COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA, & NORTHERN ISLANDS

COMMONWEALTH REGISTER

VOLUME 27
NUMBER 07

August 22, 2005

COMMONWEALTH REGISTER

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

AUG 1 1 2005

Juan N. Babauta
Governor

Diego T. Benavente
Lieutenant Governor

DECLARATION OF A STATE OF EMERGENCY

Volcanic Eruption on Anatahan

I, JUAN N. BABAUTA, pursuant to the authority vested in me as Governor of the Commonwealth of the Northern Mariana Islands pursuant to Article III, Section 10 of the Commonwealth Constitution and 3 CMC § 5121 of the Natural Disaster Relief Act of 1979, declare a State of Emergency for the island of Anatahan. This Declaration of a State of Emergency is in accordance with the recommendations and justifications presented by the Emergency Management Office (EMO), Commonwealth of the Northern Mariana Islands and the United States Geological Survey (USGS) such recommendations and justifications being attached and incorporated by reference. I further declare that the island of Anatahan is unsafe for human habitation and do therefore restrict all travel to the island of Anatahan except for such travel deemed to be for scientific purposes, provided however, that such scientific expeditions be permitted only upon prior notification to the Director of the EMO or his designee. I also declare that the off-limits zone shall continue to be maintained from thirty (30) nautical miles to ten (10) nautical miles around the island of Anatahan.

This Declaration of Emergency shall take immediately and shall remain in effect for thirty (30) days unless I, prior to the end of the thirty (30) day period, notify the Presiding Officers of the Legislature that the state of emergency has been lifted or has been extended for an additional period of thirty (30) days. The underlying justification for any such further extension, as with this Declaration of a State of Emergency, shall be set forth in a detailed communication to the Legislature.

JUAN N. BABAUTA
AUG 1 1 2005

CC: Lt. Governor
Senate President
House Speaker
Mayor of the Northern Islands
Director, Emergency Management Office
Commissioner, Department of Public Safety
Attorney General
Secretary of Finance
Special Assistant of Management and Budget

Emergency Management Office
OFFICE OF THE GOVERNOR
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Juan N. Babauta, Governor
Diego T. Benavente, Lt. Governor

Rudolfo M. Pua, Director
Mark S. Pangelinan Dep., Director

MEMORANDUM

To: Governor

11 AUG 2005

From: Acting Director, EMO

Subject: Declaration of Emergency

The EMO seismic staff and USGS, once again with close consultation has informed me that the volcano at Anatahan continues to erupt spewing ash as high as 18,000 feet as recorded by the seismographs at EMO.

Therefore, we are once again respectfully soliciting your assistance in extending the **Declaration of Emergency** for the island of Anatahan for another thirty (30) days and to maintain the ***off limits zone from 30 nautical miles to 10 nautical miles*** around Anatahan until further notice. Under these conditions, restriction of entry to the said island should continue until a thorough scientific study is done and that the findings suggest otherwise. The current **Declaration of Emergency** is expiring today, August 11, 2005.

Should you have any question or concern, please call our office at 322-9528/29.

Maria B. Kazuma

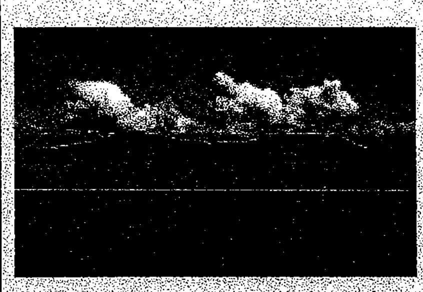
Attachments

cc: Lt. Governor
SAA
Mayor, NI

Rec'd [illegible] 8/11/05

Northern Mariana Islands Volcanic Activity

Anatahan Volcano



Anatahan Island, 1994

Summit Elev.: 788 m
Latitude: 16.35°N
Longitude: 145.67°E

The first historical eruption of Anatahan Volcano began suddenly on the evening of May 10, 2003. No one was directly threatened by the initial strong explosive activity, because residents had long before evacuated the small volcanic island.

Anatahan Volcano is located 120 km (75 miles) north of Saipan Island and 320 km (200 miles) north of Guam. The island is about 9 km (5.6 miles) long and 3 km (2 miles) wide. Anatahan is a stratovolcano that contains the largest known caldera in the Northern Mariana Islands.

The Emergency Management Office (EMO) of the Commonwealth of the Northern Mariana Islands invited USGS scientists to provide assistance in tracking the volcano's activity and assessing potential hazards shortly after the eruption began. USGS scientists first arrived in Saipan on May 30, 2003 to work directly with EMO officials to install and maintain monitoring equipment and interpret data from from overflights and a single seismometer operating on Anatahan. This station became operational on June 5.

Anatahan Volcano Update for August 8, 2005

Submitted Monday, August 8, 2005 (1000 local Anatahan time August 9

Today, August 8, Anatahan continues to be in a state of constant eruption. For the past 24 hours, volcanic tremor levels as recorded at Anatahan's east seismic station ANA2 were generally between 40 and 80 percent of the peak levels observed June 17-26.

A high-amplitude, long-period earthquake was recorded by ANA2 at 1:38pm. The event lasted for about 30 seconds. A smaller event occurred about 2 minutes later, after which background tremor amplitudes momentarily dropped by about 25% before increasing once again.

The Air Force Weather Agency reported a break in cloud cover around 8:00pm, once again enabling detection of the ash plume. As of 4:25am the ash plume was observed up to 18,000 feet, extending 120 nautical miles northwest of the summit and moving to the northwest at 5-10 knots.

A seismic swarm was recorded by the Sarigan station, beginning with an earthquake at 1:52 am Over the next 8

hours, more than 40 earthquakes were recorded, with the three largest (~M4) occurring at 1:52 am 5:39 am, and 5:54 am. A rough location computed by the USGS National Earthquake Information Center (NEIC) placed the 5:39 pm event at 16.7 degrees north and 145.2 degrees east, or about 65 km (40 miles) northwest of Anatahan with a magnitude of 4.2.

Network Status: Seismic stations ANA2 at Anatahan and SARN at Sariguan are operational.

PUBLIC NOTICE OF EMERGENCY REGULATIONS AND NOTICE OF INTENT TO ADOPT AMENDMENTS TO COMMONWEALTH UTILITIES CORPORATION RULES AND REGULATIONS

EMERGENCY: The Commonwealth of the Northern Mariana Islands, Commonwealth Utilities Corporation finds that under 1 CMC § 9104(b), the public interest requires an amendment to the Commonwealth Utilities Corporation Rules and Regulations, regarding customer deposits for electrical, water and sewer services. The current regulations concerning commercial electrical service security deposits are inappropriate to the needs of the utility. The Commonwealth Utilities Corporation has a duty to provide proper notice to all commercial electrical and other utility service customers who have existing security deposits with the utility. Due to the harm that could occur to the utility due to current restrictions on these funds, the Commonwealth Utilities Corporation finds that the public interest mandates adoption of these regulations upon fewer than thirty (30) days notice, and that these regulations shall become effective immediately after filing with the Register of Corporations, subject to the approval of the Attorney General and the concurrence of the Governor, and shall remain effective for 120 days.

REASONS FOR EMERGENCY: The Commonwealth Utilities Corporation finds that the adoption of these regulations upon fewer than thirty (30) days notice is necessary to protect continuation of utility services, and because the notice period would prevent application of the regulations during period of notice. Accordingly, the Commonwealth Utilities Corporation finds that in the interest of the public, it is necessary that these regulations are approved and adopted immediately.

INTENT TO ADOPT: It is the intent of the Commonwealth Utilities Corporation to adopt the emergency amendments to the Commonwealth Utilities Corporation Board Rules and Regulations, as permanent, pursuant to 1 CMC § 9104(a)(1) and (2). Accordingly, interested parties may submit written comments on these emergency amendments to Lorraine Babauta, Executive Director, Commonwealth Utilities Corporation, P.O. Box 501220, La Fiesta 3 Third Floor Suite 301, ~~Dandan~~ As Matuis, MP 96950 or by fax to (670) 664-6131.

Submitted by: [signature] 6-23-05

Lorraine Babauta, Executive Director — Date

Concurred by: [signature] 6/29/05

JUAN N. BABAUTA, Governor — Date

Filed and Recorded by: ______________________ 6.29.05

BERNADITA B. DE LA CRUZ
Commonwealth Register

Date

Pursuant to 1CMC §2153, as amended by Public Law 10-50, the emergency regulation amendments attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Dated this 24th day of June 2005.

PAMELA BROWN
Attorney General

PUBLIC NOTICE
EMERGENCY AMENDMENTS TO THE COMMONWEALTH UTILITIES CORPORATION RULES AND REGULATIONS
ARTICLE IX

These regulations are promulgated in accordance with the Administrative Procedure Act, 1 CMC § 9101, et seq.

Citation of Statutory Authority: The Commonwealth Utilities Corporation Board is authorized to promulgate regulations pursuant to 4 CMC § 8157.

Short Statement of Goals and Objectives: The proposed additions to the Commonwealth Utilities Corporation Rules and Regulations will provide greater financial flexibility and accountability with respect to customer security deposits for utility services..

Brief Summary of the Proposed New Section: The proposed additions to the Commonwealth Utilities Corporation Rules and Regulations are promulgated to provide greater financial flexibility and accountability with respect to customer security deposits for utility services..

For Further Information Contact: Lorraine Babauta, Executive Director, of the Commonwealth Utilities Corporation, telephone (670) 664-6131

Citation of Related and/or Affected Statutes, Rules and Regulations, and Orders: The proposed amendments affect the Commonwealth Utilities Corporation Rules and Regulations.

Dated this 23rd day of June 2005.
Submitted by:

LORRAINE BABAUTA
Executive Director

NOTISIAN PUPBLIKU POT I ENSIGIDAS NA REGULASION SIHA YAN NOTISIAN INTENSION POT PARA U MA ADOPTA I AMENDASION SIHA GI AREKLAMENTO YAN REGULASION I COMMONWEALTH UTILITIES CORPORATION

ENSIGIDAS: I Commonwealth Utilities Corporation, gi Commonwealth I Sankattan Na Islas Marianas masodda na papa I lai 1 CMC Seksiona 9104 (b), I interes pupbliku manisisita para u ma'amenda I Areklamento yan Regulasion I Commonwealth Utilities Corporation, ni tineteka I dispositon salåpe asiguridåt para I setbision ilektrisdåt, hånom, yan sewer. I prisente na regulasion ni tineteka I dipositun salåpe asiguridåt para I setbision kometsiånte ni ti man propio para I nisisidåt siha gi ilektrisidåt. I Commonwealth Utilities Corporation guaha responiblidåt-ña para u probeniyi propio na notisia para todu I Kometsiånten bisnis yan palu na kometsiånten ilektrisidåt ni man gai' dipositun asiguridåt gi prisnete. Pot I piniligro ni siña gumuaha gi ilektrisidåt ginen I prisente na pribin salåpe, I Commonwealth Utilities Corporation masodda na I interes pupbliku ma'otden I inadoptasion este na regulasion siha meños di trenta (30) diha siha na notisia, ya este na regulasion debi di u efektibu ensigidas despues mapolu gi Rehistradoran I Koporasion, sigun I ma'aprueban I Abugådo Heneråt yan I kininfotmen I Gobietno, ya debi di efektitibu esta siento bente (120) diha siha.

RASON I ENSIGIDAS: I Commonwealth Utilities Corporation masodda na I inadoptasion este siha na regulasion gi meños di trenta (30) diha siha nisisårio pot para u protehi I kontinuan I setbision ilektrisidåt, ya pot I tiempon I notisia siempre a pribeni I aplikasion I regulasion durånten I pupblikasion. Sigun, I Commonwealth Utilities Corporation masodda na I interes pupbliku, nisisårio na u fan ma'aprueba yan ma'adopta ensigidas este siha na regulasion.

INTENSION POT PARA U MA'ADOPTA: Sigun I lai 1 CMC Seksiona 9104 (a)(1) yan (2), I Intension I Commonwealth Utilities Corporation para u adopta petmanente I ensigidas na amendasion gi Areklamento yan Regulasion I Kuetpon I Commonwealth Utilities Corporation. I man enteresao na petsona siña u fan nahalom tinige' opinion pot este ensigidas na amendasion, guatto as Lorraine Babauta, komo I Executive Director, gi Commonwealth Utilities Corporation, gi P.O. Box 501220, gi Suite 301 mina tres na bibienda gi La Fiesta, gi As Matuis, MP 96950 osino fax gi (670) 664-6131.

Manahålom as: Lorraine Babauta
Executive Director, CUC
8/15/05
Fecha

Kinifotme as: JUAN N. BABAUTA
Gobietno
8/15/05
Fecha

Pine'lo yan
Marikot as: BERNADITA B. DELA CRUZ
Rehistradoran I Commonwealth
8/15/05
Fecha

Sigun I lai 1 CMC Seksiona 2153, ni inamenda ni Lai Pupbliku 10-50, I ensigidas na amendasion regulasion ni man che'che'ton esta man ma'aprueba yan ma'ina pot para u fotma yan ligåt sufisiente ginen I Ofisinan I Abugådo Heneråt.

Mafecha este gi mina bente kuåttro na ha'åne gi Junio, 2005.

PAMELA BROWN
Abugao Heneråt

NOTISIAN PUPBLIKU
ENSIGIDAS NA AMENDASION SIHA GI AREKLAMENTO YAN REGULASION I COMMONWEALTH UTILITIES CORPORATION
ATIKULU IX

Man ma'establesi este na regulasion siha sigun I Akton I Areklamenton Atministrasion, lai 1 CMC Seksiona 9101, et. seq.

Annok I Aturidåt I Lai:	I Kuetpon I Commonwealth Utilities Corporation man ma'aturisa para u ma'establesi regulasion siha sigun I lai 4 CMC Seksiona 8157.
Kada'da' Na Mensåhe Pot Finiho yan Diniseha:	I man mapropone na tinilaika siha gi Areklamento yan Regulasion I Commonwealth Utilities Corporation siempre maprobeniyi mås maolek na siñålan fainasiåt yan kontadot nu I dipositun salåpe asiguridåt I kometsio siha para I setbision ilektrisidåt siha.
Kada'da' Na Mensåhe Pot I Man Mapropone Na Nuebu Na Seksiona:	I Man mapropone na tinilaika siha gi Areklamento yan Regulasion I Commonwealth Utilities Corporation man ma'establesi para u probeniyi mås maolek na siñålan fainasiåt yan kontadot nu I dipositun salåpe asiguridåt I kometsio siha para I setbision ilektrisidåt siha.
Para Mås Infotmasion Ågang:	Lorraine Babauta, Executive Director, gi Commonwealth Utilities Corporation, gi numirun tilifon (670) 664-6131.
Annok i man Achule' yan/pat Inafekta na Lai siha, Regulasion yan Otden siha;	I man mapropone na amendasion a afekta I Areklamento yan Regulasion I Commonwealth Utilities Corporation.

Mafecha este gi mina bente kuåttro na ha'åne gi Junio, 2005

Manahålom as: Lorraine Babauta
Executive Director, CUC

8/15/05
Fecha

ARONGORONGOL TOULAP REEL GHITIPWOTCHOL ALLÉGH KKAAL ME ARONG IGHA E MÁNGEMÁNGIY BWE EBWE FILLÓÓY LLIWEL NGÁLI AMMWELIL COMMONWEALTH UTULITIES CORPORATION ME ALLÉGHÚL

GHITIPWOTCHOL: Commonwealth Téél Falúw kka falúwasch Marianas, Commonwealth Utilities Corporation e schungi bwe faal 1 CMC tálil 9104 (b), bwe tipeer toulap bwe rebwe yááyá ngáli ssiwelil Alléghúl Commonwealth Utilities Corporation, bwelle yaar customer deposits reel denki, schaal me sewer services. Sángi allégh kkaal reel alillisil commercial electrical security deposites nge ese fil yaal tittingór utility. Yaal Commonwealth Utilities Corporation angaang nge ebwe schééschéél akkaté alongal commercial electrical me akkááw alillisil customers kka eyoor yaar security deposits mellól utility. Bwelle reel fitighogho ye emmwel bwe ebwe aweiresi utility sángi ammwel kka ighila reel fundo yeel. Commonwealth Utilities Corporation ebwal schungi bwe llól tipeer toulap bwe rebwe alléghúw fillóól alllégh kkaal llól eliigh (30) rállil ammataf yeel, me allégh kkaal ebwe schééschéél bwungúló mwiril yaal atotoolong llól commonwealth Corporations, kkapasal igha ebwe alúghúlúghúló mereel Sów Bwungúl Allégh me Sów Lemelem nge ebwe ghula ebwughúw ruweigh (120) ráálil yaal ebwe schééschéél allégheló.

Kkapasal ghitipwotch: Commonwealth Utilties Corporation e schungi bwe fillóól allégh kkaal nge essóbw luuló eliigh (30) ráálil yaal arong igha e welepakk yaal essóbw sóbwósóbwóló alillisil utility, me bwelle igha arong yeel ebwe afálli mwóghútúl allégh kkaal ótol arongowowul. Schééschéél, Commonwealth Utilities Corporation ebwal schungi bwe llól tipeer toulap, bwe e welepakk rebwe ghutchuw yaar alúghúlúgh me fillóól.

Mángemángil filló: Mángemángil Commonwealth Utilities Corporation nge ebwe fillóóy ghitipwotchol ssiwel kkaal ngáli mwiischil Alléghúl Commonwealth Utilities Corporation, bwe ebwe allégheló, bwelle reel 1 CMC talil 9104(a)(1) me (2). Schééschéél, schóókka re tipeli nge emmwel rebwe ischilong mángemángiir reel Loraine Babauta, Samwoolul, Commonwealth Utilities Corporation, P.O. Box 501220, La Fiesta 3rd Floor Suit 301 As mwatuis, MP 96950 me ngáre fax reel (670) 664-6131.

Isáliyallong: Loraine Babauta, Samwool — Rál 8/15/05

Alúghúlúgh sángi: JUAN N. BABAUTA, Sów Lemelem — Rál 8/15/05

Ammwel sángi: BERNADITA B. DELA CRUZ, Commonwealth Register — Rál 8/15/05

Sángi allégh ye 1 CMC tálil 2153 iye aa lliweló mereel Alléghúl Toulap 10-50, ghitipwotchol allégh kka e ssiwel nge raa takkal amweri fischiy me alúghúlúghúló mereel CNMI Bwulasiyool Sów Bwungúl Allégh Lapalap.

Rállil ye ________llól Alimaté 2005.

____

PAMELA BROWN
Sów Bwungúl Allégh Lapalap

ARONGOL TOULAP
GHITIPWOTCHOL LLIWEL KKAAL NGÁLI ALLÉGHÚL ME AMMWELIL
COMMONWEALTH UTILITIES CORPORATION ARTICLE IX

Allégh kkaal nge ebwe akkatééwow bwelle reel Administrative Procedure Act, 1 CMC tálil 9101, et seq.

Akkatéél Bwángil: Mwiischil Commonwealth Utilities Corporation nge eyoor bwángil reel ebwe akkaté allégh kkaal bwelle reel 4 CMC tálil 8157.

Aweweel pomwol lliwel: Pomwol kka e ffé ngáli Alléghúl Commonwealth Utilities Corportion nge ebwe ayoora ghatchúl financial me lemelem ghatch ngaliir customer security deposits reel utility services.

Aweweel pomwol Tálil ye e ffé: Pomwol kka e ffe ngáli Alléghúl Commonwealth Corporation iye ebwe akkaté bwe ebwe ayoora ghatchúl financial me lemelem ghatch ngáliir customer security deposits reel utility services.

Reel ammataf faingi: Loraine Babauta, Samwoolul, llól Commonwealth Utilities Corporatin, tilifoon (670) 664-6131

Akkatéél bwángil akkááw allégh: Pomwol lliwel kkaal nge e affekktaay Alléghúl Commonwealth Utilities Corporation.

Rállil ye ________llól Alimaté 2005.
Isáliyallong:

LORAINE BABAUTA
Samwool

NOTICE AND CERTIFICATION OF ADOPTION OF AMENDMENTS TO THE COMMONWEALTH UTILITIES CORPORATION REGULATIONS

I, Lorraine Babauta, Executive Director of the Commonwealth Utilities Corporation ("Corporation") of the Commonwealth of the Northern Mariana Islands, by signature below hereby certify:

1. That the Corporation is promulgating regulations regarding the accountability of security deposits, published as Emergency Regulations in the Commonwealth Register Vol. __, No. __ on ________ __, 2005 at pages ______ to ________;

2. That such regulations regarding the accountability and refunds associated with electrical and other utility service security deposits have been published for public comment and are hereby been adopted with the attached modifications or amendments. I further request and direct that this Notice and Certification of Adoption be published in the CNMI Commonwealth Register.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 23rd day of June, 2005, in Saipan, Commonwealth of the Northern Mariana Islands.

LORRAINE BABAUTA
Executive Director
Commonwealth Utilities Corporation

AMENDMENTS TO REGULATIONS OF THE COMMONWEALTH UTILITIES CORPORATION

1. AMENDMENTS TO ELECTRIC SERVICE REGULATIONS OF THE COMMOWEALTH UTILITIES CORPORATION

Part 6.8 *Accountability of Security Deposits* and Part 6.9 *Refunding of Security Deposits* are hereby repealed in their entirety and replaced with the following:

Part 6.8 Accountability of Security Deposits

(a) The Corporation shall be liable for all security deposits received. The Corporation shall maintain an account indicating customer name, date of security deposit and amount of deposit. Effective January 15 of each year, each account shall be credited an amount equal to the average "passbook" savings interest rate payable during the past year based on rates from at least three local FDIC insured banks.

(b) The Corporation's comptroller shall prepare for the Board of Directors an annual report in January of each year which explicitly details amounts of deposits received, interest rate to be paid for the previous year and total account liabilities.

Part 6.9 Refunding the Security Deposits Power, Water and Sewer

(a) Upon the termination of a utility account, the customer shall receive a full, cash refund of any deposit in excess of any remaining unpaid charges.

(b) Refund of security deposit is to be provided within thirty (30) days of account closing, unless the amount of the charges or security account balance is in dispute.

2. AMENDMENTS TO REGULATIONS GOVERNING THE USE OF THE COMMONWEALTH UTILITIES CORPORATION WATER SYSTEM

Article IV, Paragraph 7 is hereby repealed in its entirety and replaced with the following:

7. The following procedures will govern security deposits:

(a) The Corporation shall be liable for all security deposits received. The Corporation shall maintain an account indicating customer name, date of security deposit and amount of deposit. Effective January 15 of each year, each account shall be credited an amount equal to the average "passbook" savings interest rate payable during the past year based on rates from at least three local FDIC insured banks.

(b) The Corporation's comptroller shall prepare for the Board of Directors an annual report in January of each year which explicitly details amounts of deposits received, interest rate to be paid for the previous year and total account liabilities.

(c) Upon the termination of a utility account, the customer shall receive a full, cash refund of any deposit in excess of any remaining unpaid charges.

(d) Refund of security deposit is to be provided within thirty (30) days of account closing, unless the amount of the charges or security account balance is in dispute.

3. AMENDMENTS TO REGULATIONS GOVERNING THE USE OF THE COMMONWEALTH UTILITIES CORPORATION PUBLIC SEWERS

Article V, Section 2 (c) (3) is hereby repealed in its entirety and replaced with the following:

(a) The Corporation shall be liable for all security deposits received. The Corporation shall maintain an account indicating customer name, date of security deposit and amount of deposit. Effective January 15 of each year, each account shall be credited an amount equal to the average "passbook" savings interest rate payable during the past year based on rates from at least three local FDIC insured banks.

(b) The Corporation's comptroller shall prepare for the Board of Directors an annual report in January of each year which explicitly details amounts of deposits received, interest rate to be paid for the previous year and total account liabilities.

(c) Upon the termination of a utility account, the customer shall receive a full, cash refund of any deposit in excess of any remaining unpaid charges.

(d) Refund of security deposit is to be provided within thirty (30) days of account closing, unless the amount of the charges or security account balance is in dispute.

Commonwealth of the Northern Mariana Islands

Department of Public Health

Office of the Secretary of Public Health

PUBLIC NOTICE
NOTICE OF FINDINGS AND STATEMENT OF REASONS FOR EMERGENCY ADOPTION OF AMENDMENTS TO THE RULES AND REGULATIONS GOVERNING THE ADMINISTRATION OF THE MEDICAL REFERRAL PROGRAM

(Provision of Repayable Financial Assistance in the Form of an Accommodations Allowance to an Immediate Family Member of a Patient with Catastrophic Illness)

Emergency: The Secretary of the Department of Public Health of the Commonwealth of the Northern Mariana Islands, in accordance with the authority vested in him pursuant to 1 CMC Section 2605, hereby finds that the public interest requires adoption on an emergency basis of amendments to the Rules and Regulations Governing the Administration of the Medical Referral Program.

The proposed amendments are to Section 4.2, Residency Criteria; Section 4.3, Persons Ineligible for Participation in the Program; Section V, Covered Benefits Under the Medical Referral Program; and, Section 5.6, Repayable Financial Assistance in the Form of an Accommodations Allowance for an Immediate Relative of a Patient with Catastrophic Illness (The new Section). Sections not amended but affected by the proposed changes include: Sections 9.4, 9.8 and 11.2(a).

Benefits will not be paid retroactively due to these changes but will be prospective only. No other eligibility standards or benefits are affected by these changes in the regulations.

The Secretary of Public Health finds that it is in the best interests of the public that the amendments to the regulation become effective immediately upon concurrence by the Governor and the Office of the Attorney General and filing with the Registrar of Corporations. Once approved, the emergency amendments to the regulations shall remain in effect for a period of 120 days.

Reason for Emergency: The Medical Referral Program has identified the immediate need to provide repayable financial assistance in the form of an accommodations allowance for individuals who are an immediate relative of a patient with catastrophic illness that is receiving medical treatment, irrespective of residency, if the patient is under the age of twenty-one (21) and was born in the CNMI. The Medical Referral Program has determined that patients with catastrophic illness that are currently receiving medical

treatment will realize an immediate health benefit from having an immediate family member staying with them and that to deny such assistance would be detrimental to the overall mental and physical condition of the patient. The provision of such repayable financial assistance will be conditioned on a case-by-case determination that it is in the best interests of the patient.

Contents: Attached to this Notice of Emergency are the amended provisions.

Intent to Adopt: It is the intention of the Department of Public Health to comply with the requirements of the Administrative Procedures Act, specifically 1 CMC Section 9104, in amending the Rules and Regulations. Copies of the proposed Rules and Regulations may be obtained from the Office of the Secretary of Public Health located on the ground floor of the Commonwealth Health Center (CHC). Comments on the proposed Rules and Regulations may be sent to the Office of the Secretary of Public Health, Department of Public Health, P.O. Box 500409 CK, Saipan, MP 96950. All comments must be received within thirty (30) days from the date this notice is published in the Commonwealth Register.

Authority: The Department of Public Health is authorized to implement these amendments to the Rules and Regulations Governing the Establishment and Administration of the Medical Referral Program pursuant to 1 CMC Section 2605.

Issued by:

Pedro T. Untalan, M.H.A.
Deputy Secretary of Public Health
Department of Public Health

Date: 8/18/05

Concurred by:

JUAN N. BABAUTA
Governor

Date: 8/18/05

Received by:

THOMAS A. TEBUTEB
Special Assistant for Administration

Date: 8/19/05

Filed by:

BERNADITA B. DELA CRUZ
Commonwealth Registrar

Date: 8/19/05

Certification by Office of the Attorney General:

Pursuant to 1 CMC Section 2153, the emergency amendments to the rules and regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Office of the Attorney General.

Certified by:

PAMELA BROWN
Attorney General

Date: 8/19/05

Emergency Amendments to the Rules and Regulations
Governing the Administration of the Medical Referral Program

Citation of Statutory Authority: 1 CMC Section 2605 authorizes the Department of Public Health to adopt rules and regulations regarding those matters over which it has jurisdiction. 1 CMC Section 2603(f) grants the Department of Public Health the power and duty to administer all government owned health care facilities. This includes the authority to operate the Medical Referral Program.

Short Statement of Goals & Objectives: To provide repayable financial assistance in the form of an accommodations allowance to an immediate relative of a patient with a catastrophic illness that is receiving medical treatment, if the child is under twenty-one (21) years of age, was born in the CNMI, and if it is determined by the Medical Referral Committee to be in the best interests of the patient.

Brief Summary of the Proposed Rule: The amendments to the Rules and Regulations Governing the Administration of the Medical Referral Program will clarify that an immediate relative of a patient with a catastrophic illness is eligible for repayable financial assistance to cover the cost of accommodations during the time that the patient is receiving care, irrespective of residency, if the patient is under the age of twenty-one (21) years old, was born in the CNMI, and it is determined that the provision of such assistance is in the best interests of the patient. The Medical Referral Committee will determine the eligibility for this assistance. Repayable financial assistance will not be available retroactively, but rather, will be prospective only. The financial assistance provided must be repaid in accordance with the terms

and conditions of the repayment obligation agreed to by the Department of Public Health and the recipient. The Department of Public Health shall have no discretion to waive, modify, alter or extend the terms and conditions of the repayment obligation. No other eligibility standards are affected by this change in the regulations.

Contact Person(s): Ms. Gloria Cabrerra, Administrator of Medical Referral, Department of Public Health

Citation of Related and/or affected Statutes, Regulations and Orders: Rules and Regulations Governing the Administration of the Medical Referral Program, Commonwealth Register Volumes and Numbers: 18-04; 18-07; 20-02; 20-06; 22-05; 22-07; 23-09; 24-02; 26-01; 26-02.

AMENDMENT TO MEDICAL REFERRAL RULES

The regulations previously stated:

4.2(a) The patient must be a United States citizen residing in the CNMI, or other individual who has established legal residence in the CNMI.

4.2(b) It shall be the responsibility of the patient, or patient representative, to demonstrate residence in the CNMI to the satisfaction of the Medical Referral Office staff. In determining the residence of a patient, Medical Referral Office staff shall consider all of the following:

i) the number of days spent in the CNMI each year;
ii) employment within the CNMI;
iii) whether the patient maintains an abode in the CNMI;
iv) enrollment in a CNMI school;
v) possession of a valid CNMI drivers license;
vi) current postal address within the CNMI;
vii) whether a CNMI personal income tax return was filed with the Department of Finance for prior years;
viii) enrollment in other CNMI welfare programs such as the Medicaid program, Food Stamps program, or Low Income Housing Energy Assistance Program; and,
ix) any other evidence considered by the Medical Referral Office staff as indicative of residency within the CNMI.

