLT)[41] as well as the plan to transfer the franchising powers of adjudicatory powers of the latter. Mergers may be the mood of the moment but some quarters have expressed the view that the franchising functions of th BOT is quite distinct from the registration functions of the BLT. Besides, it seems contrary to the policy of integration to divest the Board of Transportation of franchising power over watercrafts and vest the same to the MARINA, and subsequently accord it quasi-judicial powers which have been institutionalized with the BOT. What is needed for these agencies at the moment is a clearer understanding and recognition of the limits of their present powers and functions.

Decimation of BOT Powers

Indeed, there seems to be no need for a decimation of powers of this once proud and powerful regulatory body. Before Presidential Decree No. 1,

[39] IRP, Part X, Chap. 1, Art. VI, pars. 1, 3 and 9.
[40] Pres. Decree No. 474, Sec. 16. Underscoring supplied.
[41] The merger will result in the creation of a "Land Transport Authority." Please see Times Journal, September 2, 1981, p. 6, col. 7.

under the umbrella of the defunct Public Service Commission, the latter had jurisdiction over virtually all public services. The scope of its control cover no less than twenty-five public utilities, among them railroad, aircraft, watercraft, shipyard, ice-plants, telephone, electric plants, water supply, markets, and others. With Presidential Decree No. 1, telephone as well as other systems of communications, electric plants and waterworks were taken away, leaving mainly transportation utilities to the BOT—the repository of the basic staff and records of the defunct Public Service Commission. Then ice-plants and cold storage were deregulated.[42] Aircrafts remained under the jurisdiction of the CAB, although earlier decreed in the IRP to be under the BOT.[43] As early as 1980, there was a plan to give the local governments entire jurisdiction over the franchising and regulation of pedicab (tricycle) operation in the country. The power to grant franchises was, however, retained by the BOT.[44] Now, most regulatory and supervisory functions on shipping vessels and watercrafts, except franchising, are placed under the MARINA.[45]

In this regard, there are also reports that the Metro Manila Commission would take over the franchising of jeepneys in the Metro Manila. Related to this is another plan to create a traffic body to punish erring drivers of jeepneys with power to cancel their permits.[46] For several years now, the BOT has bewailed the abolition of its enforcement unit (the items of "PSC [BOT] Inspectors") so much so that as an executive agency, it is rendered helpless in enforcing its orders for it had to request help from other agencies. Then there are certain directives relative to transportation matters, like the recent provincial bus ban,[47] which used to issue from the Board under its rule-making power. In the 1960's the defunct Public Service Commission issued a similar provincial bus ban which was upheld by the Supreme Court when challenged by a bus operator.[48]

Hence, a trend appears clear on the part of the Government to divest the BOT of its powers. If this continues, the time is not so far away when the only remaining power of this agency is the power to preside over its own demise. The BOT is being likened to a once robust tree being shorn of its branches and leaves—what will ultimately remain is the forlorn figure of a drying trunk that would eventually die from disuetude.

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[42] Under Pres. Decree No. 1 (1972) which made the IRP part of the law of the land, ice-plants and cold storages were excluded from the jurisdiction of the Specialized Regulatory Boards and Pres. Decree No. 43 (1972) in effect provided that there is no need to secure CPC's to establish ice plants and cold storages.

[43] IRP, Part X, Chap. 1, Art. III, Sec. 4 (a).

[44] BOT Memo. Circular No. 82-JC-013 (1982).

[45] From a cursory examination of the provisions of P.D. No. 474 (1974), BOT-MARINA Memorandums of Agreement of 1976 and 1982 and Part X Chap. I, Art. III, Sec. 4 of the IRP, most of the maritime related activities are performed by MARINA.

[46] Times Journal, February 4, 1982.

[47] Times Journal, March 16, 1982, p. 1, col. 1.

[48] *Lagman vs. Medina*, 26 SCRA 442 (1968).