4.3. The following categories of persons are ineligible for participation in the Medical Referral Program:

a. Former residents of the CNMI who are no longer residing in the CNMI;
b. Persons who have entered the CNMI under tourist visas;
c. Persons who establish residency in the CNMI for the sole purpose of obtaining a medical referral;
d. Residents of the CNMI and their dependents who are traveling abroad and are not on official CNMI Government business;
e. Residents of the CNMI traveling abroad on official CNMI Government business who independently make arrangements for medical care or hospitalization;
f. Residents of the CNMI and/or their dependents who exercise their right to obtain medical care outside the CNMI Government health care system and obtain medical care which has not previously authorized by the Medical Referral Committee; and,
g. Persons who have entered the CNMI or are residing in the CNMI in violation of the CNMI Immigration laws.

The amended regulations now read:

4.2(a). The patient must be a United States citizen residing in the CNMI, or other individual who has established legal residence in the CNMI, provided however, that the Department of Public Health shall have the authority to extend repayable financial assistance in the form of an accommodations allowance to an immediate relative of a patient with a catastrophic illness, irrespective of residency, if the patient was born in the CNMI, is under the age of twenty-one (21) years old, and if it is determined that such assistance is in the best interests of the patient.

4.2 (b) It shall be the responsibility of the patient, or patient representative, to demonstrate residence in the CNMI, where necessary, to the satisfaction of the Medical Referral Office staff. In determining the residence of a patient, Medical Referral Office staff shall consider all of the following:

x) the number of days spent in the CNMI each year;
xi) employment within the CNMI;
xii) whether the patient maintains an abode in the CNMI;
xiii) enrollment in a CNMI school;
xiv) possession of a valid CNMI drivers license;
xv) current postal address within the CNMI;
xvi) whether a CNMI personal income tax return was filed with the Department of Finance for prior years;

xvii) enrollment in other CNMI welfare programs such as the Medicaid program, Food Stamps program, or Low Income Housing Energy Assistance Program; and,

xviii) any other evidence considered by the Medical Referral Office staff as indicative of residency within the CNMI.

4.4. The following categories of persons are ineligible for participation in the Medical Referral Program:

a. Former residents of the CNMI who are no longer residing in the CNMI, provided however, that the Department of Public Health shall have the authority to extend repayable financial assistance in the form of an accommodations allowance to an immediate relative of a patient with a catastrophic illness, irrespective of residency, if the patient was born in the CNMI, is under the age of twenty-one (21) years old, and if it is determined that such assistance is in the best interests of the patient;
b. Persons who have entered the CNMI under tourist visas;
a. Persons who establish residency in the CNMI for the sole purpose of obtaining a medical referral;
b. Residents of the CNMI and their dependents who are traveling abroad and are not on official CNMI Government business;
c. Residents of the CNMI traveling abroad on official CNMI Government business who independently make arrangements for medical care or hospitalization;
d. Residents of the CNMI and/or their dependents who exercise their right to obtain medical care outside the CNMI Government health care system and obtain medical care which has not previously authorized by the Medical Referral Committee; and,
e. Persons who have entered the CNMI or are residing in the CNMI in violation of the CNMI Immigration laws.

New Section:

5.6: Repayable Financial Assistance in the Form of an Accommodations Allowance for an Immediate Relative of a Patient with Catastrophic Illness.

An immediate relative of a patient with catastrophic illness may be eligible to receive repayable financial assistance in the form of an accommodations allowance while the patient is undergoing medical treatment, irrespective of residency and notwithstanding Sections 9.4, 9.8 and 11.2(a) of these Rules and Regulations, provided that:

a. The Medical Referral Committee determines that an immediate relative is eligible to receive repayable financial assistance in accordance with this Section;

c. The Medical Referral Committee determines that it is in the best interests of the patient;
d. The patient is under the age of twenty-one (21) years old;
e. The patient was born in the CNMI;
f. The immediate relative is staying with the patient during the time that the patient is undergoing medical treatment, except during such times as the patient is admitted to a hospital for in-patient treatment;
g. The financial assistance provided is no more than the actual cost of reasonable accommodations;
h. The immediate relative does not have other sources of financial assistance that are adequate to pay for the accommodation expenses of the patient and/or immediate relative;
i. The financial assistance provided must be repaid in accordance with the terms and conditions of the repayment obligation agreed to by the Department of Public Health and the recipient;
j. The recipient of the repayable financial assistance shall file all requested documentation related to actual accommodations expenses to the Medical Referral Office; and,
k. The Department of Public Health shall have no discretion to waive, modify, alter or extend the terms and conditions of the repayment obligation.

PUBLIC NOTICE

PROPOSED REGULATION REGARDING THE COMMONWEALTH'S DEPARTMENT OF PUBLIC SAFETY'S (DPS) FEE SCHEDULE FOR NON ESSENTIAL SERVICES RENDERED BY DPS.

The Commissioner of the Department of Public Safety (DPS) notifies the general public of his intention to adopt new regulations regarding adoption of a fee schedule for the performance of non essential services by DPS. The regulations are attached and are promulgated pursuant to the DPS Commissioner's authority as set forth in P.L. 14-77 Section 4.

All interested persons may examine the proposed regulations and submit written comments, positions, or statements for or against the regulations to DPS Commissioner Santiago Tudela, at the Jose Sablan Building, Caller Box 10007, Saipan, MP 96950; or by facsimile transmission to (670) 664-9027,within thirty(30) calendar days following publication of this notice in the Commonwealth Register. Comments, positions, or statements should be directed to the attention of DPS Deputy Commissioner Juan Salas.

Dated this 26th day of July 2005 on Saipan, Commonwealth of the Northern Mariana Islands.

DPS COMMISSIONER

By: ______________
Santiago Tudela

Pursuant to P.L. 14-77, the proposed regulation regarding DPS's fee schedule for non essential services rendered by DPS, a copy of which is attached hereto, have been reviewed and approved as to form and legal sufficiency by the Attorney General's Office.

By: ______________ 8/4/05
Clyde Lemons, Jr Date
Deputy Attorney General

Filed by: ______________ 8/4/05
Bernadita Dela Cruz Date

Rec'd by: ______________ 8/4/05
Thomas Tetuteb Date
Special Assistant for Adminstration

PUBLIC NOTICE

PROPOSED EMERGENCY REGULATION REGARDING THE COMMONWEALTH'S DEPARTMENT OF PUBLIC SAFETY'S (DPS) FEE SCHEDULE FOR NONESSENTIAL SERVICES RENDERED BY DPS

These regulations are promulgated in accordance with the Administrative Procedures Act, 1 CMC § 9101, et seq. The Commissioner of DPS is promulgating these regulations regarding DPS's fee schedule for non essential services rendered by DPS.

Citation of Authority:	The DPS Commissioner is authorized to promulgate regulations pertaining to fees for nonessential services pursuant to P.L. 14-77.
Short Statement of Goals and Objectives:	The regulations further define the requirements of P.L. 14-77 and sets the fees to be charged by DPS for nonessential services.
Brief Summary of the Proposed Regulations:	These regulations set forth what are nonessential services and the fees to be charged for the services as set forth therein. The regulations also permit the DPS commissioner to contract out nonessential services to a private entity. The fees set forth in the regulations shall not apply to any such private entity
Citation of Related and/or Affected Statutes, Rules, and Regulations:	None.
For Further Information Contact:	Kevin A. Lynch, Assistant Attorney General, Office of the Attorney General, Civil Division, 2nd Floor Hon. Juan A. Sablan Memorial Building, Caller Box 10007, Capitol Hill, Saipan, MP, 96950, tel: 670-664-2341 or fax: 670-664-2349.

Dated this 26th day of ~~January~~ July 2005.

Submitted by:

Santiago Tudela
DPS Commissioner

NOTISIAN PUPBLIKU

MAN MA PROPONE NA REGULASION NI TINETEKA I DIPÅTTAMENTON I PUBLIC SAFETY POT ÅPAS I SETBISION NON ESSENTIAL NI ESTA MA PROBENIYI GINEN I DPS

I Komisinan I Dipåttamenton I Public Safety (DPS) ha notififika I henerât pupbliku pot I intension na para u adopta nuebu na regulasion siha ni tineteka I ma adopta na åpas siha ni man ma potfotma na setbision non essential ni esta ma probeniyi ginen I DPS. Este na regulasion siha ni man che'che'ton man ma establesi sigun I aturidât I Komisinan I DPS ni ma na guaha ni Lai Pupbliku 14-77 Seksiona 4.

Todu i man enteresao na petsona siña ma ina i man mapropone na regulasion siha ya hu fan nahalom tinige' opinion, pusision, pat deklarasion para pat i kumokontra i mapropone I regulasion siha guatto i Komisinan i Dipåttamenton I Public Safety as Santiago Tudela, gi Jose Sablan Building, Caller Box 10007, Saipan, MP 96950, osino fax guatto gi (670) 664-9027 gi halom trenta (30) diha siha gi kalendårio tinatitiye' i fechan i pupblikasion este na notisia gi Rehistran i Commonwealth. I tinige' opinion, pusision, pat deklarasion I regulasion siha u ma na fan ma entrega I Delegådon I Komisina as Juan Salas.

Ma fecha gi este mina ____________ na ha'âne gi Julio, 2005 giya Saipan, I Sankattan Siha Na Islas Marianas.

KOMISINAN I DPS

As: ____________________
Santiago Tudela

Sigun I Lai Pupbliku 14-77, I ma propone na regulasion siha ni tineteka I åpas setbision non essential ni esta ma probeniyi ni DPS, I kopia ni che'che'ton, esta man ma ina yan ma aprueba pot para u fotma yan ligât sufisiente ginen I Ofisinan I Abugådo Henerât.

Ginen as: ____________________
Clyde Lemons, Jr.
Delegådon I Abugao Henerât

____
Fecha

Pine'lo' as: ____________________
Bernadita B. Dela Cruz

8/19/05
Fecha

Ma risibe' as: ______________________
Thomas Tebuteb
Espesiåt Na Aydånte Para I Atministrasion

8/19/05
Fecha

NOTISIAN PUPBLIKU

MAN MA PROPONE NA REGULASION NI TINETEKA I DIPÅTTAMENTON I PUBLIC SAFETY POT ÅPAS I SETBISION NON ESSENTIAL NI ESTA MA PROBENIYI GINEN I DPS

Man ma establesi este na regulasion siha sigun I Akton Areklamenton I Atministrasion, lai 1 CMC Seksiona 9101, et. seq. I Komisinan I DPS a establelesi este na regulaion siha ni tineteka I åpas I setbision non essential ni man ma probeniyi ni DPS.

Notan I Lai:	I Komisinan I DPS ma åturisa para hu establesi I regulasion siha ni tineteka I åpas I setbision non essential sigun I Lai Pupbliku 14-77.
Kada'da' Na Mensåhe Pot I Finiho yan Diniseha Siha:	I regulasion siha mås ha defina I nisisidåt siha gi Lai Pupbliku 14-77 ya ha na guaha åpas siha ginen I DPS para I setbision non essential siha.
Kada'da' Na Mensåhe Pot I Man Ma Propone Na Regulasion Siha:	Este na regulasion siha ha deklåra håfa man non essential na setbisio siha yan håfa na åpas para u ma åpasi an ma probeniyi ni setbisio. Este na regulasion siha ha petmiti I Komisinan I DPS na u na guaha kontråta para I setbision non essential gi ahensian praibet. Este siha na åpas ni ma na guaha ni regulasion siha ti debi na u aplikao gi maseha håfa na ahensian praibet.
Nota Pot i Man Tineteka osino Inafekta Na Regulasion Siha:	Tåya.
Petsona Para Ma Tonpadiset:	Si Kevin A. Lynch, Ayudånten I Abugådo Heneråt, Ofisinan I Abugådo Heneråt, gi Civil Defense, gi Segundo bibienda gi Memorial Building Honoråble Juan A. Sablan, gi Caller Box 10007, gi Capitol Hill, giya Saipan, MP 96950, numirun tilifon 670-664-2341 osino fax gi 670-664-2349.

Ma fecha gi este mina _____________ na ha'åne gi Julio, 2005.

Nina hålom as:

Santiago Tudela
Komisinan I DPS

ARONGORONGOL TOULAP

POMWOL ALLEGH BWELLE REEL ÓBWÓS MELLÓL COMMONWEALTH PUBLIC SAFETY (DPS) NGÁLI ALILLIS KKA ESE WELEPAKK IKKA E TOOWOW MEREEL DPS.

Samwoolul Depattamentool Public Safety (DPS) ekke arongaar aramas toulap reel mángemángil bwe ebwe fillóóy allégh kkaal sángi filló ye ótol óbwós ngáli mwóghútúl non essential services ye e tooto mereel DPS. Allégh kka e appasch nge aa akkatééló bwelle reel bwángil Samwool (Commissioner) yeel iye aa aléghéléghéló mellól Alléghúl Toulap ye 14-77 Tálil faawu (4).

Schóókka re tipeli nge emmwel bwe rebwe amweri pomwol allégh kkaal me ischilong mángemáng, kkapasal, me ngáre aweewe reel allégh kkaal ngáli Samwoolul DPS Santiago Tudela, me Jose Sablan Building, Caller Box 10007, Seipél, MP 96950; me ngáre facsimile reel (670) 664-9027, llól eliigh (30) ráálil mwiril schagh yaal arongowow ammataf yeel mellól Commonwealth Register. Aghiyegh, kkapasal, me ngare aweewe nge ebwe schééschéél mwete ngáli DPS Deputy Commissioner Juan Salas.

Ráálil ye ____________ llól Wuun 2005 wóól Seipél, Commonwealth Téél falúwasch Marianas.

DPS COMMISSIONER

Sángi: ____________________
Santiago Tudela

Sángi allégh ye P.L 14-17, pomwol allégh yeel bwelle óbwós mellól DPS's ngáli non essential services iye e tooto mereel DPS, tilighial ye e appasch, nge raa takkal amweri fischiy me allégheló mereel Bwulasiyool Sów Bwungúl Allégh Lapalap.

Sángi: ____________________ ____________
Clyde Lemmons, Jr Rál
Deputy Attorney General
Sów Bwungúl Allégh Lapalap

Aisis sángi: ____________________ 8/19/05
Bernadita Dela Cruz Rál

Mwir sangi: ____________________ 8/19/05
Thomas Tebuteb Rál
Sów Alillisil Sów Lemelem

ARONGORONGOL TOULAP

POMWOL ALLEGH KKA RE GHITIPWOTCHUW BWELLE ÓBWÓS MELLÓL COMMONWEALTH DEPARTMENT OF PUBLIC SAFETY NGÁLI ALILLIS KKA ESE WELEPAKK IYE TOOWOW MEREEL DPS

Allégh kkaal nge e akkatééwow bwelle reel Administrative Procedures Act, 1 CMC tálil 9101, et seq. Samwoolul DPS nge ekke akkaté allégh kkaal bwelle reel salapial DPS ngáli alillis kka ese welepakk ikka e toowow mereel DPS.

Akkatéél bwángil: Samwoolul DPS nge eyoor bwángil bwe ebwe akkaté allégh kkaal iye e ghil ngáli óbwóssuul non essential services sángi P.L. 14-17.

Aweweel pomwol lliwel: Allégh yeel nge e sóbwósóbwóló yaal ebwe yááyá ngáli P.L. 14-17 me a allégheló schagh salapi ye ebwe óbwós mereel DPS ngali nonessential services.

Aweweel pomwol allégh: Allégh kkaal nge aa fféérló bwe nonessential services me fees igha ebwe alillis ighila. Allégh kkaal nge ebwal alisi DPS commissioner igha ebwe contract nonessential services ngáli private entity. Salaapial allégh kkaal nge e fil ngáli private entity.

Aweweel akkááw bwángil allégh: Esóór.

Reel ammataf faingi: Kevin A. Lynch, Sów Alillisil Sów Bwungúl Allégh Lapalap, Bwulasiyool Sów Bwung, Civil Division, 2nd floor Hon. Juan A. Sablan Memorial Building, Caller Box 10007, Capitol Hill, Seipél, MP, 96950, tel: 670-664-2341 me ngáre: 670-664-2349.

Ráálil ye _________ llól Wuun 2005.

Isaliyallong:

Santiago Tedula
DPS Commissioner

PUBLIC NOTICE

NOTICE OF EMERGENCY AND ADOPTION OF THE COMMONWEALTH'S DEPARTMENT OF PUBLIC SAFETY'S REGULATIONS

EMERGENCY: The Commonwealth Department of Public Safety ("DPS") finds that under 1 CMC § 9104(b) the public interest and welfare requires the adoption of emergency regulations and further finds that the public interest and welfare mandates adoption of these emergency regulations upon fewer than thirty (30) days notice, and that these regulations shall become effective immediately upon filing with the Registrar of Corporations, subject to the approval of the Attorney General and the concurrence of the Governor, and shall remain in effect for 120 days.

REASON FOR EMERGENCY: On July 8, 2005, Governor Juan N. Babauta signed into law House Bill No. 14-292, which became Public Law 14-77 and gives the Department of Public Safety the authority to promulgate rules and regulations to enhance safety in the CNMI. P.L. 14-77, in essence, recognizes the financial constraints of the CNMI budget and permits DPS to charge for non-essential services that are currently performed free of charge. The legislature has, by the passage of P.L.14-77, recognized the need for DPS to collect for certain non-essential services so that DPS can perform its primary obligations of protecting the CNMI's residents and their property.

It is necessary to enact these regulations immediately as a result of the recognition of DPS's core responsibilities by P.L. 14-77.

The Commissioner of Public Safety finds that the following services are not an essential part of its law enforcement or core responsibilities as set forth in P.L. 14-77, Section 2:

i.) Shoreline security protection;
ii.) Towing of privately owned boats;
iii.) Search and rescue operations performed after the first seventy-two (72) hours.
iv.) Each response to a private security alarm, whether said alarm call is active or not;
v.) Escorts;
vi.) Service of process in civil cases;
vii.) Special events;
viii.) Marine events;
ix.) Non-emergency locked vehicles.

The Fees for such services shall be as follows:

i.) $35.00 per hour per officer for shoreline security, there will be an additional charge of $1,000.00 per day for the use of a DPS patrol boat required for shoreline security;
ii.) $100.00 for the towing of a privately-owned or operated boat or other floating vessel;

iii.) $100.00 per day for search and rescue operations after the first seventy-two (72) hours of each such operation;
iv.) $100.00 per response to a private security alarm call, active or not;
v.) $100.00 per escort;
vi.) $200.00 per service of civil process.
vii.) $10.00 per hour for each officer assigned to a special event (examples include, but are not limited to, providing security and directing traffic at special events such as concerts, parades, or any other privately conducted activity)
viii.) $100.00 for each marine permit event;
ix.) $35.00 for opening a locked vehicle

Fee waiver or reduction: The Commissioner of Public Safety or the Deputy Commissioner may waive or reduce any part of the foregoing fees if such fees cause an undue hardship or is in the best interest of the CNMI. The Commissioner or Deputy Commissioner's decision as to whether to grant or deny a fee waiver or reduction is final and non-appealable.

Memoranda of Understanding and Contracts: Consistent with P.L. 14-77 the Commissioner of Public Safety may enter into a memorandum of understanding or contract with any private entity to carry out any of the non-essential services set forth in these rules and regulations. Said private entity(ies) may set fees for the services herein as said private entity deems appropriate, with the approval, in writing, by the Commissioner of Public Safety.

AUTHORITY: The authority for the adoption and promulgation of this Regulation is by virtue of the authority vested in the Commissioner of Public Safety pursuant to Public Law 14-77 and the Commonwealth Administrative Procedures Act, 1CMC § 9101, et seq.

Issued by: ______________________ 8/4/05
SANTIAGO F. TUDELA Date
Commissioner of Public Safety

Concurred by: ______________________ 8/10/05
JUAN N. BABAUTA Date
Governor

Received by: ______________________ 8/4/05
THOMAS A. TEBUTEB Date
Special Assistant for Administration

Filed by: BERNADITA B. DELA CRUZ
Commonwealth Registrar

8/10/05
Date

Certification by the Office of the Attorney General:

Pursuant to 1 CMC § 2153, as amended by P.L. 10-50, the emergency regulations attached hereto have been reviewed and approved by the Office of the Attorney General.

Certified by: PAMELA BROWN
Attorney General

8/10/05
Date

PUBLIC NOTICE
PROPOSED RULES AND REGULATIONS
OF THE DEPARTMENT OF FINANCE
GOVERNMENT DEPOSIT SAFETY ACT

The Secretary of the Department of Finance for the Commonwealth of the Northern Mariana Islands hereby notifies the general public of the intention to adopt regulations implementing the Government Deposit Safety Act. The proposed regulations are promulgated pursuant to the authority set forth in 1 CMC Sections 7721, et seq. Specifically, these amendments provide that government deposits may be received and held by banks authorized to conduct business by the Commonwealth which meet satisfactory examinations. The regulations also define what constitutes "public funds" subject to the provisions of the Government Deposit Safety Act.

All interested persons may examine the proposed amended regulations and submit written comments to the Secretary of Finance, Caller Box 10007, Capitol Hill, Saipan MP 96950 or by facsimile at 664-1115 within 30 calendar days following the publication of this notice in the Commonwealth Register.

Dated this 19th day of Aug., 2005, at Saipan, Northern Mariana Islands.

By: ______________________
Fermin Atalig, Secretary
Department of Finance

Pursuant to 1 CMC Section 2153, as amended by P.L. 10-50, the proposed regulations for the Secretary of Finance, a copy of which is attached hereto, have been received and approved as to form and legal sufficiency by the Attorney General's Office.

By: ______________________ 8/19/05
Pamela Brown — Date
Attorney General

Filed by: ______________________ 8/19/05
Bernadita Dela Cruz — Date
Commonwealth Registrar

Received by: ______________________ 8/19/05
Thomas Tebuteb — Date
Special Assistant for
Administration

NOTISAN PUPBLIKU

MAN MA PROPONE NA AREKLAMENTO YAN REGULASION SIHA GI DIPÅTTAMENTON I FINANSIÅT POT AKTON I SÅFU NA DIPOSITU GI GOBIETNAMENTO

I Sekritårion I Dipåttamenton i Finansiåt gi Commonwealth I Sankattan Siha Na Islas Marianas ha notififika i pupbliku heneråt pot i intension para u adopta i regulasion siha ma na guaha i Akton i Såfu na Dipositu gi Gobietnamento. I ma propone na regulasion siha man ma establesi sigun i aturidåt ni ma mensiona gi 1 CMC Seksiona 7712, et. Seq. Espesifikåmente, este na amendasion siha a probeniyi na i dinipositan i gobietnamento siña man ma risibe ya u fan ma susteni nu ayo siha na bångku ni man inaturisa nu i Commonwealth para u ma kondukta bisnis ya ma sodda i satisfichosu na eksaminasion. Este na regulasion siha lokkue ha na klåru håfa taimano na gumuaha "Fondon Pupbliku" sigun i probesion probesion siha gi Akton i Såfu na Dipositu gi Gobietnamento.

Todu i man enteresao na petsona siha siña ma ina i man ma propone ni man ma amenda na regulasion siha ya u fan ma entrega i tinige' opinion siha guatto I Sekritårion i Finansiåt, gi Caller Box 10007, gi Capitol Hill, giya Saipan MP 96950 pat u ma fax gi 664-1115 gi halom trenta (30) dias despues di ma pupblika este na notisia gi Rehistran i Commonwealth.

Ma fecha este mina 19th na ha'åne gi Agosto, gi 2005, giya Saipan, I Sankattan Siha Na Islas Marianas.

Ginen as: [signature]
Fermin M. Atalig, Sekritårio
Dipåttamenton i Finansiåt

Sigun i lai 1 CMC Seksiona 2153, ni inamenda nu i Lai Pupbliku 10-50, i man ma propone na regulasion siha para i Sekritårion i Finansiåt, i kopia siha ni man che'che'ton, esta man ma resibi yan ma aprueba pot para u fotma yan sufsiente ligåt ni Ofisinan i Abugao Heneråt

Ginen as: ______________________
Pamela Brown
Abugao Heneråt

____
Fecha

Pine'lo as: ______________________ 8/19/05
Bernadita B. Dela Cruz
Rehistradoran i Commonwealth

Fecha

Ma Risibe' as: ______________________ 8/19/05
Thomas Tebuteb
Espesiåt Na Ayudånte
Para i Atministrasion

Fecha

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF FINANCE

Proposed Regulations Implementing the Government Deposit Safety Act

Citation of Statutory Authority: The proposed amended rules and regulations for the Secretary of the Department of Finance are promulgated pursuant to 1 CMC Sec. 7725.

Statement of Goals and Objectives: The proposed amended rules and regulations are to provide standards for safeguarding the financial assets and deposits of the Commonwealth and various public entities.

Brief Summary of the Rules: The amended rules and regulations require minimum standards to be met by banks wanting to receive and hold government deposits. The regulations define what constitutes "public funds" subject to the Government Deposit Safety Act.

For Further Information: Secretary, Department of Finance, Caller Box 10007, Capitol Hill, Saipan MP 96950, telephone: 664-1100 or by facsimile at 664-1115.

Citation of Related and/or Affected Statutes, Regulations and Orders:
1 CMC Sections 7721, et seq.

Submitted By: [signature]
Fermin Atalig, Secretary
Department of Finance

8/18/05
Date

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF FINANCE

RULES AND REGULATIONS OF THE DEPARTMENT OF FINANCE IMPLEMENTING THE GOVERNMENT DEPOSIT SAFETY ACT

Part I. General Provisions

Section 101. Authority. These regulations are promulgated pursuant to Title 1, Sections 2557 and 7721, et seq., and 7725 of the Commonwealth Code.

Section 102. Purpose. These regulations are intended to provide safeguards for all Commonwealth Government bank deposits, and to establish regulations for the deposit of government funds. These regulations set forth the conditions for safeguarding the deposit of government resources with banks and establish provisions for bank secured collateral on certain deposits of public funds.

Section 103. General.

(a) These regulations shall govern all deposits and public funds which bear the fiscal as well as accounting entity of the Commonwealth of the Northern Mariana Islands. The entity of the Commonwealth of the Northern Mariana Islands includes the Executive Branch, the Legislative Branch, the Judicial Branch, and all Commonwealth Government Corporations and semi-autonomous or autonomous public agencies.

(b) For purposes of this regulation, "public funds" shall include any funds, revenues, deposits, or monetary assets of any Commonwealth government agency, executive department, legislative agency, judicial office or agency, public autonomous or semi-autonomous entity, public corporation, or any trust held for the benefit of the public or indigenous residents.

Part II. Definitions

Section 201. Definitions. The following terms as used hereafter shall mean as defined hereto unless the context requires otherwise:

(a) "Bank" means as defined on section 102(b) P. L. 3-104.

(b) "Collateral" means United States Treasury Bills, United States Treasury Notes, or any money or security constituting direct obligations of the United States Treasury and bearing the full faith and credit of the United States of America owned by the local bank or its Headquarters outside of the Commonwealth. The Secretary of Finance may also allow securities or other obligations

issued by certain United States public or semi-autonomous agencies, such as the Federal National Mortgage Association, Federal Home Loan Banks, and similar agencies, to serve as collateral upon written request of the bank holding deposits subject to these regulations. Such written request shall set forth the type of security or obligation to be used as collateral and shall identify the United States public or semi-autonomous agency issuing such security or obligation. If the Secretary of Finance finds that such security or obligation will adequately protect the safety of the Commonwealth deposits, the Secretary may authorize the bank to use such security or obligations to serve as collateral; however, at any time that the Secretary of Finance determines that the collateral consisting of non-U.S. Treasury collateral make be at undue risk, the Secretary may notify the bank that U.S. Treasury collateral shall be substituted within 30 days of the date of such notice.

(c) "Collateral Presentation" means:

(1) Exhibiting or showing to the Secretary or his designee, or depositor the necessary collateral equal to the value of deposit within five (5) working days of the deposit being made and thereafter maintaining full collateralization of deposits consistent with Section 301 (e), or

(2) By presenting a letter certifying collateral sufficiency, if in the opinion of the Secretary, his designee, or depositor is satisfactory.

(d) "Commonwealth" means the Commonwealth of the Northern Mariana Islands, or the Commonwealth Government.

(e) "Deposit" means money placed in a bank by depositor in the following bank accounts:

(1) Demand Deposit Account, Checking,

(2) Time Certificate of Deposit (TCD),

(3) Passbook Savings Account, and

(4) All other means of bank accounts.

(f) "Depositor" means an entity or agency of the Commonwealth of the Northern Mariana Islands whose funds are covered under Section 103 of these regulations.

(g) “FDIC" means the Federal Deposit Insurance Corporation.

(h) "Market Value" for purposes of collateral means the value of the collateral as of any particular date as set forth in the Wall Street Journal or similar widely recognized and reputable financial news journal or newspaper.

(i) "Secretary" means the Secretary of the Department of Finance of the Commonwealth of the Northern Mariana Islands, or his designee.

Part III. Policies

Section 301. Deposits.

(a) The Secretary, his designee, or other depositor, shall not make deposits to any banking or financial institution that is incapable of obtaining and providing the necessary collateral to assure deposit security, insure and protect the deposit of public resources against loss.

(b) The bank shall present collateral in the form as defined under Part II Definitions Section 201(c) with a market value at least equivalent to the deposit value. A bank is allowed up to five working days to show proof of collateral covering the total value of any deposit in excess of the FDIC insured amount, as applicable.

(c) The collateral shall not include assets that are identified or used as securing or collateralizing other contracts, obligations, or commercial banking activities. The collateral securing the deposits must be a pledge in which the Commonwealth government entity or agency deposits take priority.

(d) Collateral is not necessary for amounts equal to or less than the insured amount for any federal deposit insurance provided to the bank.

(e) As the amount of deposits increases or decreases the amount of the collateral shall proportionately increase or decrease. If the bank is not able to adequately provide the necessary collateral in case of increases, it shall immediately notify the Secretary, his designee, or the depositor, of such collateral deficiency:

(1) A separate collateral presentation for the increases shall not be necessary. However, the Secretary, his designee, or any depositor, from time to time may require the bank to make such a collateral presentation and the bank shall make collateral presentation at such time.

(2) Acceptance of the additional deposits by the bank is an implied agreement and representation by the bank that the deposit satisfies all the deposit requirements under this part.

(3) In light of the fluctuation of Demand Deposits and Savings Accounts, a bank may comply with the requirement of sufficient collateral in an amount equal to the previous month's average daily balance on the current month for checking or savings account, whichever is applicable.

(f) A bank may be permitted to secure a written agreement with another bank to provide security for the deposits if the other underwriting bank:

(1) Pledges its collateral, consistent with Section 201 (b),

(2) Satisfies the necessary deposit requirements under this part, and

(3) Makes the necessary collateral presentation when requested by the Secretary, his designee, or depositor.

Section 302. Bank Preferences.

(a) All deposits shall be made to banks in the following order of preferences:

(1) The bank is located in the Commonwealth and is insured by the FDIC, and is in good standing with the Department of Commerce, through the Director of Banking, as the Commonwealth's banking supervisor, and is not otherwise in violation of applicable Commonwealth laws, rules or regulations,

(2) The bank is capable of complying with Sections 301(a) to (f) of this Part as applicable,

(3) The bank that offers the best (highest), interest rate (investment return) for funds deposited, over the term requested,

(4) The bank that offers the best (lowest) interest rate to the Commonwealth residents on loans for -

(i) Residential Housing

(ii) Small Business Loans

(iii) Agricultural and Fishing Development loans, and

(iv) That the type of loans identified in Section 302 a)(4) are currently, and actively being offered to Commonwealth residents.

Section 303. Access to Records. The Secretary or his designee, including the Secretary of Commerce in his role as Director of Banking, or his designee, shall have full access to review and obtain records of all deposits made by all depositors of public funds with any bank. The Public Auditor shall have authority to inspect, review, and obtain deposit records and to conduct its own independent audit of the bank only with regard to public funds and deposits.

Section 305. Responsibility of Depositor. It is the responsibility of the depositor to notify the bank in writing as to whether the funds being held or deposited with such institution are subject to these regulations. The depositor shall report to the Secretary all bank accounts certifying to the effect that the deposit(s) is/are adequately protected pursuant to these regulations and that such requirements under this Part are satisfied and in compliance therewith. The information required with the certification shall include the:

(a) The name of the bank,

(b) Account title,

(c) Account number,

(d) Amount of deposit, and

(e) Amount and type of collateral, if applicable.

Part IV. Administrative Penalties

Section 401. Penalties.
(a) In addition to any criminal penalties provided under 1 CMC Section 7728 and other applicable laws, the Secretary may suspend a bank from receiving deposits of public funds in the following manner:

(1) For the first offense, the bank may be suspended for not more than five (5) years,

(2) For the second offense, the bank may be suspended for not more than ten (10) years, and

(3) For the third offense, the bank may be suspended for an indefinite time.

(b) Persons or entities making deposits or opening accounts which are subject to these regulations shall be responsible for notifying the bank of the applicability of these regulations. The failure of any person or entity to so notify the bank of the applicability of these regulations and/or whose deposits or accounts fail to be secured pursuant to these regulations when otherwise required shall be reported to the Attorney General, the Public Auditor, or such other agency as may be relevant for investigation and civil or criminal prosecution.

Approved by the Secretary of Finance

Fermin Atalig, Secretary
Department of Finance

COMMONWEALTH DEVELOPMENT AUTHORITY

P.O. BOX 502149, SAIPAN MP 96950
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PUBLIC NOTICE

NOTICE AND CERTIFICATION OF ADOPTION OF THE AMENDED RULES AND REGULATIONS OF THE DEVELOPMENT CORPORATION DIVISION OF THE COMMONWEALTH DEVELOPMENT AUTHORITY

We, Tom Glenn A. Quitugua, Chairman of the Board of Directors and Maria Lourdes Seman Ada, Executive Director of the Commonwealth Development Authority, which is promulgating the Amended Rules and Regulations of the Development Corporation Division (DCD) of the Commonwealth Development Authority (CDA), published in the Commonwealth Register, Volume 27, Number 05, on June 20, 2005, at pages 024548 through and including page 024590, by signatures below, hereby certify that as published such Rules and Regulations are a true, complete and correct copy of the DCD Rules and Regulations previously proposed by the CDA Board of Directors, which, after the expiration of appropriate time for public comments have been adopted at its regular meeting on July 21, 2005, a quorum being present, with minor changes.

We hereby request and direct that this Public Notice be published in the CNMI Commonwealth Register. Copies of the Amended DCD Rules and Regulations are available at the office of the Commonwealth Development Authority, Chalan Pale Arnold Road, Saipan, MP 96950.

We declare under penalty of perjury that the aforementioned rules and regulations are true and correct and that this declaration was executed on the 12th day of August, 2005, Saipan, Commonwealth of the Northern Mariana Islands.

Tom Glenn A. Quitugua
CDA Board of Directors

Maria Lourdes S. Ada
CDA Executive Director

Bernardita B. Dela Cruz
Registrar

Date 8/17/05

Received by:

Thomas I. Tebuteb
Special Assistant for Administration

Date 8/19/05

Pursuant to 1 CMC § 2153, as amended by P.L. 10-50, the rules and regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Pamela Brown, Attorney General

Date 8/19/05

COMMONWEALTH DEVELOPMENT AUTHORITY

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NOTISIAN PUPBLIKU

NOTISIA YAN SETIFIKASION I MAN MA ADOPTA NA AMENDASION I AREKLAMENTO YAN REGULASION GI DIBISION I ADILANTON KOPORASION I ATURIDÅ ADILANTON I COMMONWEALTH

Hami as, Tom Glenn A.Quitugua, Kabiseyon i Kuetpon i Direktot siha yan si Maria Lourdes Seman Ada, i Direktoran i Aturidåt Adilanton i Commonwealth, en establelesi i man ma Amenda na Areklamento yan Regulasion siha gi Dibision i Adilanton i Koporasion i Aturidåt Adilanton i Commonwealth, en pupblika gi Rehistradoran i Commonwealth, Volume 27, Numiru 05, gi Junio 20, 2005, gi påhina 024548 ya ha enklusu påhina 024590, ginen i fitman måmi gi san papa, en setifika na i ma pupblika na Areklamento yan Regulasion siha man magåhet, kabåles, yan ma na dinanche na kopia anai ma propone gi halacha ni Direktot siha gi Kuetpon i Aturidåt Adilanton i Commonwealth, despues di empas i ha'ånen i propiu na tiempo para i opinion pupbliku siha ni ma adopta gi regulåt na huntan i kuetpo gi Julio 21, 2005, ya ma kuorum, gi entre i didide' na tinilaika.

Pot este na rason, en nonombra na ma pupblika este na Notisian Pupbliku gi Rehistradoran i Commonwealth. Kopian i man ma Amenda na Areklamento yan Regulasion siha ma propobeniniyi gi Ofisinan i Aturidåt Adilanton i Commonwealth, gi Chalan Pale Arnold, giya Saipan, MP 96950

En deklåra gi papa i penan chatmanhula na i ma mensiona na Areklamento yan Regulasion siha na man magåhet yan dinanche' ya ma laknos este na deklarasion gi 12th gi Agosto, 2005, giya Saipan, i Sankattan Siha na Islas Marianas.

Tom Glenn A. Quitugua
Kabiseyon i Kuetpon i Direktot siha
Aturidåt Adilanton i Commonwealth

Maria Lourdes S. Ada
Direktora
Aturidåt Adilanton i Commonwealth

Bernadita B. Dela Cruz
Rehistradora

8/17/05
Fecha

Ma Risibe as:

Thomas I. Tebuteb
Espisiat Na Ayudånte Para i Åtministrasion

Fecha 8/19/05

Sigun i Lai 1 CMC Seksiona 2153, i Areklamento yan Regulasion siha ni man che'che'ton man marisibe' yan ma'aprueba pot para hu fotma yan ligåt sufisiente ginen i Ofisinan i Abugådo Heneråt gi CNMI.

Pamela Brown, Abugao Heneråt

Fecha

COMMONWEALTH DEVELOPMENT AUTHORITY

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ARONGOL TOULAP
ARONG ME ALÚGHÚLÚGHÚL FILLONG NGÁLI DEVELOPMENT CORPORATION DIVISION REEL COMMONWEALTH DEVELOPMENT AUTHORITY

Yáámem, Tom Glenn A. Quitugua, Assamwoolul Mwiisch kkaal me Maria Lourdes Seman Ada, Samwoolul Commonwealth Development Authority, iye ekke atééw Allégh kka aa lliweló mellól Development Corporation Division (DCD) ngáli Commonwealth Development Authority (CDA), akkatééló mellól Commonwealth Register, Volume 27, Number 05, ótol Alimaté 20, 2005 llól peigh 024548 lóffósch me ebwal toolong peigh 024590, sángi yáámem mákk iye elo faal, ay kkee alúghúlúgh bwe Allégh kkaal nge e welewel, a takk me e ffat tilighial Allégh kaa DCD ikka raa fasúl pomwoli mereel Assomwoolul mwiichil CDA, me, igha schagh aa filló ótol aghiyeghiir toulap, raa fillóóy loll yaar yéélágh wóól Wuun 21, 2005 nge re tooto alongéér me eghús schagh ssiwel.

Yáámem nge ay tittingór me afalafal bwe arongorong yeel nge ebwe akkatééwow mellól Commonwealth Register. Tilighial DCD Alléghúl kaal nge eyoor me Bwulasiyool Commonwealth Development Authority, Chalan Pale Arnold Road, Seipél, MP 96950.

Ay kke appelúghúlúgh faal penalty of perjury bwe alongal allégh kkaal nge e welewel me igha appelúghúlúgh yeel e fféérló wóól 12th Eluwel, 2005 Seipél, Commonwealth Téél Falúwasch Marianas.

Tom Glenn A. Quitugua
CDA Assamwoolul Mwiisch

Maria Lourdes S. Ada
CDA Samwool

Bernadita B. Dela Cruz, Registrar

8/17/05
Rál

Mwir sángi:

Thomas I. Tebuteb
Sów Alillisil Sów Lemelem

8/19/05
Rál

Sángi allégh ye 1 CMC tálil 2153, iye aa ssiweló mereel Alléghúl Toulap 10-50, allégh kka e appasch nge raa takkal amweri fischiy aléghéléghéló mereel CNMI Bwulasiyool Sów Bwungúl Allégh Lapalap.

Pamela Brown, Sów Bwungól Allógh Lapalap

Rál

COMMONWEALTH DEVELOPMENT AUTHORITY
DEVELOPMENT CORPORATION DIVISION

RULES AND REGULATIONS

(adopted July 21, 2005)

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CHAPTER ONE

SCOPE, POWERS, AUTHORITY, AMENDMENTS AND EFFECTIVE DATE

1.1 **Scope**. These rules and regulations govern the administration of the Development Corporation Division ("DCD") of the Commonwealth Development Authority ("CDA"), subject to any limitations set forth in the CDA Act (*i.e.*, 4 CMC § 10101, *et seq.*). These rules and regulations apply to all the activities in which DCD is engaged and supersede and replace any and all previously issued or amended rules and regulations of DCD.

1.2 **Powers**. As a mandated division of CDA, DCD is hereby invested with those powers reasonably necessary and incidental to the fulfillment of its purposes, which purposes are as outlined in 4 CMC § 10102(b). The powers of DCD include, but are not limited to, those powers set forth in 4 CMC § 10203 and are subject only to any limitations set forth in the CDA Act.

1.3 **Authority**. These Rules and Regulations are prescribed by virtue of the authority given CDA under 4 CMC § 10203(a)(2) and (a)(30); and are duly published and adopted in accordance with those procedures set forth in the Administrative Procedure Act (1 CMC § 9101, *et seq.*).

1.4 **Amendments**. These Rules and Regulations may be amended from time to time upon recommendation of the Board of Directors and adoption by the CDA Board.

1.5 **Effective Date**. The effective date of these Rules and Regulations shall be as set forth in 1 CMC § 9105(b).

CHAPTER TWO

GENERAL DEFINITIONS

Unless the context otherwise requires, in these Rules and Regulations:

2.1 **Agriculture**. Agriculture means the science, art, and business of cultivating the soil producing crops and raising livestock.

2.2 **Aquiculture**. Aquiculture means freshwater farming or hydroponics, the cultivation of plants and the production of crops in water rather than in soil.

2.3 **Board of Directors**. Board of Directors means the board of directors of DCD.

2.4 **Chairman**. Chairman means the chairman of the Board of Directors.

2.5 **Commonwealth.** Commonwealth means the Commonwealth of the Northern Mariana Islands.

2.6 **EDLF.** EDLF means the Economic Development Loan Fund.

2.7 **Executive Director.** Executive Director means the Executive Director of CDA.

2.8 **Farmer.** Farmer means a farm operator, owner or worker who cultivates or produces a crop in water or soil as an Occupation.

2.9 **Fisherman.** Fisherman means one who fishes as an Occupation.

2.10 **Governor.** Governor means the Governor of the Commonwealth.

2.11 **Loan.** Loan means the delivery by DCD to, and the receipt by a Loan Applicant of, a sum of money upon agreement by that Loan Applicant to repay it to DCD with interest.

2.12 **Loan Applicant.** Loan Applicant means a person, partnership, association, or corporation seeking a loan or guaranty from CDA.

2.13 **Loan Guaranty.** Loan Guaranty means a promise by DCD to answer for repayment of a debt or performance of an obligation of an Applicant, if that Applicant is primarily liable to a financial institution other than CDA and fails to make payment or perform the obligation.

2.14 **Mariculture.** Mariculture means seawater farming or the cultivation of marine organisms and crops in their natural habitat.

2.15 **Occupation.** Occupation means the principal or regular employment or activity in which one engages.

2.16 **Public Auditor.** Public Auditor means the Public Auditor of the Commonwealth.

2.17 **Rancher.** Rancher means an owner or manager of a ranch who raises livestock as an Occupation.

CHAPTER THREE

BOARD OF DIRECTORS

3.1 **Composition of the Board.** The affairs of DCD shall be governed and controlled by the Board of Directors, which shall be composed of the seven (7) members of the CDA Board of Directors; members of the Board of Directors shall serve until their terms of office with the CDA Board expire.

3.2 **Quorum, Manner of Acting.** Five (5) members of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the Board of Directors. The act of the majority of the members present at a meeting at which a quorum is present shall be the act of the Board of Directors. A member who is unable to attend a particular meeting may authorize in writing another member in attendance to cast the absent member's vote upon any item of business properly noticed. This proxy representation may not be used for more than three consecutive meetings and may not be used to establish a quorum.

3.3 **Board Leadership.** At the first meeting of each year, the Board of Directors shall elect a Chairman and Vice Chairman from amongst their members as the first item of business at that meeting. A member elected shall serve a one (1) year term or until his or her term as a member of the Board of Directors ends, whichever is less. A member may be elected for successive terms. Any vacancies in leadership created by resignation, removal or death shall be filled by election at the next regular or special meeting called for that purpose.

3.4 **Chairman.** The Chairman shall preside over the meetings of the Board of Directors. He or she shall also have such powers and shall perform such duties as may from time to time be specified in resolutions or other directives of the Board of Directors. In the absence of such specifications, he or she shall have the necessary powers and authority and shall perform and discharge the duties normally associated with chairmen of similar public corporations.

3.5 **Vice Chairman.** The Vice Chairman shall assume the duties and responsibilities of the Chairman in his or her absence; and shall also have such powers and shall perform such duties as may from time to time be specified in resolutions or other directives of the Board of Directors.

3.6 **Resignation.** A member may resign at any time by delivering written notice of his or her resignation to the Chairman of the Board of Directors. Written notice must also be provided the Governor if he or she is also resigning from the CDA Board. The acceptance of such resignation shall not be necessary to make it effective and shall take effect at the time specified therein. Upon resignation, the member shall cease to sit on the Board of Directors and shall not be included in any quorum count.

3.7 **Removal.** A member may only be removed before the expiration of his or her term by the Governor and on grounds of gross neglect or dereliction of duty, breach of fiduciary duty, conviction of a felony or mental or physical incapacity. Upon removal, the member shall cease to sit on the Board of Directors and shall not be included in any quorum count.

3.8 **Quarterly Meetings.** The Board of Directors shall meet at least once each quarter at a time and place designated by the Chairman. An agenda for and notice of the meeting shall be delivered to each member at least fourteen (14) days prior to the meeting.

3.9 **Special Meetings.** The Chairman may convene other or special meetings of the Board of Directors on forty-eight (48) hours written notice to each member, which notice shall include

the proposed agenda and the time and place for the meeting.

3.10 **Open and Closed Meetings.** All meetings of the Board of Directors shall be open to the public during discussion of policies, procedures, and administrative and other non-confidential matters; and shall be closed to the public during discussion of personnel, financial, credit confidences, or any other privileged information related to or concerning Loan Applicants, projects and other matters of a confidential nature.

3.11 **Action Without Meeting.** For urgent or in emergency situations, any action required or permitted to be taken at a meeting may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed and approved by at least five (5) members. Such consent shall have the same force and effect as shall be as binding as if the same had been acted upon or consented to at a meeting of the Board of Directors duly convened and held.

3.12 **Minutes of Meeting.** The Board of Directors shall cause to be kept written minutes of the proceedings of each of its meetings. The Board of Directors shall designate a secretary to keep its minutes and records who may or may not be a member of the Board of Directors.

3.13 **Compensation.** The members of the Board of Directors shall be compensated pursuant to 1 CMC § 8247 and may be reimbursed in accordance with the Commonwealth law for any reasonable and necessary expenses incurred in the performance of their duties.

3.14 **Disclosure of Conflict.** Any member who is directly or indirectly interested in any arrangement, transaction or business matter entered into, proposed or under consideration by the Board of Directors shall, as soon as possible after the relevant facts have come to his or her attention, disclose the nature of the interest to the Board of Directors. Any disclosure shall be recorded in the minutes of the meeting and, except as otherwise provided by a resolution, the conflicted member shall not take part after the disclosure in any deliberation or decision relating thereto, but may be counted as present for the purpose of forming a quorum for any such deliberation or decision. A willful failure to disclose a conflict of interest shall be a breach of duty and cause for immediate removal of the member from the Board of Directors.

3.15 **Contracting Authority.** The Executive Director and the Chairman, or the Vice Chairman if the Chairman is absent, shall have the contracting authority for all matters pertaining to the operations of DCD, including, but not limited to, the execution of loan documents, guarantees and other necessary agreements, contracts and checks. In the absence of the Chairman and Vice Chairman, the Chairman or Vice Chairman of the CDA Board of Directors is authorized to act in his or her stead. At all times, the contracting officers shall comply with applicable procurement regulations.

CHAPTER FOUR

DUTIES OF THE BOARD

4.1 **Oversight Authority.** The Board of Directors shall oversee the administration of all Loans and other fund allocations to ensure that there is compliance with all Loan agreement provisions and fulfillment of the statutory purposes of DCD and those duties set forth in these Rules and Regulations.

4.2 **Loan Decisions and Approval.** Pursuant to 4 CMC § 10306(a)(4) and delegation by the CDA Board, the Executive Director may review, reject, approve and make all decisions concerning Loan or Loan Guaranty applications of up to $25,000 per Loan Applicant. A report of all Loans so handled shall be included by the Executive Director in his or her quarterly reports to the Board of Directors. *See* Section 16.3. All Loan or Loan Guaranty applications of more than $25,000 per Loan Applicant shall be reviewed by the Executive Director and then shall be submitted to the Board of Directors for all necessary approvals, disapproval or decisions relating thereto.

4.3 **Annual Reports.** The Board of Directors shall prepare a report of its activities at the end of each fiscal year and shall submit the same to the CDA Board of Directors for incorporation into the CDA Annual Report to be forwarded to the Governor and Legislature.

4.4 **Operating Budget.** The Board of Directors shall prepare an annual operating budget for DCD and shall submit such budget for approval by the CDA Board of Directors.

4.5 **Policies.** As it deems it necessary, the Board of Directors may by resolution make policies regarding all DCD matters including, but not limited to, matters discussed in these Rules and Regulations, Loan applications, documents, forms, fees and administration, the form and manner of accepting and making payments; and the manner in which specific documents and notices are served and received by DCD.

CHAPTER FIVE

OFFICERS

5.1 **CDA Officers.** The Executive Director and Comptroller of CDA shall also serve as the officers of DCD and shall exercise those duties and powers given to them under 4 CMC § 10306 for the benefit of DCD. The Executive Director shall be the officer primarily responsible to oversee, monitor and administer the DCD loans, subject to consultation with the Loan Manager and the DCD Board as directed by these regulations and in accordance with established policy and procedure.

5.2 **Delegation of Duties.** The Board of Directors may from time to time delegate to an officer

or its officers any of its power or authority given under these Rules and Regulations. Any officer to whom any powers or authority is so delegated may exercise the same in the same manner and with the same effect as if they had been conferred on him or her directly by these Rules and Regulations.

CHAPTER SIX

LOAN ELIGIBILITY AND AVAILABILITY

6.1 **Eligibility Policy**. It is the policy of DCD that it shall not compete with any private banks or other financial institutions in the funding of private economic projects. It is, therefore, recommended that borrowers first seek financial assistance from established banks and other financial institutions before submitting a Loan application to DCD.

6.2 **Persons**. Eligible Loan Applicants who are persons must be United States citizens or nationals and must have been domiciled in the Commonwealth for at least two (2) continuous years immediately preceding the submission of their Loan application.

6.3 **Partnerships and Associations**. Eligible Loan Applicants who are partnerships or associations must be wholly owned by United States citizens or nationals who have been domiciled in the Commonwealth for at least two (2) continuous years immediately preceding the submission of the Loan application.

6.4 **Corporations**. Eligible Loan Applicants who are corporations: must be organized under the laws of the Commonwealth and at least fifty-one percent (51%) of their capital stock issued, outstanding and entitled to vote must be owned and held by United States citizens or nationals who have been domiciled in the Commonwealth for at least two (2) continuous years immediately preceding the submission of the Loan application; and must distribute profits to its stockholders in direct proportion to the number of shares held by each stockholder.

6.5 **Farmer, Rancher, Fisherman**. Eligible Loan Applicants who are Farmers, Ranchers or Fishermen must be, by definition and Occupation, Farmers, Ranchers or Fishermen.

6.6 **Farm and Ranch Loans**. A Farm or Ranch Loan is a Loan that uses funds reserved for farmers, fishermen, agricultural and marine cooperatives in Covenant § 702(c), and that is made for the purpose of: purchasing farm and ranch equipment such as tractors, plows and other attachments for tractors, tillers, hand tools, related shop tools, repair parts, seeds, plants, fertilizers, farm chemicals, planters, livestock and poultry or specialized equipment and fixtures designed solely for the raising of crops, livestock, poultry or egg production, building shelters for farm machinery, livestock or poultry; or providing reasonable, one-time, start-up operating funds. The foregoing is not to be interpreted as an all comprehensive list and is subject to expansion by the Board of Directors. A Farm or Ranch Loan may or may not be made for the purpose of mariculture or aquiculture activities. Over the road vehicles

such as trucks and pick-ups may be included in a Farm or Ranch Loan; however, such vehicles must be used at least sixty percent (60%) of the time (in hours) for actual farming and ranching activities. Sedans and other enclosed motor vehicles, such as extra cab pick-ups, shall not be included.

6.7 **Fishing Loans**. A Fishing Loan is a Loan that uses funds reserved for farmers, fishermen, agricultural and marine cooperatives in Covenant § 702(c), and that is made for the purpose of: purchasing boats, boat trailers, ships, fishing gear, safety equipment, ship-to-shore radios, cooler boxes and other directly related fishing equipment, or providing reasonable, one-time, start-up operating funds. Fishing loans are limited to commercial fishing ventures, sport fishing does not qualify. Over the road vehicles such as trucks and pick ups may be included in a Fishing Loan; however, such vehicles must be used at least sixty percent (60%) of the time (in hours) for actual fishing activities, such as the launching or dry storage of fishing boats. Sedans and other enclosed motor vehicles, such as extra cab pick-ups, shall not be included.

6.8 **Commercial Loans**. All Loans that are not considered Farm, Ranch or Fishing Loans are considered Commercial Loans.

6.9 **All Loans Callable**. The repayment terms for all Loans shall not be more than thirty (30) years and shall be callable every five (5) years, but the repayment terms must be fully amortized over the total period given. Upon the 1st five years maturity and for term continuance on the remainder of the given period, the Loan Manager and the Executive Director must determine that there is sufficient cash flow for debt service requirement and that the Loan is not subject to any adverse financial condition before allowing said Loan to continue until again callable five (5) years hence.

6.10 **Percentage of Available Cash, Direct Loan**. DCD shall not make any direct Loan if, at the time for approval, such Loan would exceed twenty-five percent (25%) of the total uncommitted cash then available to Loan Applicants under the particular category of Loans for which the Loan Applicant applied.

6.11 **Percentage of Available Cash, Loan Guaranty**. DCD shall not guarantee any bank loan or participate in any Loan Guaranty if, at the time for approval, such Loan Guaranty would exceed twenty-five percent (25%) of total uncommitted cash then available to Loan Applicants under the particular category of Loans for which the Loan Applicant applied.

6.12 **Percentage of Available Cash, Exceptional Cases**. In exceptional cases meriting special consideration, the limits set forth in Sections 6.10 and 6.11 may be exceeded provided the Loan or Loan Guaranty is of high economic benefit to the Commonwealth (as determined by a statement on economic priorities issued by CDA) and the Loan is fully and sufficiently secured. In such exceptional cases, DCD may enter into a syndicated financial arrangement in an effort to limit the exposure of DCD to only twenty-five percent (25%) of its then uncommitted cash.

6.13 **Ancillary Services.** DCD may provide ancillary services to a borrower, in connection with a Loan or other financing activities by DCD, when it would not be practical for such services to be provided by another financing institution.

CHAPTER SEVEN

CREDITWORTHINESS AND RESTRICTIONS

7.1 **Determination of Creditworthiness.** In all cases, the Board of Directors shall be responsible for determining the creditworthiness of each Loan Applicant.

7.2 **Requirements and Criteria.** In making its determination, the Board of Directors must evaluate the Loan application based on the following general credit requirements and credit underwriting criteria:

(a) The Loan Applicant must be of good financial and moral character;

(b) Evidence pertaining to the credit worthiness of the Loan Applicant obtained under the Fair Credit Reporting Act (15 U.S.C. § 1681) or other applicable laws;

(c) The Loan Applicant must demonstrate an ability to operate a successful business;

(d) The Loan Applicant must be willing to provide DCD with evidence of a reasonable investment of equity in cash or in-kind of not less than twenty percent (20%) of the total project cost to ensure that the Loan Applicant has an appropriate stake in the venture;

(e) The Loan Applicant must show that the proposed loan is of sound business and economic potential to the respective community in which it will operate; and

(f) The Loan Applicant must show that the past earnings, if any, and future prospects and potential earnings of the business or project indicates the ability to repay the Loan and other fixed debt, if any, out of earnings.

7.3 **Restrictions.** No Loan Applicant shall be qualified or granted a Loan if:

(a) The Loan Applicant was a controlling shareholder or a manager of an association or a corporation that, at any time during the three (3) years immediately preceding the filing of the Loan application and during the period of control or management by the Loan Applicant, had been adjudicated bankrupt, filed for bankruptcy or been placed under receivership;

(b) The Loan Applicant is in default of any debt, loan or any financial obligation at the time of filing the Loan application or if the Loan Applicant has a record of defaulting on previous loans or other credit extensions without justification;

(c) Within three (3) years of the date of the Loan application, any property of the Loan Applicant was actually foreclosed upon, or taken and sold at foreclosure sale to satisfy any debt owed to a creditor by the Loan Applicant;

(d) The Loan proceeds are to be used for a hobby, personal entertainment or personal pleasure; or

(e) The Loan is not fully secured by sufficient securities or collateral.

7.4 **Additional Restrictions**. In addition to the above restrictions, the Board of Directors shall not make or approve a Loan or Loan Guaranty:

(a) If funds are otherwise available on reasonable terms from other sources, including but not limited to personal resources, commercial banks, savings and loan associations and credit unions. Evidence that such funds are not available shall be in the form of at least three declination letters from three other sources, each stating that the applicant was denied a loan for reasons other than: (i) an incomplete application, (ii) insufficient security, (iii) insufficient documentation, or (iv) bad credit.

(b) If Loan proceeds are to be used for illegal and/or immoral activities;

(c) For the purpose of refinancing a debt not connected with the Loan;

(d) For the purpose of providing short term financing, except as necessary in connection with medium or long-term assistance by DCD.

CHAPTER EIGHT

LOAN APPLICATION REQUIREMENTS AND REVIEW

8.1 **Application Review**. Loan applications shall be considered and reviewed only after they are complete. A Loan application shall not be considered complete until all necessary documents, including, but not limited to, security and collateral documents and government permits, have been obtained and received and all applicable fees have been paid

8.2 **Application Documents**. For all Loans and the continuance of all Loans, the Loan Manager and the Executive Director shall ensure that the following loan documents, as applicable, are obtained:

(a) A certification letter from the Loan Manager to the Executive Director that he/she has inspected the individual business establishment and has determined that the business is still in engaged in the same operation mode and that there is no adverse financial conditions preventing recommendation of the new loan, renewal or continuance.

(b) Interim and last three years Financial Statements (Income Statement & Balance Sheet) and last three years Audited Financial Statement with supporting schedules for loans over $250,000.00.

(c) Personal Financial Statements for current year of owner or major stockholders and Individual Tax Returns (filed) with all schedules for the last three years.

(d) Current year and last two years Business Gross Receipts Tax (BGRT) & last three years Corporate Income Tax Returns (Form 1120CM) with all schedules.

(e) Inventory Aging List, Accounts Receivables, Payables Aging Lists, Rent Rolls & Tenant Lists, & Rental/Lease Agreement.

(f) Hazard (fire/typhoon & earthquake) & liability insurance & life insurance policy.

(g) Most recent filed Business documents (*e.g.*, Business License(s), Articles of Incorporation or Organization, By-Laws, Certificate of Incorporation & Annual Report.

(h) Business Plan/Profile.

(i) Corporate Resolution to Borrow.

(j) Sketch Map of Business property.

(k) Recorded Warranty Deed, Deed of Gift or Certificate of Title & Land Management Approved Survey Property Map.

8.3 **Application Fee**. DCD may, when the Loan application is made, charge each Loan Applicant an application fee not to exceed $100.00. The application fee shall be credited to the closing costs if the Loan is made. If the Loan application is not approved, or the borrower cancels the Loan application prior to approval, the deposit fee will not be returned to the Loan Applicant.