Conclusion

For the government to function effectively, it must have the proper agencies to respond to the complex and multifarious needs of the modern citizenry. Professor Irene Cortes has aptly noted that, "Government regulation is a fact of life now and can be expected to increase rather than diminish in the future. Not only have the number of regulatory agencies increased, the scope of their powers and their areas of regulation have likewise expanded."[49] With the growth of and increasing reliance upon regulatory bodies, there is also a greater likelihood for more than one agency actively participating the same reliefs to the public. There is among these agencies also a tendency to overlap or duplicate functions, or exercise powers that are justified more by their claim of urgency than by their charters. These possibilities in the administrative scene had been discerned by Dean Roscoe Pound of Harvard University as early as 1940:

> "More recently there have come to be ideas of making over the social and economic structure through administrative action. The result has been in the present century a *rapid development* of administrative bodies and *agencies of every kind, a growing tendency to commit undifferentiated powers to them,* a tendency on their part to *exercise powers beyond what are assigned to the executive* in our policy, and an increasing advocacy of administrative absolutism not only by the administrative officials but by teachers and students of jurisprudence and politics."[50]

It seems we are behind the United States in this regard for more than forty years. The rapid growth of "agencies of every kind," the tendency "to commit undifferentiated powers" to them and their tendency "to exercise powers beyond what are assigned" are percipient observations aptly descriptive of our present administrative problems. Yet, they were experienced by the United States *before* the second world war.

Therefore, to remedy these problems especially relative to the BOT and MARINA, there must indeed be a clear understanding and recognition of their respective powers and functions. Corollary to this, it has become of crucial importance to also delineate definite guidelines, and to re-examine and re-define the limits of the areas of responsibilities of these agencies, consistent with the public utility laws, jurisprudence and administrative principles.

The first and second BOT-MARINA Agreements are great steps along this direction. These timely undertakings are positive responses to the present campaign, eloquently articulated by the IRP, "to promote simplicity, economy and efficiency in government," as well as "to eliminate overlapping and duplication of services, functions and activities of the

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[49] Cortes, *The Constitutional Commissions,* 1976 THE GOVERNMENT IN TRANSITION 80.

[50] POUND, ADMINISTRATIVE LAW, ITS GROWTH, PROCEDURE AND SIGNIFICANCE 27-28 (1942). Underscoring supplied.

government," with the end in view of improving "the service in the transaction of the public business."[51] Otherwise, to allow this exercise of seemingly "undifferentiated powers" and functions by the BOT and the MARINA, a kind of situation which obtained in the American administrative scene in the 1940s would be to abet a legal anachronism.

[51] See Declarations of Policy and Powers of the Commission of Reorganization in Rep. Act No. 5453 (1968) and the IRP.

ANNEX "A"

MEMORANDUM OF AGREEMENT BETWEEN THE MARITIME INDUSTRY AUTHORITY AND THE BOARD OF TRANSPORTATION

WHEREAS, under Presidential Decree No. 1, otherwise known as the Integrated Reorganization Plan, creating the Board of Transportation, and under Presidential Decree No. 474, creating the Maritime Industry Authority, certain powers given respectively to the said government agencies over the shipping industry appear to be overlapping;

WHEREAS, in the interest of the government and all parties concerned, the Board of Transportation and the Maritime Industry Authority desire to work harmoniously to preclude overlapping of functions in the implementation of the rationalization program of the interisland shipping industry;

WHEREAS, after a careful re-study and review of the existing Memorandum of Agreement between the two agencies dated August 10, 1976 and its implementation, it was found to be still inadequate in defining and delineating their respective roles or areas of responsibilities;

WHEREAS, there is a need to revise and up-date said Memorandum of Agreement to make responsive to the demands of public service and of the said rationalization program;

NOW, THEREFORE, it is hereby agreed that, in the implementation of the rationalization program for the interisland shipping industry and the exercise of their pertinent functions under Presidential Decree No. 474 and Presidential Decree No. 1, the Maritime Industry Authority and the Board of Transportation, respectively, shall coordinate with, and supplement, each other following the working arrangement herein below set forth:

1. The Board of Transportation shall be the franchising agency and shall have the principal functions of issuing Certificate of Public Convenience to domestic water carriers as expressly provided in P.D. No. 1, and the Maritime Industry Authority shall serve as the technical, economic and enforcement staff of the Board of Transportation for water transportation.