8.4 **Incomplete Application**. A pending Loan application shall be deemed to have been removed from consideration if incomplete and if the Loan Applicant has been notified in writing of such defect and has not corrected the defect within thirty (30) days of such notification.

8.5 **Loan Approval**. No Loan Applicant shall be deemed to have been granted a Loan unless and until the Executive Director, or his or her designee, so notifies the Loan Applicant in writing and the Loan Applicant indicates his acceptance in writing. Notice by any other DCD employee or member of the Board of Directors, verbally or otherwise, shall be invalid and have no effect and may subject said person to disciplinary action.

8.6 **Rejection of Application**. The Executive Director and the Chairman are authorized to cancel a conditionally approved Loan if the conditions set out in the approval letter are not fulfilled within ninety (90) days after the receipt of such letter by the Loan Applicant.

8.7 **Loan Interest Rates**. DCD shall review and from time to time recommend to the CDA Board of Directors the rates of interest to be assessed its borrowers or any particular borrower. A recommended rate may not exceed the rate authorized by law; and in recommending interest rates DCD shall consider the costs of capitalization, its own administrative expenses in relation to its Loans, overall prevailing market rates, and other economic indicators. DCD may also recommend special interest rates for projects and other undertakings which serve particular socio-economic needs, but with due regard for the overall need of DCD to recover its costs.

8.8 **Loan Fees**. Loan Applicants shall pay all fees necessary or incidental to their Loans. Such fees may include, but are not limited to, recording fees, notary fees, returned check fees, appraisal fees, certified public accounting fees in the event such is required by the Board of Directors and any legal fees incurred by DCD for the drafting of documents necessary for the Loan. In the case of direct Loans and at the request of the Loan Applicant, loan fees may be included in the total Loan amount; in the case of a Loan Guaranty, the Loan Applicant shall be required to remit all Loan Fees to DCD prior to the execution of the Guaranty agreement.

8.9 **Loan Closing Service Charge**. In addition to any Loan Fees, DCD shall assess each Loan Applicant a processing service charge equal to one-half (½) of one percent (1%) of the total amount of the Loan plus all applicable legal fees but not less than $125.00. In the case of

direct Loans and at the request of the Loan Applicant, the service charge may be included in the total Loan amount; in the case of a Loan Guaranty, the Loan Applicant shall be required to remit the service charge to DCD prior to the execution of the Guaranty agreement.

8.10 **Posting and Revision of Fees.** All fees and charges may be reviewed and revised by the Board of Directors. The fees set forth in these Rules and Regulations shall continue in force and effect until reviewed and revised by the Board of Directors. Publication of any revised fees or new fees shall be by posting a schedule of revised fees in the offices of CDA. No amendment of these Rules and Regulations or further publication in the CNMI Register of any revised or new fees shall be required.

8.11 **Borrower Records.** The Board of Directors may, as deemed necessary, require its borrowers to keep records and accounts in accordance with sound and generally accepted business practices, and may require them to furnish necessary information regarding their business operations and accounts. DCD retains the right to inspect its borrowers' finances, as well their operations, records, and books of accounts. The Board of Directors is further authorized to retain an independent accounting firm to perform the compilation and preparation of financial reports of a borrower, with the costs incurred being borne by the borrower.

CHAPTER NINE

CONSTRUCTION LOAN REQUIREMENTS

9.1 **Construction Requirements.** In addition to all other submission requirements, a Loan Applicant seeking to construct a building with Loan proceeds is required to submit the following documents:

(a) Complete plans and specifications of the building or improvements to be constructed approved by a certified professional engineer;

(b) A schematic drawing of the building and its proposed location;

(c) A certification from the Commonwealth Utility Corporation that adequate water service and electricity are available on the premise where the project will be situated;

(d) A certification from other appropriate government agencies that the proposed project will not have a negative impact to the existing community and environment including the effect of any applicable zoning laws;

(e) A signed copy of the construction contract between the builder and the owner showing, among other things, that DCD is not subject to any liability before, during or after construction is completed;

(f) An original copy of the performance and payment bond covering the total amount contracted;

(g) An original copy of the workmen's compensation insurance policy;

(h) A signed copy of the construction management contract between the construction manager and the owner. The manager must be licensed to do business in the Commonwealth

and must possess a thorough knowledge in construction management. A provision in the construction management contract should provide that the manager must ensure that the project is thoroughly inspected by qualified inspectors and conforms to approved plans and specifications. In addition, the contract shall contain a provision imposing personal liability on the manager for non-performance under the management contract;

(i) Cost breakdown for description of materials; and

(j) Builder's Risk Insurance should be obtained with CDA as loss payee.

9.2 **Construction Loan Disbursement**. Disbursements will be done based on stages of construction completion pursuant to a request for payment, certified by the contractor, borrower and the bonding company, with a certification letter from the construction manager as to the status of project. Of the amount requested, ten percent (10%) will be retained until completion of the project and expiration of any mechanic's lien period. Upon completion of the project, borrower shall submit: a completion certification, a release of mechanic's lien, an affidavit that all liens have been paid, a contractor's warranty, a certificate of occupancy, an insurance policy on building with CDA as loss payee, and proper government agency approval of any septic tank, if applicable.

CHAPTER TEN

LOAN GUARANTY AND PARTICIPATION

10.1 **Loan Guaranty**. DCD may guarantee up to ninety percent (90%) of the principal amount of a loan extended to a qualified Loan Applicant by a lender other than DCD. DCD must approve of the lender's administration and default policies before agreeing to guarantee any loan. DCD shall set aside as a reserve not less than twenty-five percent (25%) of the amount of a guaranteed loan. A Loan Guaranty must meet and satisfy the same criteria as a direct Loan including, but not limited to, the disbursement requirements of Section 13.2 and the requirements and restrictions of Chapter 7, exclusive of 7.4(a).

10.2 **One Percent Interest Rate**. The lender shall impose a one percent (1%) per annum interest rate, which shall be collected by the lender for DCD. This interest rate shall be in addition to the interest rate to be charged by the lender under the terms and provisions of its loan, and shall be assessed and collected first, before the interest rate to be charged by the lender. The lender shall collect and remit the one percent (1%) per annum interest rate to DCD on a quarterly basis.

10.3 **Loan Guaranty Documents**. The Board of Directors shall approve and adopt a standard Guaranty agreement for use with all participating lenders. The Guaranty agreement shall include terms and conditions deemed reasonable and necessary for the protection and purposes of DCD including, but not limited to: (a) a maximum term of five (5) years; (b) language prohibiting amendments or addendums to a CDA Guaranty; (c) language prohibiting the subordination of any of CDA's rights under its guaranty; and (d) with any

90% guaranty, language requiring the lender to complete the foreclosure process before calling the guaranty.

10.4 **Examination of Account.** Upon its request and at all reasonable times, DCD shall be entitled to examine and audit the borrower's account with lender and copies of any security instruments or loan documents held by lender which relate to disbursements or advances made, or to be made, under the Loan Guaranty.

10.5 **Loan Participation Program.** The Board of Directors may jointly participate with banks or other financial institutions in financing a loan to an eligible Loan Applicant. The terms and conditions of the financial participation must be approved by the Board of Directors. DCD and the bank or lending institution shall share the collateral interest on any security for the loan in direct proportion to their loan exposure. The period of repayment may not be more than the period authorized by these Rules and Regulations.

10.6 **Private Projects.** The Board of Directors may elect to participate in an ongoing or new private sector project or undertaking to further the purpose of DCD. In determining whether or not to participate, the following shall be considered: (a) whether there are any other private sector lending institutions in the Commonwealth which may participate; (b) to what extent DCD is committing its financial and technical resources for the particular project; (c) if the project is new to the Commonwealth, or an island in the Commonwealth, would such participation protect the future participation of Commonwealth citizens; and (d) is it in the best interest of the Commonwealth for DCD to participate. If a determination is made to participate, the Board of Directors shall ensure that DCD's interests are fully secured and that the total amount of funding made available for any given private project is determined solely by the Board of Directors.

CHAPTER ELEVEN

SECURITY

11.1 **Security Policy.** DCD shall secure its Loans and Loan Guaranties in accordance with sound lending practices, provided that in doing so, DCD shall have due regard for its purposes to promote economic development in the Commonwealth.

11.2 **First Mortgage on Real Estate.** Wherever possible, all Loans shall be secured by a fee-simple, first mortgage or deed of trust interest in real estate and improvements. First position of any mortgage shall be proven by the submission of a preliminary title report (PTR) from a CNMI licensed title insurance company. The allowable Loan to be secured by any fee simple real estate first mortgage on unimproved bare land shall not exceed fifty percent (50%) of the appraised value of the land. The allowable Loan to be secured by any fee simple real estate first mortgage on improved land shall not exceed sixty percent (60%) of the appraised value of the land, including improvements and proposed improvements.

11.3 <u>Second Mortgage on Real Estate</u>. Secondary mortgages are discouraged, but may be allowed if a Loan application has a strong economic feasibility and potential for success, the Loan Applicant has a good credit rating and excellent repayment ability, and the total outstanding principal debt of the holder of the first security interest and the proposed second mortgage shall not exceed more than thirty percent (30%) of the appraised value of the land for unimproved bare land or forty percent (40%) of the appraised value of the land for improved land and proposed improvements. Third mortgages shall not be accepted.

11.4 <u>Leasehold Mortgage</u>. The total loan allowable on the first leasehold mortgage interest given as security shall not exceed fifty percent (50%) of the appraised leasehold value (existing as well as proposed leasehold improvements), but excluding the underlying value of the fee simple land No loan secured only by a leasehold mortgage shall have a repayment term that is greater than the remaining term of the mortgaged lease. Prior to accepting a mortgage on a lease, the borrower shall obtain for DCD an estoppel certificate from the fee simple landowner certifying that the lease is in full force and effect and consenting to the mortgage of the leasehold interest.

11.5 <u>Chattel Mortgage and Inventories</u>. Loans may further be secured by a chattel mortgage or a security interest on personal and/or business properties provided that such Loan amounts shall not exceed forty percent (40%) of the value of such personal and/or business properties, or of the purchase price thereof, whichever is lower, and provided that DCD receives a first lien on the chattel mortgage or security interest. Crops or agricultural products such as livestock, poultry and fish may not be used as security for any Loan due to their perishable nature.

11.6 <u>Additional Security</u>. In addition to any one or combination of the above securities, the Board of Directors may require individual guaranties from the shareholders of a corporation, partners in an association or partnership, and an assignment of receivables and/or assignment of life or mortgage insurance from each Loan Applicant. All guarantors, endorsers or other cosigners are subject to the same credit underwriting standards as the principal Loan Applicant.

11.7 <u>Appraisals</u>. The Board of Directors in determining the sufficiency of any real or personal property offered as security shall use the current market value of the property, and shall require a complete appraisal report for all Loans greater than $25,000 or a letter of appraisal (*i.e.*, curbstone appraisal) for all Loans less than $25,000, subject to the discretion of the Executive Director. All appraisals shall be by an appraiser approved and engaged by DCD. DCD shall contact the appraiser and order the appraisal; however, the cost of, and any expenses associated with, the appraisal shall be paid by and be the obligation of the Loan Applicant The Board of Directors shall only approve and engage qualified appraisers who are U.S. educated, and who are licensed and authorized under applicable CNMI law to conduct business and to appraise commercial and residential property in the CNMI.

11.8 **Title Insurance**. All Loans having real estate as security should have title insurance policies naming CDA as the loss payee. All title insurance and title reports submitted to CDA must be from a CNMI licensed title insurance company. The expense of title insurance, casualty insurance and title opinions shall be paid solely by the Loan Applicant.

CHAPTER TWELVE

INSURANCE

12.1 **Property & Casualty Insurance ("P&C")**. All Loans having real estate improvements as security shall have the necessary insurance policies insuring the improvements against any damage due to earthquake, fire, typhoon, and any other casualty and liability up to the full insurable value of the improvements. Such insurance shall be obtained from a company on the list of insurance companies approved by DCD and licensed to do business in the CNMI.

12.2 **Surety**. With respect to construction Loans, a Loan Applicant shall be required to produce a performance and a payment bond each covering the full value of the project, the improvements and the construction cost.

12.3 **Life Insurance**. All fishing, farming and agricultural borrowers are required to maintain adequate life insurance in an amount equal to or greater than the outstanding balance of their Loan principal, interest and fees. This requirement of life insurance may only be waived upon a showing of three (3) declination letters from three (3) DCD approved life insurance companies. Depending on the planned use of the Loan proceeds and/or the risks involved with the business ventures, DCD may also require general commercial Loan borrowers to maintain life insurance in amounts DCD deems sufficient to adequately cover the Loan proceeds and/or risks involved. On all life insurance policies covering Loans, DCD shall be named as the first or primary beneficiary. Upon approval of a Loan application, DCD shall inform the Loan Applicant of any life insurance requirement. In the event the Loan Applicant has an existing life insurance policy, with coverage in excess of the Loan amount, the borrower may assign the benefits of the existing policy to DCD to satisfy the life insurance requirement. Unless the borrower has first obtained an acceptable waiver, no loan proceeds shall be disbursed to any borrower, until the requisite life insurance has been obtained and the first year premium has been paid in full.

12.4 **P&C, Surety and Life Insurance Companies**. Loan Applicants shall purchase all required insurance and bonds from any one of the several companies approved by DCD. DCD shall keep a list of such approved P&C, surety and life insurance companies for easy reference and the following shall apply:

(a) Upon approval of the Loan Applicant's insurance application by the insurance firm, initial premiums may be paid, at the time of closing of the Loan, out of the first disbursement of loan proceeds;

(b) Subsequent premiums shall be paid by the borrower in accordance with the insurance policies terms and conditions;

(c) Should a borrower fail to pay any of the subsequent premiums, DCD may pay such premium on behalf of the borrower;
(d) Should DCD pay such premium on behalf of the borrower, then the borrower's Loan shall be restructured to include the premium payment by DCD, and any related fees, in the principal amount owed. In the event a loan is restructured, the borrower shall be advised by DCD of the new monthly payment amounts.
(e) Borrowers may, at any time during the term of their Loans, select a different insurance firm, as long as the newly selected insurance firm can satisfactorily meet the insurance requirements of DCD and is on the DCD approved list of companies; and
(f) The insurance firm and the borrower are required to notify DCD, in a timely manner, when an insurance policy is in danger of expiring due to unpaid premiums; and when an insurance policy lapses due to nonpayment.
(g) Should it choose, DCD may establish an escrow account for the purpose of collecting funds for necessary insurance. Such escrow accounts are to be administered as directed by the DCD Board.

12.5 **Lapsed Coverage**. In the event any borrower fails to obtain P&C, life insurance, property insurance or any other insurance required under the Loan documents or policies, or to maintain such insurance coverage, then the borrower shall be called in to meet with the DCD Loan Manager, and the following shall apply:
(a) The Loan Manager shall inform the borrower that, unless the necessary insurance is obtained or the policy is reinstated, the Loan will be declared to be in default.
(b) Upon approval of the borrower's insurance application by the insurance firm, DCD may pay the first year premium, on behalf of the borrower, and the Loan may be restructured to reflect the new principal amount including the premium paid by DCD.

CHAPTER THIRTEEN

DISBURSEMENTS

13.1 **Check Signing Authority**. All checks issued by DCD shall contain two signatures, one of which shall be the Executive Director (or other official of DCD with check signing authority as approved by the Board of Directors of CDA) and the other by the Chairman (or Vice Chairman or the Chairman or Vice Chairman of the CDA Board of Directors in the absence of the Chairman or Vice Chairman). In the absence of both Chairmen and Vice Chairmen, the Board of Directors shall appoint one among its members to sign jointly with the Executive Director or other official of DCD.

13.2 **Disbursement Requirements**. No funds shall be disbursed unless the Loan application is complete and all documents have been fully reviewed and executed by all necessary parties and all fees and charges have been paid or added to the total loan amount. All disbursements are subject to the accounting procedures and policies set forth under the CDA Act and these Rules and Regulations. These disbursement requirements shall also apply to any funds guaranteed by DCD and disbursed by a private bank or lender.

13.3 **Retained Proceeds.** In the event an approved Loan is for a construction project and the contractor is not bonded, the standard withholding of ten percent (10%) of the project cost may be increased at the discretion of the Board of Directors. With each incremental payment, an amount equal to a minimum of ten percent (10%) of the incremental payment shall be withheld to assure that all subcontractors, materialmen and suppliers have been paid. Such withheld portion shall be released only after the project has been completed, upon finding by the Chairman, or his or her designee, that all the materialmen, subcontractors, and other suppliers have been paid.

13.4 **Incremental Disbursements.** Each construction increment shall be done according to plans and specifications and must be approved by the Loan Applicant or owner. Upon receipt of such approval, then such increment shall be inspected by the Executive Director, or his or her designee, to determine that the work has been performed according to the plans and specifications. Upon approval of each increment by the Executive Director, or his or her designee, funds may accordingly be disbursed, subject to the ten percent (10%) withholding set forth above.

13.5 **Purchase of Equipment and Materials.** In the event that disbursements involve the purchase of equipment, materials or other properties then disbursements shall be made only upon the Loan Applicant producing satisfactory receipts, purchase orders, or other types of evidences of purchase. No further disbursement shall be made without first satisfying the previous disbursements with supporting documents.

13.6 **Disbursement Discretion.** The Executive Director shall exercise his or her sound discretion in authorizing the release or disbursement of any approved Loan proceeds. All disbursements are to be used for approved purposes and as set forth in the Loan commitment/approval letter from DCD.

CHAPTER FOURTEEN

PROFESSIONALS

14.1 **Approved Professionals.** All professionals who seek to be paid out of proceeds from a Loan, or who provide their services in connection with the Loan approval process, including without limitation, Accountants, Architects, Attorneys, Appraisers, Contractors, Engineers, Insurers, Lenders and Surveyors, must meet certain minimum requirements of qualification before payment for their services, or reliance on their opinions will be permitted.

14.2 **Pre-Qualified List.** The Board of Directors may cause to be published a request for proposals from professionals, setting forth the minimum qualifications and from the responses, create a pre-qualified list. At any time, professionals may submit their qualifications and request inclusion on the list.

14.3 **Requirements**. When establishing minimum qualifications, the Board of Directors may require, among other things: the possession of a Commonwealth business license for at least two (2) years in advance of the request for inclusion on the pre-qualified list; professional licensing from the relevant professional society; a client list of customers from the Commonwealth who can attest to the quality of the professional's work; and other proof of the ability of the professional to perform.

CHAPTER FIFTEEN

FEASIBILITY STUDIES AND TECHNICAL ASSISTANCE

15.1 **Feasibility Studies**. The Board of Directors, with the approval of the CDA Board of Directors, may authorize the total or partial funding of economic feasibility studies on specific projects in the areas of agriculture, aquiculture, mariculture, light industries, fishing and of other economic projects. With the approval of the CDA Board of Directors, DCD may hire a consultant or retain the services of a professional firm to perform the feasibility study or authorize a prospective loan applicant to perform such a study.

15.2 **Results and Reports**. The results of any feasibility studies undertaken solely by DCD shall be provided without charge to interested residents of the Commonwealth, except that a reasonable fee for printing and reproduction costs may be charged.

15.3 **Technical Assistance**. At its option and without obligation, the Board of Directors may provide, through its staff or by retaining the services of outside experts, consultants, architects, engineers, technical or management assistance to borrowers, businesses or to assure quality construction of any project undertaken or financed by DCD.

CHAPTER SIXTEEN

LOAN SERVICING

16.1 **Tracking System**. The Executive Director shall institute a follow-up or tickler system and accounting system to assure that all the payments concerning all Loans are received in a timely fashion. Any accounting system required by law shall be followed. The system used shall include the ability to follow-up on insurance payments, principal and interest payments that are delinquent more than fifteen (15) days and production of any financial statements required pursuant to the Loan agreement.

16.2 **Monthly Reports**. For the first year, borrowers shall be required to submit monthly reports to show exactly how the Loan proceeds are being spent. After this initial period, all Loans shall require a least an annual or semi-annual financial report from the borrowers together with a status report on the business. For Loans in excess of $500,000.00, the Executive

Director shall require a borrower to submit annual financial statements audited by a certified public accountant or other documentation displaying the financial condition of the borrower.

16.3 **Loan Quality Assurance & Control.** The Executive Director and the Loan Manager shall conduct a review every quarter on all Loans. As part of that review, the file documentation must be reviewed to insure that the borrowers are providing all updated loan documents required by DCD. Each loan requirement must also be scrutinized to insure that the borrower has satisfied all terms and conditions of the Loan agreement.

(a) The Executive Director shall supervise all lending activities and quality of Loans and shall assist the Loan Division with loan functions.

(b) The Executive Director shall ensure that all Loan applications and approved Loans are domiciled and serviced by the central office (Saipan) and that all such Loans approved are within the CNMI jurisdiction and that there is no deviation.

(c) The Executive Director and Loan Manager shall report to the Board of Directors any exceptions and or deviations revealed during the review.

(d) Any Loan application in excess of the Executive Director $25,000.00 credit limit must be presented and reported to the Board or Directors for further review and final approval or disapproval.

(e) The Loan Manager shall develop a tickler for all required insurance policies showing the expiring policies for each Loan account. The Loan Manager shall insure that renewals are received thirty (30) days prior to policy expiration. These insurance policies must be updated. Should the borrowers be unable to update the policy, DCD has the option of purchasing the policy to protect its interest, but approval should be obtained from the Executive Director to add on any insurance costs.

(f) The Loan Manager must maintain an updated list of all Loans and guarantees.

(g) The Loan Manager must contact the borrowers ninety (90) days prior to the expiration of Loans to discuss renewal requirements.

(h) The Loan Manager shall insure that the handling of credit reports, insurance, documentation, filing and other administrative duties and functions of the credit division are in accordance to standard documentary procedure and lending policy.

(i) The Loan Manager shall prepare and submit to the Executive Director the month-end delinquent reports as well as track the recoveries of past due Loans, either performing, non-performing or Loans handled by attorneys.

(j) The Executive Director shall submit his/her Loan Quality Assurance & Control report to the Board of Directors for further review and disposition. This quarterly report is due on or before the tenth (10th) day following the quarter end.

16.4 **Failure to Submit Reports.** If a borrower fails to submit a required financial or status report, the Executive Director may order an investigation or audit of the financial condition of the borrower upon five (5) days written notice to the borrower. Any failure to submit the required reports or refusal to cooperate with an investigation or audit shall be deemed and considered an event of default under the Loan.

16.5 **Executive Director Meetings and Reports.** Borrowers shall be required to meet with the

Executive Director, or his or her designee, as often as the Executive Director deems is necessary to discuss Loan problems or review business records.

CHAPTER SEVENTEEN

LOAN REPAYMENT

17.1 <u>Term of Loan</u>. The repayment period or term of a Loan may not exceed thirty (30) years, exclusive of any grace period, revisions or extensions. A Loan may not be revised or extended more than five (5) times, not including any revisions or extensions made prior to the 2005 amendment of these regulations. A Loan Applicant may be granted a term of more than twelve (12) years only if the Loan is secured by a first mortgage of sufficient real property. If the Loan is secured only by a second mortgage of real property, its term may not exceed twelve (12) years inclusive of any grace period, revisions or extensions. If the Loan is secured only by a chattel mortgage, its term may not exceed three (3) years, inclusive of any grace period, revisions or extensions, except upon submission of audited financial statements and approval of an increased term by the Board of Directors. When determining the term of Loan, the Board of Directors shall consider, among other things, the repayment capability of the Loan Applicant and the useful life of the assets to be acquired with the Loan.

17.2 <u>Advance Payments and Early Payoff</u>. There shall be no minimum repayment period requirement, prohibition, fee charge or penalty for an advance payment on or the early pay-off of a Loan.

17.3 <u>No Assumption of Loan</u>. No assumption shall be allowed of any Loan without the prior pre-approval of the Board of Directors. Any pre-approved assumption shall be conditioned on the qualification of the party seeking to assume the Loan as an eligible Loan Applicant.

17.4 <u>Death of Borrower</u>. Upon the death of a borrower, the entire unpaid balance of the Loan shall be immediately due and payable. First, the Loan Manager shall claim and collect any life insurance proceeds available to be applied toward the loan. If life insurance proceeds are insufficient, then the Board of Directors may allow assumption of the Loan by the heirs of the borrower if a final decree in the probate of the borrower identifies the heirs and approves distribution to them of the mortgaged property and Loan, and if the respective heirs themselves qualify as eligible Loan Applicant and execute all necessary documents. In the event the insurance proceeds are insufficient and the Loan is unable to be assumed by heirs, then DCD shall pursue foreclosure and seek to collect its Loan in court.

17.5 <u>Monthly Payments</u>. All Loan payments shall be due and payable monthly. Monthly payments on the Loan shall be made in accordance with the executed Loan documents. Unless the Board of Directors agrees, or the Loan documents state, otherwise, timely monthly payments will first be applied against any accrued interest and then against the outstanding principal amount.

17.6 **Past Due Payments**. Any payments toward a delinquent Loan or that are past due or not made on or before the date they are due under the executed Loan documents shall first be applied against any outstanding out-of-pocket expenses and charges associated with the Loan including, but not limited to, legal fees, publication, insurance, court and appraisal costs, then against any accrued interest and finally against the outstanding principal amount.

17.7 **Late Payment Fees**. In accordance with the terms and conditions of the Loan documents, late payment fees may be charged each time a monthly payment is missed or delayed more than fifteen (15) calendar days. The amount of late payment fees shall be posted and as determined by the Board of Directors as circumstances require.

17.8 **Additional Required Payments**. It is a policy of DCD to continually foster economic development and, accordingly, borrowers shall be encouraged to pay-off their Loans as swiftly as they are able in order to better circulate DCD's available loan funds. It shall be an understood and agreed upon condition of each Loan, that any proceeds generated by a Loan that exceed those required to operate and preserve the business should be used to pay down or pay-off the Loan.

CHAPTER EIGHTEEN

LOAN REVISIONS AND REFINANCING

18.1 **Loan Revision**. Subject to the approval of the Board of Directors, a borrower may request and receive a loan revision. A Loan may not be revised or extended more than five (5) times, not including any revisions or extensions made prior to the 2005 amendment of these regulations.

18.2 **Loan Revision Fee**. As a condition of every loan revision, the borrower shall be assessed and shall pay a loan revision fee equal to one quarter (¼) of one percent (1%) of the outstanding balance of the Loan plus any applicable legal fees but not less than $125.00. Any assessed loan revision fee must be paid before a loan can be revised and may not be included in or added to principal amount of the loan.

18.3 **Waiver of Interest and Late Fees**. In general, it is a recognized policy that accrued interest and late fees shall not be waived. Further, in recognition of 4 CMC § 10402(f) and the fact that CDA pays its administrative expenses, in large part, out of earned interest on its loans, only the CDA Board can authorize the waiver of interest or fees and, even then, only as part of negotiated settlements or declared emergencies as set forth in Section 18.4.

18.4 **State of Emergency Relief**. In the event the U.S. President declares a state of emergency for all or part of the CNMI, and in the event the declared emergency reasonably impacts some or all of the DCD borrowers, the CDA Board may waive interest and penalties for a

period up to six (6) months for those borrowers who are both: (a) fully performing, current borrowers; and (b) who are affected by the declared emergency.

18.5 **Working With Borrowers.** Subject to very real time and resource limitations, the Loan Division shall use its best efforts to work with its delinquent borrowers to facilitate revisions in those situations where such an option is feasible and the borrower is willing.

18.6 **Loan Refinancing.** Subject to the approval of the Board of Directors, a borrower whose Loan is current may refinance his or her Loan to take advantage of an available and reduced interest rate or to consolidate a supplemental DCD loan with his or her DCD Loan. In every refinance situation, the borrower must first be qualified as if she was a new DCD borrower, including the presentation of sufficient security and mortgages.

18.7 **Loan Refinancing Fee.** As a condition of every loan refinance, the borrower shall be assessed and shall pay a reasonable loan refinance fee to be set by the Board of Directors and posted in accordance with Section 8.10. Any assessed loan refinance fee must be paid before a loan can be refinanced and may not be included in or added to principal amount of the loan.

CHAPTER NINETEEN

LOAN COLLECTION AND FORECLOSURE

19.1 **Monitoring.** The Executive Director and Loan Manager shall closely monitor the repayment of all Loans and shall prepare and issue reports for the Board of Directors as required by Section 16.3.

19.2 **Fifteen Day Phone Call.** If any payment is not received by the fifteenth (15th) day after its due date, then the Loan Manager, or his or her designee, shall attempt to contact the borrower by telephone informing them of the payment default.

19.3 **DCD Thirty Day Notice.** If any payment is not received by the thirtieth (30th) day after its due date, then the Loan Manager, or his or her designee, shall again attempt to contact the borrower by telephone or by written letter informing them of the payment default.

19.4 **DCD Sixty Day Notice.** If any payment is not received by the sixtieth (60th) day after its due date, then the Loan Manager, or his or her designee, shall again attempt to contact the borrower by telephone or by written letter informing them of the payment default.

19.5 **Demand Letter.** If any payment is ninety (90) days or more delinquent, the matter shall be forwarded to CDA Legal Counsel together with a delinquency update showing the amount of principal, interest and fees needed to bring the Loan current. CDA Legal Counsel shall send the borrower a letter demanding payment within thirty (30) days.

19.6 **Notice of Default.** If the borrower fails to bring the Loan current within the thirty (30) days

stated in the Demand Letter, the Loan Manager, or his or her designee, may direct CDA Legal Counsel to send the borrower a Notice of Default in accordance with the Commonwealth's Mortgage Foreclosure Act (2 CMC § 4537, *et seq.*). The Loan Manager, or his or her designee, shall provide CDA Legal Counsel with an Account Update of all principal, interest and fees outstanding and the working file in order to facilitate the drafting of a Notice of Default. A Notice of Default must be served personally or by certified mail, return receipt requested, upon the borrower.

19.7 **Other Defaults**. If a borrower has defaulted for any reason other than the failure to make a monthly Loan payment, and notice of such default has been given to the borrower and the borrower has failed to cure said default within thirty (30) days or within the period provided for in the Loan documents, the Loan Manager, or his or her designee, may direct CDA Legal Counsel to send the borrower a Notice of Default and to commence foreclosure notwithstanding the fact that said default has not yet continued for the periods applied to defaults due to a failure to make a monthly payment.

19.8 **Deed in Lieu of Foreclosure**. In the event of default, the Loan Manager, together with the Executive Director, may propose a deed in lieu of foreclosure to the defaulted borrower. For purposes of these regulations, a deed in lieu of foreclosure shall be defined as when the defaulted borrower voluntarily agrees to exchange by way of a deed all of his or her mortgaged property for the elimination of all or a part of his debt.

Before any deed can be accepted, a current and approved appraisal must be obtained for the mortgaged property and the cost of such appraisal must be paid by the borrower. The appraised value will be used for the value of the mortgaged property. In the event an appraisal value exceeds the outstanding balance of the defaulted loan, no credit or payment shall be made by CDA to the defaulted borrower for the difference. The value assigned the mortgaged property shall be the value of the loan only.

If any debt remains (anything above the appraised value of the mortgaged property), the remaining debt shall be reduced to a new note with new terms. If the defaulted borrower provides new and acceptable security for this new note, interest rates may be reduced; otherwise the interest rate on the new loan will remain the same as the rate for the old loan.

Only CDA mortgaged properties can be used for deeds in lieu of foreclosure. No other, new or substitute property can qualify for a deed in lieu of foreclosure.

19.9 **Complaint to Foreclose**. After the Notice of default is served on the borrower, and if the borrower fails to cure the default in the time frame allowed, and in the manner directed by the Loan Manager or his or her designee, and if the deed in lieu of foreclosure option has been rejected by the borrower, then CDA Legal Counsel may be directed to file a lawsuit to collect the Loan and foreclose upon the mortgages.

19.10 **Acceleration of Loan**. Upon filing of the lawsuit, the Loan shall be accelerated and the

entire principal balance plus any accrued interest shall become immediately due and payable. Prejudgment interest shall accrue on the principal at the rate established in the Loan agreement. Prior to the entry of a judgment, the borrower may have the right, as set forth by the law, to cure the default and bring the Loan current. After judgment, interest shall accrue at the rate established by law for judgments.

19.11 **Judgment and Auction.** Upon entry of a judgment in the lawsuit, a copy of the judgment shall be served upon the borrower. If the borrower fails to pay the entire judgment amount within three (3) months from the time borrower is served the copy of the judgment, all properties mortgaged as security for the Loan shall be noticed for sale. The Board of Directors shall set the minimum bid for any auction after considering the appraisal obtained, the outstanding loan balance and all other relevant documents. All auction notices shall include the minimum bid set by the Board of Directors, and shall provide notice that the Board of Directors reserves the right: to withdraw the mortgaged property from auction before the sale or before a bid for the property is accepted; to adjourn the auction without notice at any time before the mortgaged property is struck off, without incurring any liability whatsoever thereby; and to reject any and all bids. At auction, CDA may purchase the mortgaged property.

19.12 **Multiple Properties.** In the event of multiple real properties being noticed for sale, either the Executive Director or Loan Manager shall apportion the minimum bid for any sale of property in a manner so as to maximize the likelihood of sale and to maximize the possibility of recovery of all amounts owed DCD.

19.13 **Certificate of Sale.** If the property is sold at an auction, CDA Legal Counsel shall prepare a Certificate of Sale and shall deliver a copy to the buyer after recording the original.

19.14 **Deed.** After the one year redemption period, if the borrower has not redeemed the property, CDA Legal Counsel shall prepare a Deed to be executed in accordance with the Commonwealth's Mortgage Foreclosure Act and to be delivered to the buyer after filing.

19.15 **Controlling Authority.** If any of the above procedures conflict with any applicable provision of law or any term in any of the Loan documents, then said law or contractual term shall control.

19.16 **Loan Revisions.** A Loan being foreclosed or in financial difficulty may only be revised in accordance with Section 18.

19.17 **Settlement.** All CDA obtained judgments are subject to settlement at the discretion of the Board of Directors, subject to the mutual agreement of the parties and a determination by the Board of Directors that such a settlement is reasonable and in the best interest of DCD and CDA.

19.18 **Attorneys Fees.** In accordance with all executed Loan documents, a borrower shall be

responsible for, and his or her account shall be charged with, all reasonable expenses and legal fees incurred by DCD in the collection, foreclosure and monitoring of his or her Loan. Any payments toward a Loan to which fees and expenses have been charged shall first be applied against those outstanding fees, expenses and other charges, then against any accrued interest and finally against the outstanding principal amount.

CHAPTER TWENTY

FUNDS AND ACCOUNTING

20.1 **Accounting Records and Reports.** The Executive Director shall ensure at all times that accounting records and supporting documents are maintained to insure sound internal control. DCD shall use the accrual method of accounting. Monthly financial statements with detailed loan fund status reports must be prepared in accordance with Generally Accepted Accounting Principles and Practices (GAAPP) and copies thereof shall be provided to the Board of Directors.

20.2 **Accounting System.** A separate accounting system shall be used and maintained for the functions of DCD including its economic development loan fund activities. The accounts and statements of account of DCD shall be audited by the Public Auditor or an independent auditor approved by the Public Auditor. The fiscal year of DCD shall be identical with that of the Commonwealth Government.

20.3 **Liquid Funds.** DCD shall maintain sufficient liquid assets to be able to meet normal operating expenses and discharge its short-term liabilities and current maturities of any long-term indebtedness. DCD funds not currently needed in liquidity shall be reinvested by the Board of Directors, to the extent permitted by law, in qualified investments which mature not later than the date on which such funds will be needed.

20.4 **Accounts.** DCD may, as it deems necessary, open and maintain savings and checking accounts and other investment forms with banks or savings and loan associations which are reputable financial firms and members of the Federal Reserve System or the Federal Deposit Insurance Corporation (FDIC). Money received by DCD shall be deposited into such accounts.

20.5 **Collections.** DCD shall cause to be collected and obtained: (a) from the Development Banking Division of CDA, all 702(c) Covenant funds, any appropriated or budgetary funds, and all assets of the EDLF existing prior to September 19, 1985; (b) all money to be received by or on behalf of DCD, with respect to repayment of any Loan made, including interest and other charges payable; (c) all money arising from property or investments acquired by or invested in by DCD; and (d) all other money and property due and payable to DCD. DCD shall not accept and hold deposits, but may hold evidence of deposits, or otherwise accept control of deposits, in other financial institutions.

20.6 **Loan and Investment Amounts.** The Board of Directors shall pay out of the DCD funds: (a) approved Loan or Loan Guaranty amounts; and (b) amounts approved for investment or equity participation, and participation in any projects and/or feasibility studies or technical assistance.

20.7 **Operation Expenses.** The Board of Directors shall pay out of funds available to DCD pursuant to 4 CMC § 10401(b)(1) and (b)(3) all expenses, costs and obligations incurred for the administration and operation of DCD. Payment under this section shall be in conformity with the operating budget, prepared and submitted to the CDA Board of Directors. *See* Section 4.4.

20.8 **Technical Assistance and Studies.** The Board of Directors shall also pay out of funds available to DCD pursuant to 4 CMC § 10401(b)(1) and (b)(3) all amounts expended or obligated for technical assistance, economic studies, project evaluations and feasibility studies. Payment under this section shall also be in conformity with the operating budget, prepared and submitted to the CDA Board of Directors. *See* Section 4.4.

20.9 **Interest Tracking and Booking.** DCD shall track accrued and unpaid interest for one hundred twenty (120) days, after which such interest shall continue to accrue but shall be booked (together with the underlying Loan) as non-performing and shall be isolated from amounts/funds able to be used for payment of CDA administrative and operating expenses.

CHAPTER TWENTY-ONE

INVESTIGATIONS AND AUDITS

21.1 **Investigations and Audits.** The Board of Directors or the Executive Director may instruct a representative of DCD, or may contract with a qualified firm or person, to investigate or audit the accounts of any borrower in order to ascertain:

(a) Whether the Loan has been used for the purposes for which it was granted;

(b) Whether there is evidence or indication of future difficulties arising that might prevent the borrower from repaying the Loan in accordance with the Loan agreement; or

(c) Whether management or other assistance is needed to improve the business operation.

21.2 **Associated Fees for Costs.** The Board of Directors may impose reasonable fees upon the borrower for performing the above services in order to recover its costs incurred.

CHAPTER TWENTY-TWO

CONFLICTS AND CONFIDENTIALITY

22.1 **Conflicts of Interest.** As a mandated division of CDA, DCD follows and abides by the

same conflicts of interest law and standards as CDA. The applicable conflicts of interest law and standards are set forth in 4 CMC § 10408.

22.2 **Confidentiality**. No member of the Board of Directors or DCD employee or officer who becomes privy to any confidential information, data figures, projections, estimates, customer lists, tax records, personnel history, accounting procedures, promotions and information otherwise privileged as a result of his or her membership shall reveal such information to any person, firm, corporation, or other entity outside the course of his or her official duties; nor shall he or she use such information for his or her own personal gain. Nothing in this section shall prevent DCD from using and disclosing such information as is necessary to administer its Loans or collect amounts outstanding from the Loan Applicant or borrower.

22.3 **Preparation of Loan Applications**. No DCD employee, officer or member shall engage in the preparation of any Loan application; provided, however, that the Loan Department staff may assist a Loan Applicant in the preparation of a Loan application within the DCD office without compensation. If the staff assists the Loan Applicant, the Loan Applicant shall first waive any legal claims against the staff, DCD and CDA for any wrongful performance or alleged misrepresentation on the Loan application.

CHAPTER TWENTY-THREE

VIOLATIONS OF RULES AND REGULATIONS

23.1 **Known Violations**. Known violations or possible violations of any provision contained in these Rules and Regulations shall immediately be reported to the Executive Director or other person designated for that purpose. The violation or possible violation shall then be promptly reported to the Board of Directors by the Executive Director.

23.2 **Discovered Violations**. If any DCD employee or member discovers irregularities in the use and enforcement of these Rules and Regulations, or has reasonable grounds to believe that these Rules and Regulations may have been violated, the employee or member shall report the matter to the Executive Director who shall furnish the Board of Directors with the information he or she has obtained.

23.3 **Additional Information**. It is the responsibility of the Executive Director, together with the Chairman, to review the information submitted, and request additional information necessary to make a determination as to whether there is substantial evidence of a violation of these Rules and Regulations or whether further investigation should be undertaken.

23.4 **Penalties**. If it is determined by the majority of the Board of Directors that an individual has violated any of the provisions of these Rules and Regulations, he or she shall be subject to the penalties provided by law, and to such additional disciplinary and other remedial action including, among others, dismissal, suspension, or reduction in job position, as is appropriate.

CHAPTER TWENTY-FOUR

SIGNATURES

24.1 **DCD Board.** The undersigned Chairwoman of the Development Corporation Division of the Commonwealth Development Authority hereby executes and acknowledges the recommendation and adoption by the DCD Board of the foregoing DCD Rules and Regulations, in their entirety.

MARCIE M. TOMOKANE, Chairwoman

Date: 07\21\05

24.2 **CDA Board.** The undersigned Chairman of the Commonwealth Development Authority hereby executes and acknowledges the approval and adoption by the CDA Board of the foregoing DCD Rules and Regulations, in their entirety.

TOM GLENN QUITUGUA, Chairman

Date: 7/21/05

Office of the Secretary
Department of Finance

P.O. Box 5234 CHRB SAIPAN, MP 96950 TEL. (670) 664-1100 FAX: (670) 664-1115

NOTICE AND CERTIFICATION OF ADOPTION OF PROPOSED REGULATIONS FOR THE COMPUTATION OF RETROACTIVE SALARY ADJUSTMENT PAYMENT FOR OVERTIME HOURS EARNED DURING THE PAY PERIOD ENDING JUNE 1, 1991 THROUGH PAY PERIOD ENDING AUGUST 20, 1994

I, Fermin M. Atalig, Secretary of Finance which is promulgating the Regulations for the Computation of Retroactive Salary Adjustment Payment for Overtime Hours Earned During the Pay Period Ending June 1, 1991 Through Pay Period Ending August 20, 1994, published in the Commonwealth Register Volume 27, No. 06 on July 20, 2005 on pages 024662 to 024669, by signature below hereby certify that as published such regulations are true, complete and correct copy of the proposed Regulations for the Computation of Retroactive Salary Adjustment Payment for Overtime Hours Earned During the Pay Period Ending June 1, 1991 Through Pay Period Ending August 20, 1994, which, after the expiration of appropriate time for public comment have been adopted with no changes.

By signature below, I hereby certify that the proposed Regulations for the Computation of Retroactive Salary Adjustment Payment for Overtime Hours Earned During the Pay Period Ending June 1, 1991 Through Pay Period Ending August 20, 1994 are the true, correct and complete regulations. I further request and direct that this Notice of Certificate of Adoption be published in the CNMI Commonwealth Register.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on this 18th day of AUGUST, 2005, on Saipan, Commonwealth of the Northern Mariana Islands.

Fermin M. Atalig
Secretary of Finance

Bernadita B. Dela Cruz
Commonwealth Registrar

Date 8/19/05

Received by

Thomas I. Tebuteb, SAA

Date 8/19/05

Pursuant to 1 CMC §2153, as amended by P.L. 10-50, the rules and regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General's Office.

Pamela Brown, Attorney General

Date 8/19/05

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

STATE BOARD OF EDUCATION
PUBLIC SCHOOL SYSTEM
P.O. BOX 501370
SAIPAN, MP 96950

Roman C. Benavente
Chairman

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PUBLIC NOTICE

NOTICE AND CERTIFICATION OF ADOPTION OF PROPOSED AMENDMENTS TO BOARD OF EDUCATION REGULATIONS REGARDING TEACHER CERTIFICATION, COURSE REQUIREMENTS FOR PROMOTION AND GRADUATION AND REPEAL OF STANDARDS AND BENCHMARKS

I, Roman C. Benavente, the Chairman of the Ninth Board of Education for the Commonwealth of the Northern Mariana Islands ("Board") pursuant to the authority provided by Article XV of the CNMI Constitution and Public Law 6-10 hereby adopt as permanent the proposed amendments and repeal of certain PSS Regulations as published in Volume 27, Number 5 of the Commonwealth Register dated June 20, 2004 (pages 024615-024625) without modification or amendment. Further, I hereby certify that these amendments and the repeal of the standards and benchmarks have been adopted after the appropriate time for public comment.

Accordingly, I request that this Notice and Certification of Adoption be published in the Commonwealth Register. Pursuant to 1 CMC sec. 9105(b), these amended regulations are effective 10 days after publication.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 15th day of August 2005, on Saipan, CNMI.

By: ______________________
ROMAN C. BENAVENTE
BOARD OF EDUCATION CHAIRMAN

Approved By: ______________________ **Date:** 8/19/05
PAMELA BROWN
ATTORNEY GENERAL, CNMI

Filed By: ______________________ **Date:** 8/19/05
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ATTORNEY GENERAL LEGAL OPINION No. 05-10

Date: August 4, 2005

To: Gregorio Sablan, Executive Director, Commonwealth Election Commission

From: Arin Greenwood, Assistant Attorney General

Through: Pamela Brown, Attorney General

CC: James Livingstone, Chief of the Civil Division

Re: CNMI's Elected Officials On Active Duty

This memorandum responds to your request for a legal opinion regarding whether a person who is a member of the Armed Forces on active duty in the U.S. military, or who is a reservist serving more than 270 days on active duty, may be a candidate for elected office or may serve as an elected official in the Commonwealth.

Short Answer

There is no Commonwealth law or regulation that prevents a member of the Armed Forces on active duty in the U.S. military, or a reserve member who is serving more than 270 days on active duty, from being a candidate for elected office or from serving as an elected official in the Commonwealth.

It is a violation of federal law for someone who is on active duty for the military or has orders to serve more than 270 days on active duty as a reservist from either holding elected office or running for partisan elected office.

The Commonwealth cannot prosecute this violation of federal law. If the federal government successfully prosecutes the violation, then the conviction may bar the individual from running for office in the Commonwealth in the future.

Analysis

I. Commonwealth Law.

The Commonwealth's laws and regulations do not prevent a member of the Armed Forces on active duty in the U.S. military, or a reserve member who is serving more than 270 days on active duty, from being a candidate for elected office or from serving as an elected official in the Commonwealth. In other words, the laws of the Commonwealth allow individuals on active duty to hold and run for office in the Commonwealth.

As discussed below, the federal government's actions enforcing its laws could bar individuals from running for office in the future.

II. Federal Law.

Federal law prohibits members of the Armed Forces who are on active duty and reservists who are on active duty for more than 270 days from holding elected office. Department of Defense Directive ("DoDD") Number 1344.10, issued on August 2, 2004, as authorized by 10 U.S.C. §973 *as amended*, outlines what political activities are permitted and which are proscribed for members of the Armed Services who are on active duty ("members").

A. DoDD's Definition Of "Active Duty"

Members of the armed services are considered to be on active duty when they are on "full-time duty in the active military service of the United States regardless of duration or purpose, including:

E2.1.1.1. Full-time training duty;

E2.1.1.2. Annual training duty; and

E2.1.1.3. Attendance, while in the active military service, at a school designated as a Service school by law or by the Secretary of the Military Department concerned."

DoDD 1344.10, Enclosure 2, E2.1.1

Pursuant to Paragraph 4.3.2 of DoDD Number 1344.10, reserve members who are serving more than 270 days are also considered on active duty for purposes of this directive. Reserve members do not have to serve this amount of time before they are considered to be on active duty. Instead, they only need to receive orders that they must report for active duty for 270 days or more. Once a reservist receives orders to report to active duty for 270 days or more, the directive applies.

B. DoDD's Prohibition Regarding Political Activity.

Paragraph 4.2 of the DoDD involves the "Nomination of Candidacy for Civil Office" of members. It expressly prohibits members – here meaning members of the Armed Forces on active duty and reserve members who are serving more than 270 days – from holding elected office or running for elected office.

Pursuant to Paragraph 4.1.2.2, "A member on active duty shall not . . . be a candidate for, hold, or exercise the functions of civil office except as authorized in paragraphs 4.2 and 4.3 below." DoDD 1344.10 4.1.2.2

Paragraph 4.3 outlines the circumstances under which a member may hold or exercise the functions of civil office attained by election of appointment. Paragraph 4.3.4 applies to elected and appointed civil office in the government of the CNMI (and other states, territories, and other non-federal governments). Pursuant to this section, "[n]o member on active duty may hold or exercise the functions of civil office in the government of . . . a territory, possession, or commonwealth of the United States." DoDD 1344.10 4.3.4.

There are exceptions to this prohibition that may be found in Paragraph 4.3.5. These exceptions are limited to nonpartisan civil offices and include such positions as notary public and member of a school board.

As is discussed below, violation of these provisions could be construed to be a felony under federal law. This means that anyone to whom the DoDD applies – anyone on active duty as discussed above – who runs or holds elected office could be convicted of a felony by the federal government.

C. Potential Implications Of Federal Law.

a. The Commonwealth Cannot Enforce DoDD 1344.10

Only the federal government – and not the Commonwealth – can enforce DoDD Number 1344.10 to ensure that members of the Armed Forces are not candidates for elected office or do not hold elected office. The Commonwealth may, however, be able to prevent persons who have been convicted of violating DoDD Number 1344.10 from being candidates for elected office or from holding elected office.

As stated above, the Commonwealth does not have any law that prevents a person who is a member of the Armed Forces on active duty in the U.S. military, or who is a reserve member serving more than 270 days, from being a candidate for elected office or from holding an elected position. Moreover, federal courts have held that only the federal government can enforce the DoDD. *Neel v. Pippy,* 247 F.Supp.2d 707 (W.D.Pa. 2003)

b. Federal Law May Still Impact An Individual's Ability To Be A Candidate In The Commonwealth.

Individuals cannot run for any elected office in the Commonwealth if they have been convicted of a "felony" anywhere in the United States. 1 CMC §§ 6301-6307 (2004). And a person who is convicted of violating DoDD Number 1344.10 may be convicted a felony – as is discussed below, this is a matter of unresolved Commonwealth law.

Pursuant to 8 U.S.C. §3559(a)(5), "An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is...[l]ess than five years but more than one year, as a Class E felony." 18 U.S.C. §3559(a)(5). The maximum term of imprisonment for DoDD Number 1344.10 is confinement for 2 years. *See* Uniform Code of Military Justice, Article 92 (as amended).

Note, though, that military law – unlike civilian law - does not categorize convictions as "felonies" or "misdemeanors," which means that a conviction of violating DoDD 1344.10 is not necessarily a felony

conviction. Nonetheless, some state courts have found that military court convictions do constitute felony convictions for various purposes. For example, in *Commonwealth v. Smith*, 528 Pa. 380, 598 A.2d 268 (Pa. 1991), the Supreme Court of Pennsylvania found that a prior court-martial armed robbery conviction constituted a prior felony conviction even though the statute under which the appellant had previously been court-martial convicted did not distinguish between felonies and other degrees of crimes. *Id.* at 384-293, 271–275; *see also* 11 A.L.R.5th 218 for more cases.

Determining whether this violation of DoDD constitutes a felony involves interpreting Commonwealth's law. There is no statute, regulation, or case law addressing this issue. The Commission may enact a regulation interpreting the term "felony" and decide whether or not it includes violations of military laws, such as DoDD Number 1344.10.

In the meantime, unless the legislature, Commission, or a court determines that violation of DoDD Number 1344.10 does *not* constitute a felony, anyone who violates DoDD Number 1344.10 risks becoming ineligible to run for or hold elected office in the Commonwealth. 1 CMC §§ 6301-6307 (2004). .

Please feel free to contact me at 664-2341 or at aringreenwood@hotmail.com with any questions or comments.

Arin Greenwood
Assistant Attorney General

Concurred by:

Pamela Brown
Attorney General

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ATTORNEY GENERAL OPINION No. 05-11
(formerly No. 05-09)

To: **Hon. Juan N. Babauta, Governor**

From: **Alan J. Barak, Asst. AG, Civil Division**
Through: **Pam Brown, Attorney General**
Date: **7/27/05**

Re: **CUC independent power provider ("IPP") contract for Power Plant 1 Not a Constitutional public debt or public indebtedness**

ISSUE AND SHORT ANSWER

Question

Is the government-owned corporation, Commonwealth Utilities Corporation, contract ("CUC") for a multi-year independent power producer's delivered electricity a "public debt" or "public indebtedness" within the meaning and substance of, and subject to the restrictions of, the CNMI Constitution, article X, sections 3 and 4?

Short Answer

No.

The CNMI Constitution restricts the Government from incurring "public debt" without express legislative approval. It restricts "public indebtedness" past a level of 10% of total assessed valuation, and prohibits the use of "public indebtedness" for Government operating expenses.

CUC's proposes to enter into a 20-year contract for power to be generated by a private firm. The contract does not give rise to "public debt" or restricted "public indebtedness" under the CNMI Constitution.

The contract is neither a "public debt" nor "public indebtedness" because it provides for annual payments, does not engage the full faith and credit of the CNMI, looks to repayment solely from the utility rates, and such a contract is specifically authorized in CUC's statute. Substantial U.S. case law supports these conclusions.

This long-term power supply contract is no different in kind than similar contracts found throughout the power industry in the United States, in virtually every jurisdiction. Similar public corporation contracts, and contracts by local government for utility services, have been upheld for decades as not constitutionally restricted debt.

As a matter of policy, it is difficult to imagine any publicly-owned utility carrying on its business if its supply agreements had to meet legislative pre-approval. CUC is required by statute to conduct itself like a business. Businesses must have the flexibility to enter into short- and long-term supply contracts without having the contracts reinterpreted as statutorily-limited public debts.

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ANALYSIS

Summary

CUC seeks to contract for the services of a private power company to provide 51 megaWatts (MW) of firm power over a 20-year period. This constitutes roughly 2/3 of CUC's 70 MW system. It is critically important to the utility, which presently owns unreliable, inefficient, fault-ridden power generating equipment.

This Opinion presents the background, and authority for, the conclusion that CUC's long term power procurement contracts are not "public debt" or "public indebtedness", and are not restricted by the CNMI Constitution's limitations. This Opinion also provides the background to the IPP deal, including a profile of CUC. The legal analysis appears in the second, shorter section.

Discussion

The first section of this Opinion, "Background", provides a description of CUC, including its legal environment, and an overview of the nature and use of public debt. The second section applies the tools of legal analysis, including review of relevant case law and principles of statutory construction.

1. Background

    a. CUC, the public corporation enterprise

CUC is a public power utility, owned by the CNMI Government. It is similar to municipal utilities and public power agencies found throughout the United States.

There are 2,000 community-owned US electric utilities, serving over 43 million people or about 14 percent of the nation's electricity consumers. Some of the nation's largest cities - Los Angeles, San Antonio, Seattle and Orlando - operate publicly owned electric utilities, but many public power communities are small, with their utilities serving 3,000 or fewer customers. Public power systems are found in 49 states – all except Hawai'i. Many of the country's largest companies and cutting edge hospitals and research facilities such as Intel, Blue Diamond Growers, Campbell Soup, Procter & Gamble, IBM, the Mayo Clinic, Sanyo, Hills Pet Nutrition, Belden Wire and Cable, Hon Industries, and General Dynamics, Kraft, 3M, Northrop Grumman and GE, are served by public power systems. (Source for this paragraph: (American Public Power Ass'n website, www.appanet.org/aboutpublic.)

The CUC is a public corporation of the Executive Branch of the CNMI government.[1] It was re-organized to the Department of Public Works for purposes of administration and coordination.[2] The Governor appoints its board members. (4 CMC § 8131) The CUC is part of the CNMI government. CUC is a "public corporation". AG Op 01-03-30, p 4. It has "corporation powers", is allowed to prepare and adopt its own budget, is granted specific exemptions from the CNMI Civil Service System for the hiring, retaining and compensation of its employees, and is permitted to conduct its own procurement, hire within certain limits, secure its own legal counsel, and is exempted from the payment of certain corporate duties and taxes. Id, citing 4 CMC §§ 8121(a), 8123, 8133, 8151. (*See infra*, section 1.j, for CUC's financial powers.)

CUC's base rates for over five years have been $0.11/kWh for residential and nonprofit customers and $0.16/kWh for business and government customers, and the rates have varied little from that amount for 10 years.[3] Presently the base rates include $0.05493/kWh (5.493 ¢/kWh) for fuel.[4] The balance of CUC rates cover Operations & Maintenance, Materials & Supplies, debt service, cash reserve requirements and other expenditures for providing service.[5]

CUC is an $80 million/year company with a $60 million/year fuel bill.[6] CUC is on the edge of bankruptcy because, while its fuel costs have doubled over the past year, its base rates have remained static.[7] Thus, while fuel has increased to roughly $0.12/kWh, the base rate for fuel has remained at the 1993 level of $0.05493.[8] The under-recovery of fuel costs in CUC base rates has ranged from $3.7 million in 2002 to roughly $16.6 million in 2004.[9]

The "rate" for electricity is the charge for each unit sold – the kiloWatthour, or "kWh". For instance, a normal lightbulb uses 60 Watts of power.[10] A thousand bulbs in, for example, a hotel sign, all burning at one time, use 60 kilowatts (thousand watts) of power. If they burn for one hour, they use 60 kwh of electricity. At 10 cents per kwh, the sign costs $6.00 to run for that hour.

A utility commission, and the CUC Board, must distinguish between the kinds of costs as it sets rates. There are other issues of repair and maintenance, the kind of generating plants (and different fuels) used to power the customers, and when during the day the customer requires its maximum, or "peak", power.

As a matter of law, the CUC must be able to distinguish between the costs that its customer groups place on its system. There are presently two "classes" of ratepayers for CUC – commercial/government and residential. There is little, if any, cost justification for charging government more than other commercial customers, or, even more than residential customers. Big customers tend to be cheaper to serve than are little customers.

Most US utilities offer three types of rates, depending on the nature of the service – residential, commercial and industrial. And they often differentiate between large commercial and small commercial customers. In order to charge different rates to each class, the utility, and the public utility commission, must find a rational basis to discriminate among these types of customers.

In any event, the utility commission, and the reviewing courts, typically look for a rational basis to set differential rates. Without that basis, the higher charge to one group is an unlawful subsidy. In the CNMI, the decision is further governed by statutory language that prohibits rate subsidies, language predicated on the Grant Pledge Agreement, and the federal funding which paid for CUC's generating plants.[11]

The base rates may differentiate among the rate classes. See 4 CMC § 8141(d). But the CUC may not subsidize one rate class with another. 4 CMC §§ 8141, 8143. The Board must review these rates annually. 4 CMC § 8141(e).

Presently CUC uses only one fuel, No. 2 diesel oil. The base rates recover 5.493 cents/kwh for it. CUC informational materials indicate that CUC fuel costs presently exceed the revenues recoverable by this base rate number by about 4.5 cents, due to fluctuating oil prices. (CUC Fuel Surcharge Presentation, Nov. 8, 2004, Tinian, pp 7-8 [on file])

b. Ratemaking law applicable to CUC functions

The economic, financial and regulatory environment in which CUC operates is critical to the understanding of the purchase of electricity from an independent power producer, or "IPP". In general, the US

Constitution and the statutes of every state and, for government-owned utilities, municipality, require that a power utility be given a fair opportunity to cover its costs and earn a return on its investment. Part of the regulatory scheme is the ability to adjust prices up or down as the firm's largest single cost – fuel – fluctuates. The adjustment allows for customer refunds from overcollections. All regulatory statutes also provide for more elaborate procedures to examine and adjust the overall rates of these utilities. *See, generally, Principles of Public Utility Rates*, Bonbright, Danielsen and Kamerschen (2d ed. 1988), the "Bible" of electric utility ratemaking.

Government utility commissions regulate rates, charges, fees and service quality. Before a private, investor-owned utility is allowed to raise rates, the utility commission must provide notice and evidentiary, contested case hearings. Informational public hearings are also typically held for a general rate case. But, because changes in rates must rest on "competent, material and substantial" evidence, taken in a recorded or transcribed hearing, with the opportunity for cross-examination, it is the contested case hearings that become critical to the agency's rate decision.

While some 100 years ago the legislatures set rates for monopolies, that is no longer the case. For many reasons, legislatures created public utility, or public service, commissions (PUC's, or PSC's) to address rates, fees charges and service quality for power, gas, water, telephone, toll roads and railroads. Not the least reason was the great time and technical difficulty involved in determining the proper charges for a monopoly's electricity – accounting, engineering, finance, and marketing expertise are required just for electric utilities. Another, more practical, reason was that legislators wished to avoid having to repreatedly justify to their constituents their votes to raise the rates on one or another essential service.