2. The Board of Transportation, as the franchising agency, shall accept, receive and docket all applications or petitions together with the pertinent supporting documents.
   Before filing the application or petition as the case may be, the applicant or petitioner should first furnish the Marine Industry Authority a duplicate copy of the application or petition together with the supporting papers, and the Board of Transportation must first require proof of service to Maritime Industry Authority before the application is accepted for filing.
   Upon receipt of said application or petition, Maritime Industry Authority shall commence its evaluation and investigation thereof, and make the

proper recommendation, and on the basis of which the Board of Transportation shall hear and decide, grant or approve, or deny the application or petition.

3. The Maritime Industry Authority, as the technical staff of the Board of Transportation, shall have the following specific functions as follows:

a) To evaluate all applications for Provisional Authority, Certificate of Public Convenience, and renewal thereof, as the case may be, and submit its findings/recommendations thereon to the Board of Transportation.

b) To evaluate all petitions for permanent replacement or substitution of vessels and submit its findings/recommendations thereon to the Board of Transportation.

c) To evaluate and recommend the reasonable fare rates or increase of fares that may be authorized to be charged by any public water carrier, and submit its recommendations to the Board of Transportation for hearing and decision.

d) To evaluate and recommend the necessary trade routes to be served and the measured capacity of those routes in terms of tonnage and sailings for approval by the Board of Transportation and for inclusion in the grant of PA or CPC.

e) To evaluate all petitions for change of route and/or change of schedule/frequency and submit its findings/recommendations thereon to the Board of Transportation.

f) To evaluate all petitions for approval of sale/lease of vessels and/or transfer or assignment of franchise and submit its finds/recommendations thereon to the Board of Transportation for hearing and approval.

g) To evaluate and conduct investigations on all petitions for temporary cessation of operation caused by or due to accident, drydocking, lay-up and other similar causes and recommend to the Board of Transportation whatever action as may be necessary and proper under the circumstances.

h) To evaluate all petitions for special permits and submit its recommendations thereon to the Board of Transportation for issuance or denial.

i) To evaluate and investigate all complaints or petitions for injunction (cease and desist order) filed against any public water transport operator for violations of franchise and/or the Public Service Act, and submit its findings/recommendations to the Board of Transportation which shall hear and decide the case.

4. In all applications and petitions filed before the Board of Transportation, and findings and recommendations of Maritime Industry Authority shall be adopted by the Board of Transportation without prejudice to the right of the private parties adversely affected to contest the same during the hearing of the case before the Board of Transportation.

5. The two agencies shall cooperate and coordinate in the compilation of statistical data regarding the operations of public water carriers and the setting up of standards on the equipment and installations, and in ensuring efficiency and safety of public water carriers.

6. The Administrator, Maritime Industry Authority, as *ex-oficio* member of the Water Transport Division of the Board of Transportation may, in his absence or inability to attend, designate the Deputy Administrator or the Chief Legal Counsel of Maritime Industry Authority to sit in the Board of Transportation provided that the said representative shall not have the right to vote.

This Memorandum of Agreement shall amend and supersede the Memorandum of Agreement dated August 10, 1976, and shall take effect upon the signing thereof by the heads of the two Agencies, and the attestation thereof of the Honorable Minister of the Ministry of Transportation and Communications.

Signed this 26th day of February, 1982 in Metro Manila, Philippines.

HON. JOSE C. CAMPOS, JR.
Chairman
Board of Transportation

HON. VICTORINO A. BASCO
Administrator
Maritime Industry Authority

APROVED:

HON. JOSE P. DANS, JR.
Minister
Ministry of Transportation and Communications