Thus, for private, investor-owned utilities, ownership of the monopoly was separated from setting rates. A notable exception in the separation of utility ownership from regulation is found in public corporations like the CUC. Where the government or a cooperative owns a utility, the legislatures have typically allowed the boards of these bodies to act both as corporate stewards and as regulators. A "municipal" utility, therefore, almost always sets its own rates.[12]

CUC is a municipal utility. By statute its board of directors oversees corporate management (by an appointed executive director) AND sets rates, charges and fees. Thus, the CUC Board is the CNMI's public body that oversees rate increase requests. The Board has all the fiduciary responsibilities of any corporate board. In particular, the Board is responsible for the financial health of the utility, preserving the enterprise for the benefit of the owners.

A principal means to protect the health of the utility is to charge the proper rates for the services provided. If CUC staff proposes to recalculate the corporation's rates generally, the Board must follow procedures to protect the public. These include the public notice procedure of 4 CMC § 8142 and the detailed procedures of the Administrative Procedure Act. The Board's decision would describe in words the formula used for the technical calculation – the utility would propose to net its revenues and expenses against each other and compare the remainder to the product of multiplying an authorized rate of return against the amount of investment in the utility. It would do this for a "test year", either an historical or an estimated future period matching the likely next year/s of operation. The difference would be described as a proposed rate increase or decrease.

As a municipal utility, CUC would not have to hold a rate-related hearing as a formal "contested case", under the APA §§ 9109 -10. While a privately-owned utility seeking a government approval for a rate increase would have to subject its proposal to such an administrative agency trial, a municipal utility's staff need only present its proposal to the utility's public board of directors. For CUC, after Board review and approval, the rate increase (or decrease) would be lawful.

Typically the utility, even a municipal utility, passes through its rates to its customers the costs of "reasonable and prudent" recurring purchases of materials and supplies. Power, sent over transmission wires, might be one of these if a utility only buys power from other sources, as did many public power utilities in the Pacific Northwest and the Mid-South, who bought from the dam-owning Bonneville Power Authority and the dam- and nuclear-owning Tennessee Valley Authority, respectively.

Modern mainland utilities exchange power with each other all the time, with technically sophisticated control centers and long-term standard contracts for the sale and purchase of power. While many other Mainland utilities during the 20th Century were fully integrated, buying and producing virtually all of their own power, statutory and market changes in the last 25 years have given rise to a new type of power producer – the IPP. The Independent Power Producer may choose to build only one power plant in a utility's service territory, selling all of its power to the one customer, a private or municipally-owned retailer. The retail utility would, in turn, sell its power to its customers.

For instance, an IPP in Western Pennsylvania burns the contents of environmentally toxic waste coal piles and sells the electricity to the regional retail utility. In California IPP owners of million-dollar wind turbines pool their power output at key ridges of the Sierra mountains and sell the power to Pacific Gas and Electric and Southern California Edison, the regional electricity retailers. Here, in the CNMI, CUC proposes to out-source roughly 2/3 of its electricity production to an IPP that will burn oil. In each of these cases, regulatory law requires utility management to prudently contract for the independent power, in terms of cost and reliability. The same law then guarantees the utility a fair opportunity to cover the costs of its power through the rates its charges its customers.

c. CNMI's ratemaking statute

CUC's plenary powers are broad. It may do all things necessary to insure the continued operation of its utility services. It is empowered and/or required by the Legislature to:

- supervise the construction, maintenance operations, and regulation of utility services (4 CMC § 8122(a));
- meter, bill, and collect fees in a fair and rational manner from all consumers of utility services it has not privatized so that the corporation will be financially independent of all appropriations by the Commonwealth Legislature (4 CMC § 8122(b));
- have all of the powers conferred by law on a public corporation, and all powers reasonably incidental to its purpose, including the powers to regulate utility services to the extent permitted by applicable federal law and the contractual obligations of the Commonwealth government (4 CMC § 8123 (k));
- strengthen the existing system of metering, billing, and collecting fees for utility services (4 CMC § 8123 (l));
- review and establish utility rates and other fees (4 CMC § 8123 (m));
- take such action as it deems necessary and proper to operate the corporation, further its purposes, administer its services, and perform its duties (4 CMC § 8123 (o)); and
- adopt regulations to carry out CUC's purposes (4 CMC § 8157).

As the above analysis suggests, CUC enjoys extremely broad powers to make and administer its own rates. As a government-owned utility, its structure collapses the typical separated functions of enterprise and regulator into one body. CUC has both (1) the duty to charge sufficient rates to cover its costs and earn a reasonable return AND (2) the power to set those rates generally.

d. General rate increases and their procedures

Revenues which a utility collects under general rate levels, are not refundable. This is because no business could operate rationally if its income was constantly subject to potential refund. But neither can CUC collect rates prospectively for services provided in the past.

Such after-the-fact, or "retroactive" ratemaking, is unlawful, and the courts have long prohibited retroactive ratemaking. *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1070 n2 (D.C.Cir.1986).[13] *See* "The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings", by Stephan Krieger, 1991 U. Ill. L. Rev. 983.

e. CNMI law's prohibition of rate subsidies.

The CUC's organic act requires that the rates must reflect the cost of providing electricity, charge the marginal cost to large customers, and charge no less than the costs of production, maintenance and operation. 4 CMC § 8143(a) and (c). This was part of the deal with federal authorities to spin CUC off from the CNMI's Department of Public Works related to the Grant Pledge Agreement.[14]

f. Federal law, through Congress' approval of the Grant Pledge Agreement, and the requirement for businesslike management of CUC

CUC was organized in 1985 in direct response to the federal government's provision of capital funding to the CNMI of $228 million, including utility services.

The US and the representatives of the Governor of the Northern Mariana Islands, pursuant to the Covenant, agreed on seven years of CUC funding, totaling $228 million, which included, as consideration, the continuation of "an independent public agency to set rates and fees for public utilities as described in PL 4-47". Agreement of the Special Representatives on Future United States Financial Assistance for the Northern Mariana Islands, of July 10, 1985, section 4(e), ("Special Rep Agreement of July 10, 1985").[15]

The Agreement promoted the goals of maximizing capital development through the use of public and private financing techniques. (Special Rep Agreement of July 10, 1985, p. 1 Part I, para 1.) The US Government was to provide technical assistance for, *inter alia*, the development of a plan for the CNMI Government's transfer to the private sector of those functions that can be privately owned and operated. Id, p. 3, Part II. para 4.b). The CNMI Government was to, *inter alia*, "reduc[e] the overall size of government." Id., p. 3, Part II. para 4.d).[16] Further:

> i) The Government of the Northern Mariana Islands shall within one year after this agreement becomes effective, develop a comprehensive plan for the transfer to the private sector of selected functions currently operated by the Government of the Northern Marian Islands, and thereafter to the extent feasible, shall implement such transfers to the private sector.

Special Rep Agreement of July 10, 1985, p. 4, Part II. para 4.i).

The Special Rep. Agreement of July 10, 1985, provided for an amendment to the Covenant, a new section 705, which embodied the US' pledge to provide the $228 million, and which was to become effective on October 1, 1985. Special Rep Agreement of July 10, 1985, p. 6, Part V. Congress adopted the Special

Rep Agreement in PL 99-396, thereby adding seven years' funding to the funding provided in the Covenant (which Congress had adopted in PL 94-241). PL 99-396 § 10.

The Grant Pledge Agreement of July 1, 1986, between the CNMI and the USA-Department of Interior ("GPA 1986"), provided for the distribution to the CNMI of capital development bond proceeds under the Agreement. These included "a loan to the Commonwealth Utilities Corporation to finance acquisition and construction of facilities for generation and public distribution of electrical power", the Series 1 bonds, GPA p. 2, 3rd para, and loans to CUC "to finance acquisition and construction of the facilities for generation and distribution of electrical power, water production and distribution and sewer lines", the Series 2 bonds, *id.* 4th ¶. No funds were to be disbursed until DoI certified that the projects to be funded complied with the Special Rep. Agreement. GPA 1986 p.3, para 1-2. (*See*, generally, PL 99-591.)[17] In 1987 the parties entered into an additional Grant Pledge Agreement for $44 million on September 22, 1987. The Department of Interior urged that the new funding be consistent with:

1. Full responsibility for power services must be transferred to the CUC from DPW.
2. CUC executes an operations and management contract or further privatization, in accord with industry standards, assigning to a private management firm responsibility for all power service for up to three years.
3. CUC adopts a full cost recovery plan in consultation with DoI so that all rates recover fully the costs of service.

Letter of July 16, 1987, fr Richard T. Montoya, Asst Secy, Territorial and Inat'l Affairs, US Dept. of Interior to Gov. Pedro P. Tenorio, p 1.[18]

g. CUC Board responsibility to the corporation to charge proper rates

With respect to the use of debt or other long term payment arrangements for CUC's operations, the CUC Board of Directors must observe its fiduciary duty to require a business-like operation. Such a board would be violating its fiduciary duty to the corporation if: (a) it knowingly caused the corporation to violate the law; or (b) it arbitrarily prohibited long term supply contracts. *See Romisher v. MPLC*, 1 CR 841, 850 (Commw. Tr. Ct. 1983) (MPLC Board members, as public officials charged with land dispositions, owe a fiduciary duty to the people).

Broadly defined, a fiduciary relationship is one involving confidence, trust and good faith.[19] Courts "universally stress the high standard of fiduciary duty owed by directors and officers to their corporation".[20] Corporate directors who order tortious conduct can be held liable for conspiracy to violate their duties toward a person injured by the corporate tort.[21]

A power of the CUC is to contract to transfer to private ownership or control the construction, management, and operation of the water, sewer, and electrical power systems in a public manner that is both timely and fair to the government, its employees, and utility service consumers.[22]

The expenditure of public funds in a manner not in accordance with the law is also a breach of a public official's fiduciary duty.[23] A CUC board member can be found liable for wilful misapplication of any funds of the corporation.[24] Paraphrasing the Superior Court, quoted with approval in *Rayphand v. Tenorio*, a trust relationship exists between a CUC board member with the power to expend public CUC funds and each taxpayer is an owner of the public funds. CUC is a trustee of public funds and a taxpayer has standing to sue for a trustee's misapplication of those funds. Each CUC board member is the trustee of the public funds, and if s/he has breached his or her duties as trustee of the public funds for the people of

the Commonwealth, s/he would be liable for any loss or depreciation in value of the trust estate resulting from the breach of trust.[25]

There is no immunity for an official who was advised of the law and defied the law. "Qualified immunity is available to officials 'who err in their duties so long as the mistake is one that a 'reasonable' officer could have made.' . . . This standard benefits the official, "protecting 'all but the plainly incompetent or those who knowingly violate the law'".[26]

The Superior Court can remove a director of a private business corporation for fraudulent or dishonest conduct, or gross abuse of authority or discretion and when removal is in the corporation's interest.[27]

h. CUC's procurement regulations

The CUC has promulgated its own regulations, but the CNMI's procurement regulations govern CUC's activities. AG Opinion No. 03-13 (Oct. 8, 2003) (Brown) (Constitutional Authority and Duties of Article X, Section 8).[28] The CNMI's procurement regulations, promulgated by the Department of Finance's Division of Procurement and Supply[29], are to be used, *inter alia*, to provide for increased public confidence in procurement procedures, to treat would-be providers fairly and equitably, to maximize the purchasing value of public funds, to provide safeguards for quality and integrity.[30] CNMI procurement regulations apply to the CUC because the CUC organic act does not explicitly authorize CUC to conduct its own procurement.[31] A review of both sets of regulations will show that they are similar.

Procurement information shall be public except when necessary to insure proper bidding procedures.[32] The Executive Director, not the Board, is responsible for procurement.[33] The "official with expenditure authority" shall prepare contract documents.[34]

All CUC contracts shall be awarded by competitive sealed bidding, except as specifically provided in the Regulations.[35] The procedures provide for production of a Request for Proposal, publication, and receipt of sealed bids.[36] There is no provision for negotiations with a bidder in advance of the RFP.

Competitive sealed proposals are permitted when the official with expenditure authority certifies in writing and secures the approval of the Procurement & Supply Director.[37] The P&S Director shall determine in writing that appropriate qualified personnel are assigned to the conduct a technical evaluation of the proposals, following a described process and specified evaluation factors.[38]

Sole source procurement is allowed under CUC regulations if the Director determines in writing, with specificity, that there is a demonstrated benefit.[39] An opportunity for prequalification may be afforded to all suppliers, when the Director determines it necessary.[40] Procurements should also advance the CNMI's policy for local preferences.[41]

Administrative appeals go to the Director of CUC or to the Director of P&S, with review by the Public Auditor. (CNMI PR 6-101 - 04 and 6-201; CUC PR 5-101, 54-192, 5-103 - 04, 5-102)

The instant IPP procurement is the product of a competitive solicitation. *See*, *infra*, p page 12. The CUC team assigned to review bids, including the Corporation's specialist from the Harris Group, has evaluated the two finalists and will soon announce the award. (*See, e.g.,* Saipan Tribune, "Changes in power privatization bidding process urged" (Monday, July 25, 2005)(www.saipantribune.com)). Thereafter CUC negotiates with the finalist to execute a contract.

i. Background on public debt

"Debt" is money, goods or services owed by one person to another. Webster's Third New World International Dictionary (1961) p 583.

Governments incur two kinds of long term debt – full faith and credit, or guaranteed obligations ("GO"), and nonguaranteed, or revenue, debt ("RD") . Variations in State and Local Government Debt: Trends and Causes, by Rassel and Hao (2004), p 2. (http://www.cviog.uga.edu/projects/abfm /Rassel.Hao.state.local.debt.pdf). "Full faith and credit" means an unconditional commitment to pay interest and principal on debt, usually issued or guaranteed by the U.S. Treasury or another government entity. (Www.investorwords.com). For "full faith and credit", *Black's* refers the reader to the definition for general obligation bond, which it says is an interest-bearing debt instrument issued by a corporation or governmental entity. *Black's Law Dictionary* (8th ed. 2004).[42]

Traditional debt burdens focused on the full faith and credit of general purpose governments. (Rassel and Hao, p 3) Tax exempt debt, typically revenue debt rather than general obligation debt, for private purposes became a principal vehicle of state and local development policy in the 1980's. (Id. p 4) Typically these were revenue bonds. (Id.) Thirty-nine states have some form of constitutional debt limit, sometimes applying to local governments as well, and two others have a statutory debt limit. In the 1980's many states avoided these limits through public authorities which borrowed through revenue bonds. (Id. p 4-5) RD became 69% of government debt outstanding by 1990.

Nonguaranteed public debt can be divided into two categories. The first is issued by governments and government agencies to support purely public purposes. The second is to support principally private enterprise and is called private purpose debt. This latter category includes industrial revenue or development bonds, hospital bonds, pollution control bonds, and mortgage revenue bonds for housing programs. (Rassel and Hao p 5)

Alaska, for instance, reported $7.1 billion in public debt in 2002, in nine categories: state debt; state supported debt; state guaranteed debt; state moral obligation debt; state and university revenue debt; state agency debt; state agency collateralized or insured debt; municipal debt; industrial revenue bonds . (http://www.revenue.state.ak.us/treasury/debtbook/2002_public_debt_revised.pdf, p 1 of 66.) Its state guaranteed debt includes "double bareled" mortgage bonds – revenue bonds which carry an independent, but currently unnecessary, state guarantee of payment. (*Id.* p 3 of 66) The State Energy Authority has issued state moral obligation funds, secured in the first instance by the proceeds of the funded projects, and in the second by a capital reserve fund; all authorized by enabling legislation which states that replenishment of the capital reserve fund is explicitly NOT a general obligation or responsibility of the State. (Id, p 3 of 66) The Energy Authority obtained a voluntary legislative refinancing of $210 million "state agency debt", short term notes, when the lack of a power purchase agreement for the Four Dam Pool made revenue bonds unsaleable and there was no state responsibility to cover them. (*Id.* p 4 of 66)

Lease purchase financing involves the issuance of debt which is secured by the leased payments and the leased facilities. Lease purchase obligations may provide for the purchase of the leased facilities by the debtor at the end of the lease. Alternatively, one of the following factors may cause the debtor to be considered the owner of the leased property for federal tax, accounting or credit purposes from the outset of the lease: term; payments; purchase price option. There are federal tax consequences to this alternative. A lease purchase may take the form of revenue bonds or certificates of participation. Where the State is the lessee, if the lease payments are subject to annual appropriations, and therefore payable out of the general fund, the lease obligation will not be considered a State obligation for the purposes of

rating agencies' measuring the State's debt burden. (Source for paragraph: Alaska Treasury Datebook 2002, p 13 of 66)

j. CUC's statutory power to borrow money

By statute, CUC may borrow funds without advance legislative approval, unless it seeks to issue CDA tax-free bonds:

> Except as otherwise provided or limited in this chapter, or by other law, in order to carry out its duties, the corporation shall have all of the powers conferred by law on a public corporation, and all powers reasonably incidental to its purpose, including the powers:
>
> . . . .
>
> (b) To receive and hold funds from contractors, consumers, lessees, the government of the Commonwealth, and any other sources.
>
> . . . .
>
> (d) To acquire and hold any interest allowed by law in any real or personal property, tangible or intangible, in connection with the activities of the corporation, and to sell, mortgage, or otherwise dispose of such interest.
>
> (e) **To borrow money from any private or public source**, either within the Commonwealth or the United States or in any other country, and to give security in connection with such borrowing.
>
> (f) Upon prior approval by joint resolution of the legislature in conformity with the Commonwealth Development Authority Act, 4 CMC § 10101 et seq., as to each issue of bonds, to make and issue tax exempt bonds and other tax exempt obligations for sale to the general public.
>
> (g) Pursuant to public notice and bidding whenever possible, to make contracts and execute all instruments necessary or convenient to exercise the powers of the corporation.

4 CMC § 8123. (Emphasis added)

> (f) The board may finance the extension or improvement of utility services through tax exempt bonds or other tax exempt obligations issued by it in conjunction with the Commonwealth Development Authority."

4 CMC § 8141.

k. CUC's proposed IPP contract

CUC proposes to contract with an Independent Power Producer ("IPP") to refit or rebuild Power Plant #1 and #2 in Lower Base, run the facility for 20 years, and provide power to CUC under a take or pay arrangement. *Commonwealth Utilities Corporation Request for Proposals*, CUC-RFP-03-026 (2003) (Solicitation of competitive proposals from responsible companies to provide management, expansion, modernization, operation, and maintenance of CUC's Power Plants I & II), as amended (through Addendum 5) (end date of June 23, 2004). CUC would own the land on which the plant operated.

The utility is presently suffering a severe shortage of reliable capacity. Its service territory on Saipan is subject to rotating blackouts due to the failure or inadequacies of CUC's old generating equipment. (

Marianas Variety, "Rolling Blackouts for 25-30 days", by Gemma Q. Casas (www.mvariety.com);[43] Saipan Tribune, "More power outages to come", by Agnes Donato (July 26, 2005) (www.saipantribune.com))

CUC would be required to pay each year for the estimated output of the facility at 51 MW, whether it takes the power or not. This is a common practice in the utility industry, one which makes possible the financing of the independent facility because it creates a predictable fund, or source, from which investors can expect payment. In fact, because CUC has no reserves and the project would retire the existing nominal capacity of about 50 MW, CUC would indeed take all of the output of the plant. Without the plant's new capacity the CUC system on Saipan would face imminent, continuing, pervasive blackouts.

At the end of the contract period, 20 years, CUC would have the option to take ownership of the plant. In the meantime, CUC would provide the oil that the plant would burn to generate electricity, at CUC's lower, bulk rate, free from the CNMI tax on fuel oil[44]. In effect, CUC's annual payments to the IPP would consist of a fixed charge, the fee paid to have the plant available, and non-fuel operating expenses and overheads.[45]

2. Legal Analysis

Neither the "public debt" nor the "public indebtedness" Constitutional restrictions apply to the IPP contract. The CNMI Constitution provides that if the IPP contract is a public debt, it must be approved by 2/3 of the Legislature. Analysis of the Constitution's language and the case law on similar provisions in other jurisdictions demonstrates, however, that such a contract is NOT a public debt. Further, as "public indebtedness", the IPP contract does not violate a related limitation, of 10%-of-value-of-real-property, because it is specially excepted. Finally, because CUC is a public corporation, and neither the Government nor a "political subdivision" thereof, annual payments for the deal are not prohibited as operating expenses of government.

This Attorney General's legal analysis is binding on CNMI agencies and instrumentalities unless and until overturned by the courts. AG Opinion No. 86-16 (Castro). *See, e.g., People v. Penn,* 302 N.W.2d 298 (Mich. App. 1981). The Constitution and the Commonwealth Code provide that the Attorney General is the attorney for the Commonwealth government:

> ....The Attorney General shall be responsible for providing legal advice to the governor and executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law.[46]

The Code provides that the Attorney General is counsel to government agencies.[47] The Attorney General must review, and approve as to form and legal capacity, all contracts of the CNMI and its instrumentalities.[48] The Attorney General has a statutory and ethical responsibility to advise government clients to refrain from violating the law. The Attorney General can also bring statutory proceedings and common-law-writ-based proceedings to foreclose the pursuit of illegal activities.

The Courts are not bound by Attorney General Opinions, but tend to regard them as "highly persuasive". *United States v. Borja (Mayor of Tinian)*, 2003 MP 8 (2003), citing *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993). An opinion of the Attorney General should be treated as persuasive authority for the judiciary so far as it is properly and thoroughly researched. *Borja (Mayor of Tinian)* 2003 MP at ¶¶ 20-21.[49] *See, generally,* State Attorneys General: Powers and Responsibilities, Lynne M. Ross, editor (NAAG 1998).

Both statutory language and court decisions govern the CUC's contract with an IPP. The CNMI Supreme Court enunciates the governing common law. The Legislature has required the adoption of the common law as presented in the Restatements of the Law.[50]

a. CNMI's Constitution restricts the "Government" and "political subdivisions" from incurring "public debt" and "public indebtedness" without legislative approval and prohibits "public indebtedness" for operating expenses.

The CNMI Constitution requires "public debt" to be authorized by both legislative houses and prohibits the use of "public indebtedness" to cover the operating expenses of the CNMI or its "political subdivisions":

> Section 3: Public Debt Authorization. **Public debt may not be authorized or incurred without the affirmative vote of two-thirds of the members in each house of the legislature.**
> Section 4: Public Debt Limitation. **Public indebtedness other than** bonds or **other obligations of the government payable solely from the revenues derived from a public improvement or undertaking may not be authorized in excess of ten percent** of the aggregate assessed valuation of the real property within the Commonwealth. **Public indebtedness may not be authorized for operating expenses of the Commonwealth government or its political subdivisions.**

CNMI Const. art. X, §§ 3, 4. (Emphasis added) CUC is a CNMI Government instrumentality. Thus, the IPP transaction must be reviewed to determine if it falls within one of three categories, and, if so, whether it is in violation of a restriction for each. There are three inquiries. One examines "public debt". The other two examine "public indebtedness".

While some cases have determined that the word "debt," when appearing in a constitution, is to be taken in its ordinary, natural, common-sense, popular meaning, unless the context requires that it be treated as used in a technical sense, others have held that the meaning of the term "debt" or "indebtedness" in a statute or constitution generally must be determined by construction, looking to the whole context of the particular document. *See* 56 Am. Jur. 2d Municipal Corporations, Etc. § 551. Almost all cases address municipal corporations, which have fewer powers than State governments. Many of the cases involve public utility services.

Unless absolutely required, the words "debt" or "liability" in debt limitation provisions should not be so interpreted as to "paralyze" the legal functioning of municipal corporations which have reached or exceeded their existing debt limits. *E.g. Moores v. Springfield*, 64 A.2d 569, 577 (Me. 1949).[51] The effect of such an interpretation could be "disastrous":

> A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting water works upon the faith of the city paying its annual rentals.

City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19-20; 19 Sup. Ct. 77 (1898).

The analysis of this Opinion places the terms "public debt" and "indebtedness" in the context of the CNMI Constitution, the nature of CUC as a public corporation, and the type of contract, for an independent power supply to benefit CNMI citizens.

b. The IPP contact is not a "public debt."

There are three reasons why a CUC contract for independent power is not a "public debt" under article X.

i. Reason 1 - CUC is not a "political subdivision" or "the Commonwealth Government" itself.

Article X, §§ 3 and 4 control the acts of the CNMI Government. But CUC is not the Government. CUC is a public corporation, an Executive Branch "instrumentality" of the Commonwealth Government. *See Marianas Visitors Bureau* v. Commonwealth of the Northern Mariana Islands, Civil Action No. 94-0516 (Super. Ct. 1994) ("MVB") (Non-corporate public body meeting five-point test is "quasi-corporation", a CNMI instrumentality under CNMI Constitution), *citing Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132 (7th Cir. 1992). The Government's Executive Branch includes government corporations, agencies and other instrumentalities. C.N.M.I. Const. art. III, § 15 [52] The Planning and Budget Act of 1983 describes organizations like CUC as "public corporations", because created by a specific Commonwealth law. 1 CMC § 7103(n). *See MVB*, p 13. *See also, Imamura v. Marianas Public Land Corp.*, Civ. No. 94-0696 (MPLC is government entity because meets five-point test: no private ownership, Government controls through appointment of board members and scope of land transfer, Government controls structure, controls finances, and sole function is to dispose of public lands).

CUC is not, either, a "political subdivision". A political subdivision of a state is a division of a state that exists primarily to discharge some function of local government. *Black's Law Dictionary* (8th ed. 2004), *citing* Municipal Corporations 54. C.J.S. Municipal Corporations §§ 56, 110, 155. A government corporation may have an identity so separate and distinct from the Government that it can sue the Government for infringing its rights. *MVB* p 18, *citing Note, Municipal Corporation Standing to Sue the State: Rogers v. Brockette*, 93 Harv. L. Rev. 586, 591 (1980). A public service corporation is properly considered to be part of the Executive Branch of government. *MVB*, citing *Advisory Opinion to the Governor*, 223 So. 2d 35, 40 (Fla. 1969) (Public service commission, a regulatory body, is within the legislative and judicial branches).[53] *See also* Treas. Reg. § 1.103-1(b) (1972) ("political subdivision" "denotes any division of any State or local government which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.).

Thus, CUC is not a governmental body of the type which the Constitution seeks to limit. It is more like the private corporations that the Government regulates. However, even assuming, *arguendo*, that CUC is "the Commonwealth Government" for the purposes of determining "public debt", there are two other reasons why the Constitutional restrictions do not apply.

ii. Reason 2 - A long term contract for IPP service, payable annually, is not a "public debt".

The CUC's debts and other obligations are not "public debt" in the Constitutional sense. And the Legislature recognized this when it established CUC as a public corporation and empowered it to act like a business. This removes CUC's agreements from article X § 3's restrictions.

The Law Revision Commission addressed the definition of a "public debt" in its annotation to the Constitution:

> According to the *Analysis* [*of the Constitution of the Commonwealth of the Northern Mariana Islands* (Dec. 6, 1976)]:

> Public debt means obligations of the Commonwealth government that are fixed, such as bonds, notes, debentures, or other forms of debt. It does not include obligations that involve a substantial contingency, such as loan guarantees where there is a reasonable expectation that the loan will be repaid by the borrower and guarantee by the Commonwealth will not require the expenditure of public funds.
>
> . . . .
>
> . . . **[T]he legislature may create special authorities to run certain utilities** or enterprises. These authorities may be empowered by the legislature to obtain financing through debt instruments. Under the restrictions contained in [article X,] section 3, this general authorization must be made by the affirmative vote of two-thirds of the members of each house of the legislature. **Once the legislature gives to an agency or authority the power to incur debt, that power may be exercised administratively without the approval by two-thirds vote of the legislature.**
>
> *Id.* at 139-41.

Commw. Law Rev. Com'n, Constitution of the Commonwealth of the Northern Mariana Islands, annotated, 1st ed. (June 1995), p 88. (Emphasis added).[1,54] Thus, according to the framers, once CUC received its 4 CMC § 1823(e) authorization to incur debt, it was free of the § 3 restrictions.[55] CUC's debt was not to be "public debt".

The *Analysis*' definition of "public debt" is not the clearest. It is self-referential – defining "public debt" by using the word "debt", specifically "other forms of debt" which are "fixed". The *Analysis*' terms suggest, however, that an obligation which is not fixed is not "public debt". It suggests that long-term promises to pay borrowed money back in fixed amounts are the types of "public debt" being restricted.

The cases are helpful. They support the view that the operating agreements of a public corporation are not such "public debt":

- It has long been held that a contract for providing a municipality with utility service over a period of years is not a public debt for the purposes of state constitutional debt restrictions. The U.S. Supreme Court held:

  > But we think the weight of authority, as well as of reason, favors the more liberal construction, that a municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness in not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed.
  > . . .

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[1]The Analysis must be cited with care. It is clarification, approved by the Constitutional Convention, not authority. *See* endnote 54 for the LRC's discussion.

City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19-20; 19 Sup. Ct. 77 (1898).

- In a "leading case"[56], the California Supreme Court held that the publicly-owned Los Angeles municipal utility's long term contract with a private business to build and operate a waste-burning incinerator is not a public debt. *City of Los Angeles v. Offner*, 122 P.2d 14(1942).[57] The LA deal was similar in many respects to the instant CUC-IPP arrangement: The City's rubbish incinerator was inadequate and failing. The City was to lease land on which a successful bidder would build a rubbish incinerator, which it would lease back to the City for an annual fee. The City had an option to buy the facility before the land lease terminated. The California Supreme Court held that the obligation rested on consideration provided annually, and that each year's payment was for the consideration actually furnished that year. In fact, held the Court, the deal was a lease and not a disguised purchase.[58] The instant CUC-IPP arrangement parallels that of the Los Angeles utility – procuring a private entity to build and run a facility for a period of years, with a potential reverter to the publicly-owned utility.

- The provisions of a contract between a county and a private corporation engaged in the waste disposal business, authorizing the corporation to impose future charges against the county if the county adopted ordinances increasing the corporation's costs of operation, and imposing cost on the county if an owner of certain hazardous waste delivered for disposal could not be identified, did not constitute "debt" within the meaning of a state constitutional provision generally barring counties from contracting debt, as the county's obligation to pay additional costs did not arise, if ever, until services had been rendered by the corporation. *Concerned Residents of Gloucester County v.Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County*, 449 S.E.2d 787 (Va.1994).

  The facts parallel the CUC-IPP arrangement. Gloucester County's landfill was no longer serviceable and the County could not afford to build a new one. So it put out an RFP for the bidder to lease County land, build a facility, pay rent, charge for waste disposal services annually, and manage closure of the facility. The Virginia legislature had provided counties with broad power to contract for waste management services, but specifically prohibited using their full faith and credit to support the contracts. Neither of the following contract provisions constituted "debt": the County would pay the remaining value of the facility upon the county's unilateral termination; prices would increase if services expanded. See also, *Fairfax County v. County Executive,* 210 Va. 680, 683, 173 S.E.2d 869, 871 (1970) (Massey II) (Well recognized service contract doctrine provides that transit system agreement with private firm is not a debt because based on service being rendered.)

- A lease purchase agreement for computers did not constitute creation of public debt within the State's constitutional prohibition. *Business Computer Rentals v. State Treasurer*, 953 P.2d 13 (Nevada 1998).[59] The Court found it important that the contract contained both a legislative "nonappropriation" clause and a reversion-for-nonpayment clause. *See also, Kane v. Goldschmidt*, 308 Or. 573, 783 P.2d 988 (1989) (Computer purchase and financing contract does not violate state constitutional restriction on public debt). The instant case is similar, as the contract will not look past the CUC's own revenues for payment.

- The "rule of reconciliation" holds that an obligation for ongoing services, paid out of current revenues is not restricted "public debt." *Moores v. Springfield*, 64 A.2d 569, 577 (Me. 1949). *Also*, AG Op. 86-01 (CNMI Government's overdrafts are not per se restricted "public debt".)[60] Similarly, the IPP contract will require continued performance of the IPP as a precondition to payment for power services.

These cases demonstrate that courts apply one of three theories to except an agreement from the restricted public debt classification – current expense, continuing contract, contingent liability. According to one commentator, under any of the three theories, which collectively constitute the overwhelming

majority view, the question whether a lease is subject to debt limitations may turn on whether termination of the lease prior to the expiration of its stated term would result in a forfeiture for the municipality in excess of the unpaid balance on the lease.[61] There is no suggestion here of such a obligation.

The IPP agreement presents no promise of the full faith and credit, or other backing, of the CNMI Government. By contrast, when the Guam Telephone Authority, a government-owned utility, sought to issue revenue bonds, payable out of its own special fund, the bonds would have been excepted from "public debt" – if the Government of Guam had not guaranteed to make up any deficiency. But the Government's guarantee made the bonds "public debt" even though the liability was contingent. As the bonds were guaranteed by the Government of Guam, the Court was presented with the issue of whether such a contingent liability created an indebtedness. *Guam Tel. Authority v. Rivera*,416 F.Supp. 283 (D.C.Guam 1976). *See*, *Chem. Bank v. Wash. Pub. Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) (Municipal utilities' agreement to honor billions of dollars of defaulted revenue bonds issued to construct large nuclear plants, without regard to actual production of power, with no ownership interest in the plants, and with little effective control over construction, and with a scope far beyond that contemplated for their service territories, was in excess of their statutory powers to contract for electricity).[62]

In sum, CUC's contract for IPP service falls well within the exceptions to "public debt" seen in the cases. The contract does not give rise to "public debt". But, assuming *arguendo* that CUC were the Government and the IPP contract were a "public debt", there is still a third reason that article X § 3 does not prohibit the deal.

iii. Reason 3 - The Legislature specifically authorized CUC to incur debt.

The Legislature's explicit authorization of a public debt satisfies the Constitution. The Legislature in 1985 explicitly authorized CUC to incur debt and implicitly authorized it to do all other things a corporation might do that could incur debt:

> Except as otherwise provided or limited in this chapter, or by other law, in order to carry out its duties, the corporation shall have all of the powers conferred by law on a public corporation, and all powers reasonably incidental to its purpose, including the powers:
>
> . . . .
>
> (d) To acquire and hold any interest allowed by law in any real or personal property, tangible or intangible, in connection with the activities of the corporation, and to sell, mortgage, or otherwise dispose of such interest.
>
> (e) **To borrow money from any private or public source**, either within the Commonwealth or the United States or in any other country, and to give security in connection with such borrowing.
>
> (f) Upon prior approval by joint resolution of the legislature in conformity with the Commonwealth Development Authority Act, 4 CMC § 10101 et seq., as to each issue of bonds, to make and issue tax exempt bonds and other tax exempt obligations for sale to the general public.
>
> (g) Pursuant to public notice and bidding whenever possible, to make contracts and execute all instruments necessary or convenient to exercise the powers of the corporation.

4 CMC § 8123. (Emphasis added)[63]

Indeed, the Legislature reserved to itself future approval of only one form of CUC indebtedness, CDA tax-free bonds:

> (f) The board may finance the extension or improvement of utility services through tax exempt bonds or other tax exempt obligations issued by it in conjunction with the Commonwealth Development Authority."

4 CMC § 8141.[64] *See also* AG Opinion 04-08 (USDA Loan Application from the Board of Regents of the Northern Marianas College) (Brown) (USDA loan not a public debt because does not require full faith and credit commitment of CNMI Government and College is public corporation with statutory power to borrow).

By expressing this one mandate, while omitting others, the Legislature will be held to have authorized the CUC to incur other forms of debt. The principal of statutory construction "*expressio unius est inclusio alterius*" provides that the Legislature, by expressing only this one requirement for Legislative approval, excluded application of legislative review of other contracts. *Marianas Visitors Bureau* v. Commonwealth of the Northern Mariana Islands, Civil Action No. 94-0516 (Super. Ct. 1994) ("MVB").[65] Thus, the Legislature, has interpreted the Constitution to exclude CUC contracts from "public debt" and the "public indebtedness" restriction.

Also, weight is added to the legislative grant of power by the vote creating the CUC. The Legislature passed the CUC act, and the specific authorizations to incur debt, with more than a 2/3 vote of each house.[66] While it is beyond the scope of this Opinion to determine whether one session of the Legislature can bind future sessions as to specific acts, as in approving individual "public debt" issuances, it is telling that the Constitutionally-required super-majority authorized this public corporation, CUC, to incur debt in the ordinary course of its affairs.

Further, to the extent the IPP contract is considered a public debt (and it is not a public debt), arguably the Legislature's annual review of the CUC budget, provided in the CUC statute, and the line item therein for power purchases from each independent power producer, resolves the "public debt" issue. Indeed, the Legislature has, for years, reviewed CUC budgets that included payments to two IPP's – the IPP running Power Plant No. 4, in Puerto Rico, and the IPP running the Tinian power plant.

Thus, there is no issue as to CUC's IPP contract giving rise to a "public debt". The contract does not.

c. Any "public indebtedness" does not violate the 10% limitation of Constitution art. X § 4 because it comes from excepted project revenues.

The Constitution also uses the term "public indebtedness". Whether or not that term is different, and broader, than "public debt", the limitation of article X § 4 – the 10% of the aggregate assessed value of real property – does not apply to the IPP contract because this Constitutional provision contains an express exception to the limitation. The exception is "other than bonds or other obligations of the government payable solely from the revenues derived from a public improvement or undertaking".

The IPP is a public undertaking for public purposes and the revenues will derive solely from the IPP's services. The IPP facility will generate power for CUC's customers and, therefore, revenues solely through the CUC electric rates. Indeed, it is a self-funding public undertaking because CUC has a right to charge rates, and **must** charge rates, sufficient to recover the annual costs for the purchased power under the CUC statute and the Constitutional principles of ratemaking discussed *supra*.[67]

d. Any "public indebtedness" does not violate Constitution art. X § 4 because it does not fund the operating expenses of the "Commonwealth government" or its "political subdivisions".

The last Constitutional restriction prohibits securing debt for the operating expenses of the government. As discussed *supra*, CUC is neither the Government nor a "political subdivision". It is an "instrumentality" of the Commonwealth Government, a public corporation. *See Marianas Visitors Bureau, supra.* Thus, the "operating expenses" prohibition of article X § 4 does not apply to it.

Further, if the CUC were held to be subject to the Constitution's "public indebtedness" restriction, § 4 would "paralyze" CUC's ability to provide utility service. *See Moores v. Springfield*, 64 A.2d 569, 577 (Me. 1949)(Holding that an obligation for ongoing services, paid out of current revenues, violates the prohibition against further public debt would lead to an absurd result and "paralyze" government). The section prohibits using public debt to fund "operating expenses". But power purchasing, like fuel oil purchasing is an operating expense of the utility – a principal operating expense. Another principal operating expense is purchasing the chemicals and power for water supply and sewage treatment.

There would be a "Catch 22" with application of the Constitutional restriction, in that CUC cannot collect revenues unless it first supplies the services on which the revenue is based.[68] CUC's purchase of power, and of the fuel to produce it, is CUC's **principal** expense, costing millions of dollars per month. CUC's fuel bill alone is estimated at $60 million per year.[69] If that expense were prohibited until CUC had amassed advance payment for its power service, CUC's power division would produce nothing. The CNMI would be faced with a public emergency, as its power, water and sewage treatment shut down. Section 4, if read to apply to CUC, would also halt the daily purchase of all CUC goods and services for which agreements are made to provide payment at a date or time after receipt of each good or service. Because paying bills after the good or service is received is a normal business practice, this prohibition would affect virtually all CUC activities.

In sum, CUC's long-term contract to secure supplies of power is neither a "public debt" nor "public indebtedness.

3. Related issue: There is virtually no litigation potential over the "public debt" issue.

The right of CNMI taxpayers to sue is often a consideration in governmental decision-making. There is always a potential for litigation when utility expenditures are made or rates are increased. Typically some business and some residential consumer interests disagree with proposed rate increases or charges. In the CNMI, with our taxpayer litigation rights and related attorney fees awards, the likelihood of such litigation is enhanced.

A taxpayer suit will lie against the CUC, as a government "instrumentality" in order "to enjoin expenditures of public funds for other than public purposes or for a breach of fiduciary duty."[70] The court shall award costs and attorney fees.[71] A taxpayer may be entitled to declaratory and injunctive relief.[72] A taxpayer may also sue for damages – the recovery of the putatively misspent public funds.[73]

There are two reasons why a taxpayer suit is unlikely, or unlikely to prevail, with respect to the CUC-IPP contract. First, as discussed *supra*, the contract is not a "public debt". This conclusion is fully supported by decisions of the U.S. Supreme Court and the courts of the states, decisions which involved utility services and agreements very like the IPP contract.

Second, there is likely no standing for such a suit. Of course, any person aggrieved by an act or omission of the CUC may obtain judicial review and the "substantially prevailing" party can recover costs and

attorney fees.[74] However, a standing provision like this one has been narrowly construed by a respected court. *Energy Ass'n of New York State v. Public Service Com'n*, 273 App.Div.2d 708, 710 N.Y.S.2d 662 (N.Y. Sup. 2000) (Neither residential electric customer nor association had standing to challenge the NY Public Service Commission's (PSC) plan for competition in the electric industry under statute permitting citizen taxpayer actions challenging the wrongful expenditure of public funds; claims that PSC unlawfully expended State funds through orders restructuring the electric industry and its application of the Home Energy Fair Practices Act did not have sufficient nexus to fiscal activities of the State to permit statutory standing.) There is, in the IPP contract, insufficient "fiscal nexus" to the activities of the CNMI to support a taxpayer suit.

4. Policy issue - It is a prudent business practice for a utility corporation to use debt.

As a matter of policy, and from the customers' perspective, the utility should run as an efficient business, repairing and replacing plant as necessary, and without significant delay. Businesses frequently find it is cheaper to pay contractors for a result than to manage the details themselves. CUC, as a business, should have the opportunity to out-source – to replace antiquated, failing plant with the "black box" of an independent power producer's electricity output.

Therefore, classifying the IPP contract as public debt would be bad public policy – bad for CUC, bad for customers, and bad for CNMI's economy and public health. *See, Moores v. Springfield*, 64 A.2d 569, 577 (Me. 1949) (Holding that an obligation for ongoing services, paid out of current revenues, violates the prohibition against further public debt would lead to an absurd result and "paralyze" government), cited in AG Opinion 86-07 (6/9/86) (Whether Government's overdraft position is a "public debt").[75]

The alternative would, apparently, be to replace all inoperative plant by paying cash in advance. This would be unworkable, for two reasons.

First, CNMI's procurement regulations require receipt of the completed project or service before paying a contractor in full. A full prepayment would be unlawful.

Second, this would require substantial rate increases merely to create a very, very large savings account. The cash payments could require the utility to amass almost $100 million out of current rates in order to have the required cash on hand in advance of this and other replacements.[76] More importantly, the utility would have to find over $50 million cash NOW to replace its broken generating units at Power Plant 1. This is not possible.

Perhaps a utility can survive without debt if it charges its customers extra and keeps its earnings in the bank. But, the prudent course of action for a utility business is typically to fund long-term capital investments like power plants through long term borrowings. The customers of the utility then pay back principal and interest as they consume the power from the funded power unit. The alternative, a big cash cushion for the use of the utility's managers, would look like an overcharge to utility customers. And it is an overcharge that would have to remain in place forever, to meet the utility's continuing need to repair and replace plant.

Conclusion

For the reasons stated supra, my opinion is that the proposed IPP contract for the Commonwealth Utilities Corporation is neither a "public debt" nor a "public indebtedness" within the meaning of the CNMI Constitution, article X, §§ 3 and 4.

ENDNOTES

1.1 CMC § 8111 et seq.

2.Executive Order 94-3, § 304(b).

3.CUC's 1993 rate regulation set three rates: residential 12.49 cents/kwh; commercial, 18.17 cents/kwh; government 18.17 cents/kwh (Comm. Reg. Vol. 14, No. 07, p 9381 (7/15/92) (proposed), except that the final adoption raised the government rate to 20.0 cents/kwh (Comm. Reg. Vol. 15, No. 02, p 10490 (2/15/93). CUC amended the rates in 1999, promulgating a regulation which set two rates: residential, 11 cents/kwh; commercial/government 16.0 cents/kwh. (Comm. Reg. Vol. 21, No. 01, p 16451 (1/18/99) (proposed), and Comm. Reg. Vol. 21, No. 08, p 16904 (8/23/99) (adopted).

4.Deloite Touche Tohmatsu, CPA's, calculated the $0.05493 fuel component of the base rate, based on 1993 sales and fuel consumption for Q1 of 1993. Source: Memo fr Exec. Director and Comptroller, CUC, to Bd of Directors, of Aug. 17, 2004, "Request to Board of Directors for Fuel Surcharge Fee", p. 3. [on file]

5.For a discussion of the elements of CUC's rates see "Final Report: Feasibility Study: Privatization of Various Utilities of the Commonwealth of the Northern Mariana Islands", by CH2MHill, Winzler & Kelly, Southern Energy, MacMeekin & Woodworth (June 1997), App. K, "Cost of Service Study: Saipan's Electric System".

6.See, e.g., CUC's most recent annual financial report, most recent cash flow statement (6/27/05) and its sole fuel oil contract with Mobil Oil Co., #CUC-PG-05-0013. [all on file]

7.CUC's Comptroller describes a "financial crisis" and has projected negative cash flow by the beginning of Year 2005 into the indefinite future, **without** increasing the rates for the fuel surcharge. Source: Memo fr Exec. Director and Comptroller, CUC, to Bd of Directors, of Aug. 17, 2004, "Request to Board of Directors for Fuel Surcharge Fee", p. 1.

CUC's oil price per gallon never rose above 88 cents/gal for the years 2001-02, then increased for 4 months in 2003 to almost $1.00/gal, to drop to 78 cents/gal in June, then finish 2003 at about 92 cents/gal, then climb in 2004 to a high of $1.17 in September, dropping to about $1.12 in December. Source: Chart I, Production Fuel, Average Monthly Purchase Price Per Gallon, January 2001 to December 2004 (author, Ed Williams, CUC Comptroller's Office).

8.Memo Fr CUC Comptroller, Thru: Executive Director, CUC, to CUC Board of Directors, re: Financial Crisis Situation at CUC, dated Tuesday Jan 25, 2005. (2 pp):

> I am writing you this letter to inform you of the serious financial situation that is facing CUC today. We face a situation that, if it is not addressed immediately, could lead to power shedding and ultimately to island wide black outs in Saipan, Tinian and Rota within the next few months.
>
> With these black outs will also come the disruption of our water and sewer services. The ripple effect of our power shut down will cause wide spread negative economic impact on all aspects of our lives; it will be felt by our businesses, health care systems, education systems, tourism industry, etc.
>
> By the end of this week we will have to deal with the fact that CUC can not meet the $2 Million advance payment requested by Mobil on January 28 to stay within our credit limit of $10 Million.

This may jeopardize the fuel delivery in February.

Three weeks from today our Cash Flow projection shows that we will have a shortfall of $1.1. Million. This is the day on which we are to pay Mobil for December's fuel. Failure to make this payment could possibly delay further deliveries until a credible payment plan can be established.

Our projections for cash flow without a fuel surcharge show CUC going further into debt. (See Attached) We must also realize that forecasting revenue may be unrealistic if we are forced into load shedding. If we are not supplying 24-hour power, our revenues will drop dramatically.

One suggestion to address our crisis has been to float a bond. However, while we may wish to pursue this in addition to a fuel surcharge, we must realize that it will take a minimum of 4 to 6 months at best to float a bond and we may have to seek the assistance of the Legislature and Governor if the bond underwriters will require a Full Faith and Credit from CNMI Government, which could even further lengthen the time until any funds became available.

At the present moment, because of the cost of fuel, the cost of production of Electricity exceeds the revenues generated by its sale. This cannot be allowed to continue. The actual costs of fuel must be recovered and the fuel surcharge is the most direct and rational approach to this problem.

I urge the Board to adopt the proposed emergency regulations today so that we may begin to address our revenue shortage immediately.

Thank you for your attention and assistance.

/s

Sohale Samari

CUC Comptroller

9.Source: Memo fr Exec. Director and Comptroller, CUC, to Bd of Directors, of Aug. 17, 2004, "Request to Board of Directors for Fuel Surcharge Fee", p. 2.

10.By convention the "w" in Watt is capitalized, in honor of James Watt, the inventor of the steam engine which is the forerunner of modern electricity generators.

11.See infra, endnote 15.

12.This summary of the principles and procedures of utility ratemaking is but a very short summary of the content of a law school course on the subject or the "crash courses" found at such institutions as Michigan State University's Institute for Public Utilities (called "Camp NARUC" for the training given many of the commissioners and staffs who are members of the National Association of Regulatory Utility Commissioners). See, www.naruc.org; http://www.ipu.msu.edu. The principal author of this Opinion, Alan J. Barak, practiced public utility law for 25 years and taught electric utility and energy litigation at Widener University School of Law.)

13.CUC may not collect revenues until and unless the relevant rate/tariff has been filed with, and approved by, its Board, which is the relevant regulatory "commission":

> The "filed rate" doctrine "forbids a regulated entity to charge rates for its service other than those properly filed with the appropriate federal regulatory authority." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981); see Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951). Derived from the filed rate doctrine is the rule against retroactive ratemaking. The latter rule "bars ... the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." City of Piqua v. FERC, 610 F.2d 950, 954 (D.C.Cir.1979); see Arkansas Louisiana Gas Co., 453 U.S. at 578, 101 S.Ct. at 2930. "It is, of course, a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." Nader v. FCC, 520 F.2d 182, 202 (D.C.Cir.1975). We have previously held that the rule against retroactive ratemaking prevents utilities from collecting revenues to compensate for underrecoveries under a fixed-rate fuel clause. Public Serv. Co. of New Hampshire v. FERC, 600 F.2d 944, 956-61 (D.C.Cir.), cert. denied, 444 U.S. 990, 100 S.Ct. 520, 62 L.Ed.2d 419 (1979).

Southern California Edison Co. v. FERC, 805 F.2d 1068, 1070 n2 (D.C.Cir.1986).

The filed rate doctrine's principles apply to the instant matter, even though no regulatory commission oversees CUC. As a municipal utility CUC is self-regulating. So there is no regulatory body with which to "file" a rate schedule. Rather, in the instant case the "regulatory commission" review required in advance of a rate increase or decrease is the set of procedures that CNMI law requires of CUC – publication twice in the Commonwealth Register (per the APA) and public hearings (per CUC's enabling statute, 4 CMC § 1842). Until and unless CUC has followed these procedures, it cannot apply new rates. And, once approved, it cannot reach back and retroactively charge the customers.

14.See endnote 15.

15.The paragraph stated, in full:

> e) The Government of the Northern Mariana Islands shall ensure continuation of an independent public agency that sets rates and fees for public utilities as described in Northern Marian Islands Public Law 4-47. **These services shall be fully funded**, including both current expenses and long-term debt, **without government subsidy through such user rates and fees by the end of the third year after this agreement is effective.**

Special Rep Agreement of July 10, 1985, p. 3, Part II. para 4.e) (Emphasis added). The Special Rep Agreement, by its terms, was to be effective October 1, 1985, through adding section 705 to the Covenant. Special Rep Agreement of July 10, 1985, p. 6, Part V. The CUC statute in fact explicitly provides that the public corporation shall be without subsidy within three years:

> (b) The corporation shall, within 90 days of confirmation of all board members, implement a plan by which it or its designee will establish rates, meter, bill, and collect fees in a fair and rational manner from all consumers of utility services it has not privatized so that the corporation **will be financially independent** of all appropriations by the Commonwealth Legislature **by the end of three complete fiscal years from October 1, 1985.**

4 CMC § 8122(b). (Emphasis added)

16.The CUC statute provided that "If a [CUC] service has been turned over to the private sector, such as telephone service, the corporation shall be reduced in size accordingly. . . ." 4 CMC § 8121(d).

17.The Department of the Interior was given the authority to initiate the process to stop the funding:

> That Northern Mariana Islands Covenant grant funding shall be provided according to those terms of the Agreement of the Special Representatives on Future United States Financial Assistance for the Northern Mariana Islands approved by Public Law 99-396, **except that should the Secretary of the Interior believe that the performance standards of such agreement are not being met, operations funds may be withheld,** but only by Act of Congress as required by Public Law 99-396.

PL 99-591, p. 211.

18.The US Department of Interior followed up with 1992 and 1993 reports of an Operations and Maintenance Improvement Program Team which recommended a number of measures directed to enhance the Corporation's ability "to economically, adequately, and efficiently meet its prescribed goals and objectives [including] the delivery of water, power, and sewer services to the people of the Commonwealth." "Purpose" [of the CUC Effective Corporate Management Act of 1996, PL 10-27, quoted at 4 CMC § 8133], Commission Comment.

19.Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986).

20.Klinicki v. Lundgren, 695 P.2d 912 (Ore. 1985).

21.See Doctors' Co. v. Superior Court, 775 P.2d 508, 513 (Cal. 1989) (Principal, the insurer, not its agents can be held liable for conspiracy in violating statutory duty.)

22.4 CMC § 8123(i).

23.Rayphand v. Tenorio, 2003 MP 12 (2003).

24.4 CMC § 8154.

25.(Citing Restatement (Second) of Trusts §205(a) (1959)). Rayphand v. Tenorio, 2003 MP 12 (2003), p. 17 ¶ 36.

26.Rayphand, 2003 MP 12, p. 30 ¶ 65 (citations omitted).

27.4 CMC § 4449.

28.The Opinion held, inter alia, that the Department of Finance's authority to "control and regulate the expenditure of public funds", per CNMI Const. art X § 8, extends to all agencies and instrumentalities of the CNMI, including public corporations. AG Opinion 03-13 (Oct. 8, 2003), p. 2.

29.2001 Com. Reg. Vol. 23 No. 05 and 2000 Com. Reg. Vol. 22, No. 08.

30.CNMI PR 1-101 (Purposes).

31.CNMI PR 1-105; 4 CMC § 8123(g), (i), (o). When read with AG Opinion 03-13 the PR 1-105 exception for a public corporation "which has been authorized to conduct its own procurement by enabling statute or other law" does not free CUC from CNMI procurement regulations because CUC is not so authorized.

32.CUC PR 1-301 (Public access); CNMI PR 1-301 (Public access).

33.CUC PR 2-101 (Responsibility).

34.CNMI PR 2-104.

35.CUC PR 3-101; CNMI PR 3-101.

36.CUC PR 3-102; CNMI PR 3-102 (Competitive sealed bidding).

37.CNMI PR 3-103.

38.CNMI PR 3-103(d).

39.CUC PR 3-104; CNMI PR 3-106 (Sole source).

40.CUC PR 3-302 (Prequalification)

41.CNMI PR 7-101 - 07 (Preferences).

42.Black's says that a general obligation bond is "A long-term, interest-bearing debt instrument issued by a corporation or governmental entity, usu. to provide for a particular financial need; esp., such an instrument in which the debt is secured by a lien on the issuer's property. Cf. DEBENTURE." It further quotes a practice aid:

> "Typically debt securities are notes, debentures, and bonds. Technically a 'debenture' is an unsecured corporate obligation while a 'bond' is secured by a lien or mortgage on corporate property. However, the word 'bond' is often used indiscriminately to cover both bonds and debentures .... A 'bond' is a long term debt security while a 'note' is usually a shorter term obligation. Bonds are historically bearer instruments, negotiable by delivery, issued in multiples of $1,000 with interest payments represented by coupons that are periodically clipped and submitted for payment." Robert W. Hamilton, The Law of Corporations in a Nutshell 128 (3d ed. 1991).

Black's Law Dictionary (8th ed. 2004). "General debt", according to Black's is "A governmental body's debt that is legally payable from general revenues and is backed by the full faith and credit of the governmental body. [Cases: Municipal Corporations 894. C.J.S. Municipal Corporations §§ 1634, 1934.]"

A "funded debt" according to Black's is: "1. A state or municipal debt to be paid out of an accumulation of money or by future taxation. [Cases: Municipal Corporations 951. C.J.S. Municipal Corporations §§ 1704-1705.] 2. Secured long-term corporate debt meant to replace short-term, floating, or unsecured debt."

43.The current blackouts are due to a lack of parts from failed engines, according to the Marianas Variety story:

> BLACKOUTS at intervals of two hours affecting different villages on Saipan will continue for the next 25 to 30 days, according to Commonwealth Utilities Corp. Executive Director

> Lorraine Babauta.
>
> She said CUC is still waiting for the arrival of the parts for power plant 1's damaged engines.
>
> "There will be rolling outages for 25 to 30 days," said Babauta.
>
> She urged the public to bear with CUC as it tries to fix power plant engines 8 and 4, which have a combined capacity of 19.5 megawatts.
>
> Engine no. 8 has been down for weeks now and needs a new bolt.
>
> Engine no. 4 broke down on Monday due to a mechanical problem.
>
> Saipan is now left with the capacity to generate 62 megawatts of power without any reserve, even if power plants 2 and 4 are fully utilized.
>
> CUC power generation manager Al Santos told Variety earlier that Saipan needs 68 to 69 megawatts of power to supply residents and businesses on island.
>
> Under the rolling outages or load shedding schedule, power will be cut off in certain areas from 11 a.m. to 11 p.m. at intervals of two hours.
>
> This schedule began on Monday.

www.mvariety.com (July 27, 2005).

44.See, e.g., AG Opinion No. 88-07 (10/27/88) (Castro), Whether the Commonwealth Utilities Corporation is subject to the CNMI General Excise Tax and the CNMI Liquid Fuel Excise Tax. (8 pp)

45.The IPP's evaluation of the deal may rest in part on the tax free nature of the "interest" payments made over the course of the contract. That is, IF for tax purposes the IPP is seen to be buying public debt in the form of a long term payment for a power plant, and to the extent that the annual payments can be broken down into capital, interest, operating expense, etc., the IPP may be able to lessen its tax liability. While the Treasury may not appreciate the loss of revenue, CUC will likely receive a more attractive bid price because of the tax-exempt treatment. *See* Rev. Ruling 63-20 (Approval of tax-exempt treatment for interest from debt-like instruments of public corporation). But this tax analysis is independent of the Constitutional law analysis required.

Edwards addresses this well-known feature of "municipal" leases:

> Because one of the most important distinguishing features of municipal leases is the potential for exemption from federal income taxation of the interest component of the lease rentals, the definition of "municipality" that applies for those purposes may be of more practical importance than the definition for state law purposes.
>
> Section 103(a) of the Internal Revenue Code of 1986, as amended (the "Code"), [FN23] provides, in general, that gross income does not include interest on any "state or local bond." Section 103(c)(1) of the Code defines "state or local bond" as any obligation of a "State or subdivision thereof." Section 103(c)(2) defines "State" [FN24] to include the District of Columbia and any possession of the United States. [FN25] Thus, "municipality"

includes, for these purposes, all fifty States, the District of Columbia, the possessions of the United States, and all of their political subdivisions.

What constitutes a "political subdivision" of a State (as that term is used in section 103(c)(1) of the Code) is a difficult question. It is also particularly important in the municipal leasing area because municipal entities that normally do not issue bonds (for example, library boards, fire departments, and other special purpose entities) often acquire equipment in lease transactions. Treasury Regulations *26-8 provide that "political subdivision" "denotes any division of any State or local government which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit." [FN26] The discussion above of the definition of "municipal corporation" for state law purposes is therefore significant, although most of the authorities interpreting this definition have focused on its second prong: whether the entity has been delegated the right to exercise part of the sovereign powers of a State or local government. [FN27]

. . . .

Practising Law Institute, Equipment Leasing - Leveraged Leasing, Stephen A. Edwards, PLIREF-EQUIP s 26:4.3 (2002), p 26-7-9 n 23-32.

46.N.M.I. const., art III, § 11.

47.1 CMC § 2153(h): Attorney General Duties

The Attorney General shall have the powers and duties as provided in the Commonwealth Constitution. In addition, the Attorney General shall have the following powers and duties:

. . . .

(h) To act, upon request, as counsel to all departments, agencies and instrumentalities of the Commonwealth, including public corporations, except the Marianas Public Land Trust. Subject to availability of funds by budgetary appropriation, separate legal counsel may be retained for particular matters.

1 CMC § 2153(h).

48.1 CMC § 2153(g).

49.Faced with two conflicting opinions of the CNMI Attorney General, the Supreme Court, responding to a certified question from the U.S. District Court, rejected the earlier, four-sentence-long opinion containing "ninety words with no reference to case law or legislative history " as "unpersuasive" in favor of the Attorney General's thoroughly research brief. Borja (Mayor of Tinian), 2003 MP ¶ 21.

50.Castro v. Hotel Nikko Saipan, Inc., 4 N.M.I. 268, 275 (1995), citing 7 C.M.C.§ 3401.

51.See endnote 75 for an extended quote from the Moores case.

52.N.M.I. Const. art. III, § 15 provides:

Executive branch offices, agencies and instrumentalities of the Commonwealth

> government shall be allocated by law among and within not more than fifteen principal departments so as to group them so far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies need not be part of a principal department. The functions and duties of the principal departments and of other agencies of the Commonwealth shall be provided by law. The legislature may reallocate offices, agencies and instrumentalities among the principal departments and may change their functions and duties. The governor may make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration. If these changes affect existing law, they shall be set forth in executive orders which shall be submitted to the legislature and shall become effective sixty days after submission, unless specifically modified or disapproved by a majority of members of each house of the legislature.

53.In Chiles v. Public Serv. Comm'n Nominating Council, 573 So. 2d 829, 832 (Fla. 1991), the Florida court reaffirmed its earlier holding that the state Public Service Commission, a regulator of utility companies, was not part of the executive branch, again applying a "primary function" test. The court reasoned that although the commission performed both executive and quasi-judicial functions, its primary functions were legislative in nature. The CUC is both the regulator and the regulated company because it is a publicly-owned utility.

54.The LRC"s "Constitution Annotated" discusses the *Analysis* and its use as authority:

> Courts have cited the *Analysis* in several decisions. According to the *Analysis*' brief preface:
>
>> The purpose of this memorandum is to explain each section of the Constitution of the Commonwealth of the Northern Mariana Islands and to summarize the intent of the Northern Marianas Constitutional Convention in approving each section. This statement was approved by the Convention on December 6, 1976 with the direction that it be available to the people along with the Constitution for their consideration before the referendum on the Constitution.
>
> *Id.* at 1. The *Analysis* is mentioned in article III, § 23(b) (directing the resident executive for indigenous affairs to "coordinate the translation and distribution of such official documents as the Constitution of the Northern Mariana Islands and the Covenant and analysis thereof").
>
> Comments to many sections in this publication include quotations from the *Analysis*. It is important to note that while courts have often cited the Analysis in support of rulings, they are not obligated to follow its interpretation of Constitutional provisions. In short, "the Analysis does not have the force law." *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1264 (9th Cir. 1982) (rejecting *Analysis* interpretation of article III, § 16). According to a Commonwealth Trial Court decision:
>
>> The Analysis is not the law. It was not voted on by the electorate. At most, it is an attempt to clarify what the law is as stated in the Constitution. To use the Analysis as authority to overcome the clear language of the Constitution is not permissible.
>
> *Camacho v. Camacho*, 1 CR 620, 628-29 (Trial Ct. 1983) (rejecting *Analysis* interpretation of schedule on Transitional Matters. § 4).

Comm.. Law Rev. Com'n, Constitution of the Commonwealth of the Northern Mariana Islands, annotated, 1st ed. (June 1995), p xiii-xiv. (Fn's omitted)

55.The CUC statutory debt authorization reads: "To borrow money from any private or public source...." 4 CMC § 1823(e).

56.Practising Law Institute, Equipment Leasing - Leveraged Leasing, Stephen A. Edwards, PLIREF-EQUIP s 26:4.3 (2002), p 26-21 n 98.

57.Edwards describes this important case in the context of three judicial theories removing government contracts from the scope of "public debt":

> The predominant theoretical basis for excluding the obligation to make payments under a lease containing a non-appropriation or an annual appropriation clause from the definition of "debt" is the "current expense" theory. [FN93] Under that theory, a municipal lease obligation subject to such a clause is not deemed to be debt because the funds used to make the annual rental payments are derived only from the current fiscal year's budget (as would be the case with funds used to pay for any other current expense item, such as salaries or maintenance expenses). [FN94]
>
> Other theories are sometimes used to justify this form of financing. The "continuing contract" theory maintains that the obligation to make the periodic rental payments does not mature until the use of the property has been enjoyed and therefore creates no obligation *26-21 at the outset of the lease for the aggregate payments. [FN95] Under the related "contingent liability" theory, debt does not include contingent municipal liabilities until the liability is fixed; a lease obligation, which by its terms is contingent upon annual appropriation, is therefore considered "debt" only as to the amount of the current year's appropriation. [FN96] These theories differ from the current expense theory by recognizing that a small amount of debt is created during each of the years making up the term of the lease-purchase agreement. [FN97]
>
> **One of the leading cases to use the "current liability" theory was City of Los Angeles v. Offner [122 P.2d 14(1942)].** [FN98] In that case, the California Supreme Court analyzed a lease-sublease arrangement between the City of Los Angeles and a private contractor under which the City agreed to sublease property from the contractor with options to purchase the property at various intervals during the term of the sublease at prevailing fair market prices. The court ruled that the arrangement gave rise to indebtedness only to the extent of the payment due in the current year. The court focused on the fact that the rental payments were at fair market value, which is in contrast to the rental payments in the standard lease-purchase agreement discussed in this chapter. The court stated that, if the designation of the agreement as a "'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void." [FN99]
>
> . . . .

Practising Law Institute, Equipment Leasing - Leveraged Leasing, Stephen A. Edwards, PLIREF-EQUIP s 26:4.3 (2002), p 26-20-21 n 98. (Emphasis added)

58.Edwards explains that the California courts have subsequently relaxed the Offner criteria, so that a lease with an automatic reverter to the "lessee" will still be held NOT to constitute public debt. The IPP deal transfers the power plant to CUC at the end of the contract. Here is Edwards' view:

> The concept of abatement leases evolved from subsequent cases in California, which undercut the most restrictive aspects of the Offner decision. For example, in Dean v. Kuchel, [FN100] another case decided by the Supreme Court of California, the leased property automatically reverted to the municipal lessee at the end of the lease term. The court decided that the lease payments were for the month-to-month use of the property and that the lease was therefore not subject to debt limitations. In so holding, the court failed to distinguish between the true lease in Offner (where the lessee had an option to purchase at fair market value at the end of the lease) and the financing lease in the transaction it was analyzing (where the lessee automatically obtained title at the end of the lease). [FN101] Abatement leases generally have the following characteristics: (1) the leased property automatically vests in the municipal lessee at the end of the lease term; and (2) if the leased property is not available for use by the municipal lessee, the rent due from the municipal lessee, will be abated in proportion to the percentage of the property that is unfit for such use. [FN102]

Id.Practising Law Institute, Equipment Leasing - Leveraged Leasing, Stephen A. Edwards, PLIREF-EQUIP s 26:4.3 (2002), p 26-22 n 100-02.

59.The Nevada Court provides a short history of constitutional debt limitations:

> As explained in Constitutionality of Chapter 280, Oregon Laws 1975, 276 Or. 135, 554 P.2d 126, 128-29 (1976), constitutional debt limitations were enacted primarily as a response to heavy borrowing by many states prior to 1840. These states financed internal and banking improvements and, after the depression of 1837, many defaulted on their obligations. States entering the union after 1840 (including Nevada) invariably included debt limitations in their constitutions. Such control over debt creation precluded carelessly imposed tax liabilities. See Robert Bowmar, The Anachronism Called Debt Limitation, 52 Iowa L.Rev. 863, 873 (1967).

Business Computer Rentals, 953 P.2d at 14, fn 1.

60.See endnote 75 for an extended quote from the Moores case.

61.Practising Law Institute, Equipment Leasing - Leveraged Leasing, Stephen A. Edwards, PLIREF-EQUIP § 26:4.3 (2002), p 26-23, Summary.

62.The complete history of the WPPS decision, reflecting its multi-billion-dollar effect: Chem. Bank v. Wash. Pub. Power Supply Sys., 99 Wash. 2d 772, 666 P.2d 329 (1983), *on reconsideration, adhered to*, 102 Wash. 2d 874, 691 P.2d 524, 40 U.C.C. Rep. Serv. (CBC) 1026 (1984), *cert. denied*, Haberman v. Chem. Bank, 471 U.S. 1065 (1985), *and cert. denied* Chem. Bank v. Pub. Util. Dist. No. 1, 471 U.S. 1075 (1985), *later proceeding*, Chem. Bank v. Wash. Pub. Power Supply Sys., 104 Wash. 2d 98, 702 P.2d 128 (1985), *later proceeding, en banc*, Haberman v. Wash. Pub. Power Supply Sys., 109 Wash. 2d 107, 744 P.2d 1032 (1987), *modified* Haberman v. Wash. Pub. Power Supply Sys., 109 Wash. 2d 107, 750 P.2d 254 (Wash 1988), *appeal dismissed*, Am. Express Travel Related Servs. Co. v. Wash. Pub. Power Supply Sys., 488 U.S. 805 (1988), *and overruled by* Scott Fetzer Co. v. Weeks, 114 Wash. 2d 109, 786 P.2d 265 (1990). *See also* Scofield Eng'g Co. v. City of Danville, 35 F. Supp. 668 (W.D. Va. 1940), *aff'd*, 126 F.2d 942 (4th Cir. 1942) (contract was void because it violated procedural requirement and no *quantum meruit*

recovery allowed).

63.It can also be argued that the Legislature explicitly authorized CUC to undertake the IPP contract in question, as it authorized the outsourcing of operations:

> (i) **To contract to transfer to private ownership or control the construction, management, and operation of the** water, sewer, and **electrical power systems** in a public manner that is both timely and fair to the government, its employees, and utility service consumers.

4 CMC § 8123(i). It would be inconsistent for the Legislature to authorize the IPP arrangement then limit or prohibit it by calling it "public debt".

64.The LRC's comment to CNMI Constitution article X § 4 does not address the meaning of the terms "public debt" or "political subdivision". It does, however, identify the statutory provision that explicitly authorizes CUC's indebtedness as "related Commonwealth Code Sections: . . . see generally . . . .provisions authorizing issuance of bonds by the Commonwealth Utilities Corporation (4 CMC §§ 8123 and 8141. . . ." Id. Comment to art. X § 4, p. 89.

65.MVB stated the proposition in English, as the existence of express exceptions to a rule gives rise to a presumption that no other exceptions were intended. The case cited Andrus v. Glover Constr. Co., 100 S. Ct. 1905, 1910 (1980); Norman J. Singer, 2A Sutherland Statutory Construction § 47.11 (5th ed. 1993). MVB, p 28. *See also E-Tours Inc. v. Marianas Vistors Authority*, Civ. No. 00-0078D, p 7 (Super. Ct. 2000).

66.The records of the vote are on file with the librarian of Northern Marianas College, the Legislature's records for the 4th Legislature having been ruined by water.

67.If there were any doubt to the source of the revenues – and there should not be, as the calculation of the costs and offsetting revenues should be straightforward – CUC could set up specially labeled accounts to track the dollars. The utility could even set out a line item in its bills identifying this source, and other sources, of the power that the customers consumed. At some point, however, "painting" the dollars would be become overly complex and unworkable.

68.Joseph Heller's *Catch 22* described a U.S. Army requirement for a soldier to be sent home from the Vietnam war front – he had to be certified insane. But if the soldier sought the certification he obviously was not insane, as any sane person would seek to escape the combat duty – that was the "Catch 22" of the regs. The term is now used to describe an impossible situation. In CUC's case it cannot charge for power until it delivers power. But, due to the size of the costs – millions of dollars per month – CUC lacks the ready cash to prepay for power, or for the fuel to buy power.

69.CUC's fuel contract gives the utility 45 days to pay for the roughly $3 million monthly deliveries. Mobil Oil contract, No. CUC-PG-05-0013 (2005).

70.NMI Const. art. X section 9. There are other means available to sue CUC. "If it clearly appears that an agency is not enforcing its regulations, limited judicial review may be available by way of extraordinary writ." *Govendo v. MGM*, 2 N.M.I. 270, 286 (1991).

71.Id.

72.Mafnas v. Commonwealth, 2 N.M.I. 48 (1991).

73.Rayphand v. Tenorio, 2003 MP 12 (2003).

74.4 CMC § 8158.

75.The Maine Supreme Court recognized the "absurdity" of a strict reading of the term "debt":

> If the words, debt and liability, be interpreted according to their most inclusive signification, one is forced to admit that a liability incurred by a town for its 'ordinary current expenses to be paid for out of its available current revenue' is a debt or liability of the town. This would be true no matter how brief the lapse of time between the incurring of the liability and its discharge, and whether or not there were cash on hand for its discharge. To avoid creation of such debts or liabilities the transactions of towns, indebted beyond their allowable limit, would have to be conducted on an absolutely cash basis. Goods purchased would have to be paid for either in advance or contemporaneously with their delivery; services, including labor, would have to be paid for in advance. Such payments would have to be made in cash. Checks and orders could not be used for they in turn would constitute liabilities. Town officers could not draw them, for they can only draw legal orders. Disbursing officers could not pay them, for they can only honor legal orders. Such a narrow interpretation of the words debt or liability in statutes or constitutions imposing a debt limit upon municipal corporations would paralyze the legal functioning of such of them as might have reached or exceeded their existing debt limits. Such a result would be absurd, and unless absolutely required, the words debt or liability in debt limit statutes or constitutions should not be so interpreted as to bring about such a result.

Moores v. Springfield, 64 A.2d 569, 577 (Me. 1949). In rejecting a town's attempt to defend against a debt by claiming that its agreement therefor had violated the prohibition against additional public debt, the Court applied a "rule of reconciliation" to hold that paying an obligation for services out of an expected revenue stream did not violate the restrictions on public debt:

> To maintain the burden of proof which is upon it, the defendant has to go further and prove by a fair preponderance of the evidence that the particular obligation for a current expense was not incurred to be paid out of revenues currently available therefor. To do this, the town must establish that there were no current revenues available for the payment of the current expense at the time it was incurred and this, whether such unavailability of current revenues be due to lack of appropriation therefor, prior exhaustion of current revenues or otherwise.

Moores, 64 A.2d at 578.

76.At a replacement price of $1,000/kW for a 70 MW system, and its generating equipment having a 20-year life, the utility would have to collect an extra $3.5 million per year.

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ATTORNEY GENERAL OPINION No. 05-12

To: Naomi E. Lujan-Gonzales, Executive Director
Law Revision Commission

From: Alan J. Barak, Asst. AG, Civil Division
Through: Pam Brown, Attorney General
Date: 8/12/05

Re: Trust Territory business regulations
Continuation in effect into new administrative code

ISSUE AND SHORT ANSWER

Questions

Do the regulations for nonprofit corporations and partnerships survive from the Trust Territory Government's legal framework? If so, should they be incorporated into the new CNMI Administrative Code?

Short Answer

Yes to both questions. The Transitional Provisions of the Constitution require the continuation of all laws which have not been repealed or superceded.

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Summary

The Commonwealth Constitution's transitional provision provides that TT laws will continue in effect unless repealed or superceded. The Trust Territory's 1974 regulations for partnerships and nonprofit corporations were never repealed or superceded. While the new Commonwealth Legislature did supercede the TT's for-profit corporation regulations with comprehensive new ones, it never addressed the partnership or nonprofit corporation regulations.

Under well-settled principles of statutory construction, the two sets of old regulations survive, and are still in full force and effect. The LRC should include the partnership and nonprofit regulations in its upcoming codification, the Commonwealth's Administrative Code.

Discussion

In order to determine whether the partnership and nonprofit regulations from TT days are still in effect, it was necessary to review the TT's authority and power to promulgate them. This required a review of the source documents for TT law.

Then, in order to determine how the TT regulations were adopted for use in the CNMI it was necessary to examine the relevant transitional documents. While the nonprofit regulations' history is relatively straightforward, the history of the partnership regulations is more complex.

1. Background and relevant facts

During the Trust Territory's management of the NMI's legal affairs a number of sets of regulations were adopted. Among these were the regulations for partnerships and nonprofit corporations. It appears that, since the adoption of the CNMI Constitution other sets of such business regulations have either been adopted to supercede TT regulations or TT regulations have been repealed.

a. Corporations

The CNMI Registrar looks to TT regulations for the oversight of nonprofit corporations. The explicit and immediate authority for the Trust Territory's nonprofit corporation regulations lay in TT Code Title 37, § 52 (Registrar's authority to promulgate regulations) and the TT's Business Code. The Code gave the High Commissioner the authority to grant for- and nonprofit corporation charters. 37 TTC § 1. The chapter, consisting of §§ 1-6, applied to every private profit and nonprofit corporation.

This corporation language was adopted into the CNMI Code, giving the power to grant charters to the CNMI Governor. 4 CMC § 4101-02; PL 3-11. Then, by Executive Order 94-3, the Governor's role was replaced by that of the Attorney General. By subsequent Executive Order the power to grant charters was moved with the Registrar to the CNMI Department of Commerce. Executive Order 97-03 (Nov. 13, 1997).[1]

i. Source of TT power and authority for corporations

The source of the power of the TT Government to promulgate nonprofit corporation regulations is the UN Charter, the trust documents based thereon, and the President and the Congress' related enactments:

> Members of the United Nations which have or assume responsibilities for the administration of territories...accept as a sacred trust the obligation to promote to the utmost ... the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure ... their political, economic... advancement....
> b. to promote constructive measures of development

Charter of the United Nations, Ch. XI, Art. 73. The basic objectives of the trusteeship system included promoting the economic advancement of the inhabitants *Id*. Art. 76. The United States was designated as the administering authority of the Trust Territory that included the Northern Mariana Islands. *Trusteeship Agreement for the Former Japanese Mandated Islands* (Approved by the Security Council, Apr. 2, 1947; Ratified by US, Jul 18, 1947 [61 stat. 397]), art. 2.

The US had full powers of legislation and could apply such of the laws of the US as it deemed appropriate. *Id*., art. 3. The US was to promote the economic advancement of the inhabitants. *Id*., art. 6 § 2.

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[1]The Department of Commerce and the Attorney General recognized that the functions of the Commonwealth Register were to remain with the Attorney General's Office. MOU of May 29, 2003.

Congress provided that all executive, judicial and legislative authority was to vest in the persons designated by the President. 48 USC § 1681 (68 stat. 330) (Jun. 30, 1954). The President provided for TT administration by executive order. Executive Orders No.'s 9875 (Jul. 18, 1947), 10265 (Jun. 29, 1951, 10408 (Nov. 10, 1952) and 10470 (Jul. 17, 1953).

The President moved civil administration of the TT to the Secretary of the Interior. Executive Order No. 11021 (May 8, 1962), amended by 11944 (Oct. 25, 1976). This included all executive, legislative and judicial authority. *Id.*, § 1. The Secretary could, in turn, delegate this authority. *Id.*, § 2.

TT laws were to remain in force and effect until they expired by their own limitation or until or unless repealed by the NMI Legislature. Secretarial Order No. 2989 (Mar. 24, 1976), Part iv. § 1. Therein lies the basis for the continuation of the corporation regulations in effect through the birth of the CNMI.

ii. The TT nonprofit corporation regulations

The TT nonprofit corporation regulations provide generally: that the Registrar may grant a charter for a nonprofit corporation to persons who have filed petitions which state the corporation's name, address, purpose, period and initial officers and directors, the provisions for internal governance and dissolution, and that the corporation is neither organized for profit nor will deliver profits to its members. TT Regulations, Title 37, "Corporations, Partnerships and Associations", Ch. 1, "Corporations Generally", Part 2, "Organization; Powers", §§ 2.9 and 2.10. Territorial Register, Vol. 1, No. 1 (Jul. 15, 1974), p. 7.

The merger or consolidation of nonprofit corporations is addressed in Title 37, Ch. 2, "Consolidation and Merger of Corporations", Part 3, "Nonprofit Corporations", §§ 3.1 - 3.9. Territorial Register, Vol. 1, No. 1 (Jul. 15, 1974), pp 26-27.

A special chapter is provided for ecclesiastical corporations. Title 37, Chapter 4 "Corporations Sole [sic] for Ecclesiastical Purposes", Part 1, §§ 1.1 - 1.9. Territorial Register, Vol. 1, No. 1 (Jul. 15, 1974), pp 29-31.

iii. CNMI use of TT nonprofit corporation materials

The CNMI Registrar maintains forms on which petitioners may file for a nonprofit charter, and the instructions therefore. (Instructions for preparing and filing petition for a charter for articles of incorporation for a non-profit, tax-exempt corporation, the form Petition, the form Charter [rev'd 5/21/99], form Bylaws; and, for a foreign nonprofit corporation, requirement for filing a foreign non-profit corporation, form application for certificate of authority).[2]

b. Partnerships

There is no TT organic act that explicitly supports the promulgation of partnership regulations. There has been no statute in the Marianas which specifically addresses partnership law.

Almost all states have such a statute. All but three states have adopted the Uniform Partnership Act. Uniform Partnership Act (1997), Refs and Annos, Table of Jurisdictions Wherein Act Has Been Adopted (Westlaw). The first state to adopt it was Pennsylvania, in 1914. *In re Safady Bros.*, 228 F. 538, 539 (D.C.Wis. 1915). A more recent version of the UPA was published for adoption in 1997. (Uniform

[2]Fax fr Remy C. Mafnas, Registrar, to A Barak (2/7/05).

Partnership Act (1997))[3] Our Legislature has before it a proposal to adopt the UPA, but it has not acted on the proposal. *See* HB 14-73.

i. Source of authority for the partnership regulations

But there is ample substantive law on partnerships, because the business organization form of partnerships evolved through the common law. *See, e.g., Seafirst Center Ltd. Partnership v. Erickson*, 127 Wash.2d 355, 361 fn. 4, 898 P.2d 299, 301 fn. 4 (Wash.1995), for a reference to the "ancient common law".[4] This means that the substance of the TT Registrar's regulations for partnerships sprang from the common law rather than from a specific statute.[5]

There was also ample authority for the TT Government to promulgate partnership regulations. Since the source documents created a TT government with full executive and legislative power, as discussed *supra,* the TT Registrar had full executive and legislative power to promulgate regulations relating to partnerships. The power and authority of the TT Government to issue these regulations originated with Congress' above-cited provision that all executive, judicial and legislative authority was to vest in the persons designated by the President. 48 USC § 1681 (68 stat. 330) (Jun. 30, 1954).

ii. The TT partnership regulations

The TT Registrar's partnership regulations provide for both general and limited partnerships. TT Regulations, Title 37, "Corporations, Partnerships and Associations", Ch. 5, "Partnerships", Part 1, "Partnerships in General", §§ 1.1 - 1.14, and Part 2, "Limited Partnership", §§ 2-1 - 2.28, Territorial Register, Vol. 1 No. 1 (Jul. 15, 1974), pp. 31 - 36.

iii. The CNMI's use of the partnership regulations

The CNMI Registrar uses the five pages of partnership regulations, and provides a form on which petitioners may register a partnership (Partnership registration form).[6]

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[3]The original UPA "was drawn by William Draper Lewis for the Conference, based on the incomplete work of the late James Barr Ames, Dean of the Harvard Law School, and on the English Partnership Act, drawn by Sir Frederick Pollock. It is an attempt to codify the existing common law on the subject, rather than to change that system; but where the rules are conflicting it chooses the one supposed to be the better." *In re Safady Bros.*, 228 F. 538, 539-40 (D.C.Wis. 1915).

[4]One treatise traces the rule that discharge of one partner discharges all partners "to the 14th century." Glanville L. Williams, Joint Obligations 106 (1949). With respect to partnerships specifically, Story cites ancient case law for the proposition that "[a] release to one partner is a release to all, whether the claim released arise ex contractu or ex delicto." Joseph Story, Partnership 287 n. 3 (7th ed. 1881)." *Seafirst Center Ltd. Partnership v. Erickson*, 127 Wash.2d 355, 361 fn. 4, 898 P.2d 299, 301 fn. 4 (Wash.1995.)

[5]When CNMI jurisprudence has not articulated a principle of common law, the courts look to the Restatements of the Law. In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary. 7 CMC § 3401. *Ada v. Sablan*, 1 NMI 415, 427 (1990). A review of the Restatements reveals no Restatement on "partnerships". Rather, pronouncements regarding the obligations of partners appear in the Restatement of Contracts and the Restatement of Torts.

[6]Fax fr Remy C. Mafnas, Registrar, to A Barak (2/7/05).

c. Continuation of both sets of regulations

A review of the Commonwealth Register shows that no regulations have been adopted during the CNMI for partnerships and nonprofit corporations. The Registrar of Corporations and practitioners have been using the TT partnership regulations as though they were still in effect.[7] By contrast, in serving for-profit corporations, the Registrar has been using the comprehensive Corporation Regulations, adopted in 1990. (12 Com. Reg. 5 (May 15, 1990), p. 6907 (proposed), p. 12 Com. Reg. 7, (Jul. 15, 1990), p. 7201 (adopted); enacted into law by PL 10-7 (effective May 10, 1996), codified at 4 CMC 4251-4705.[8]

This regulatory scheme presents a practical issue for the Law Revision's Commission's codification of the administrative code – are the old TT regulations for partnerships and nonprofit corporations "in" or "out"?

2. Applicable law

The supreme laws of the CNMI are the CNMI Constitution, the US Constitution, and the Covenant between the CNMI and the USA. The CNMI Constitution is a "paramount" source of Commonwealth law. *Ada v. Sablan*, 1 NMI 415, 427 (1990). Its transitional sections govern the survival of the partnership and nonprofit corporation regulations.

The CNMI Constitution's schedule on transitional matters provides that certain laws and corporations in existence should remain in effect until the terms of the relevant transitional provision have been executed. CNMI Const. Schedule on Transitional Matters, §§ 2, 6:

> Section 2: Continuity of Laws. **Laws in force** in the Northern Mariana Islands on the day preceding the effective date of the Constitution that are consistent with the Constitution and the Covenant **shall continue in force until they expire or are amended or repealed.**

CNMI Const. Schedule on Transitional Matters, § 2. (Emphasis added)

> Section 6: Continuity of Corporations and Licenses. **Corporations incorporated or qualified to do business** in the Norther Marian Islands on the effective date of the Constitution **shall continue to be incorporated or qualified until provided otherwise by law**. Licenses in effect in the Northern Marian Islands on the effective date of the Constitution shall continue in effect until provided otherwise by law except that no license

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[7]Phone interview with B Mailman by A Barak (1/31/05). Phone interview with Remy C. Mafnas, Registrar, by A Barak (2/7/05).

[8]According to PL 10-7, § 1 most of the regulations were codified in the new statute:

Section 1. Regulations Enacted as Statute.

(a) Except as provided by subsection (b), the rules and regulations governing business corporations in the Commonwealth, the Business Corporation Regulations, adopted July 15, 1990 in the Commonwealth Register, Volume 12, No. 7, pages 7201-6997, as amended on May 15, 1994 in the Commonwealth Register, Volume 16, Number 5, page 11888, are hereby incorporated by reference and enacted as statute law. The Commonwealth Law Revision Commission shall codify these former rules and regulations in the appropriate Commonwealth Code statutory format.

(b) Sections 1.02 and 8.03(a) of the Business Corporation Regulations are not incorporated by reference, are not enacted as statute law, and are hereby rescinded.

PL 10-7 § 1, quoted at 4 CMC § 4251, Comment.

possessed by a land surveyor, ship officer, health professional or a practicing trial assistant may be amended or revoked except for incompetence or unethical conduct.

CNMI Const. Schedule on Transitional Matters, § 6. (Emphasis added) Neither section has been certified as executed. The Trust Territory Code was incorporated into the CNMI Code in 1991 by PL 3-90 § 2.

The TT regulations in question were "laws". A regulation has the full force and effect of the law, if it has been properly promulgated. *E.g., Garnes v. Barnhart,* --- F.Supp.2d ----, 2004 WL 3118992, (N.D.Cal. 2004), citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *State of Hawai'i v. Kotis*, 91 Hawai'i 319, 330; 984 P.2d 78, 90 (Hawai'i 1999). *Also, United States of America v. Alameda Gateway, Ltd.*, 213 F.3d 1161, 1168 (9th Cir 2000).

We must look to the Commonwealth Register to see whether the CNMI has superceded or repealed the partnership and nonprofit regulations. The Commonwealth Register is the successor to the Territorial Register and shall contain the text of all laws, official rules and regulations. Executive Order 1 (Jan. 12, 1978) (Camacho, C. Governor).[9]

The Commonwealth Registrar of Corporations, by permanent regulation, repealed TT corporate regulations governing for-profit corporations, but not for nonprofit corporations or partnerships. Corporation Regulations, 17.05 (Repeal).[10] The Legislature replaced the for-profit statute with a new for-

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[9]The first executive order of the Governor specified the role of the Commonwealth Register:

Commonwealth of the Northern Mariana Islands
Executive Order of the Governor

Executive Order Number One
January 12, 1978

Northern Marianas Register

1. There is established the Commonwealth of the Northern Marianas Register, which is the successor to the Territorial Register. It shall be published daily, Sundays and Holidays excepted.

2. **The Commonwealth Register shall contain the text of all laws**, executive orders, proclamations, official rules **and regulations**, official notices, and related matters.

3. The Attorney General shall be responsible for publication of the Commonwealth Register. Copies shall be distributed to all elected officials, the senior officers of each branch, department head, and independent agencies.

4. Copies shall be available in one or more public places for public scrutiny and copies shall be available for public distribution.

Carlos S. Camacho, Governor.

Executive Order 1 (Jan. 12, 1978) (Camacho, C. Governor). (Emphasis added)

[10]The 1990 Corporation Regulations repealed some of the TT Corporation Regulations – Title 37, Ch. 1, §§ 1.1 - 2.8, 2.11 - 7.2, Ch. 2, Parts 1 and 2, and Chapter 3. Corporation Regulations 17.05, 12 Com Reg. No. 5 (May 15, 1990), p. 6997 (adopted 12 Com. Reg. 7 (Jul. 15, 1990), p. 7201).

profit corporation law, and new regulations, but did not provide a similar nonprofit statute or nonprofit regulations. *Taitano v. Northern Marianas Softball Ass'n.*, No. 93-0356 (Superior Ct. 1994) (Castro, J).[11]

3. Analysis

Absent any repealer, the CNMI Constitution's Transitional Section requires that Trust Territory laws continue in effect. A properly promulgated regulation has the full force and effect of the law.

As a principle of judicial construction, when a legislature acts on a matter in part only, the balance of the matter is said to be excluded – *inclusio unius est exclusio alterius. E.g., US v. Terrence*, 132 F3rd 1291, 1294 (9th Cir. 1997) (In construing US-Palau Compact of Free Association, and applying the doctrine of "*inclusio unius est exclusio alterius*," ("the inclusion of one is the exclusion of the other") a statute's limiting a thing to be done in a particular mode, in this case providing three immigration exemptions, includes a negative of any other mode, in this case preserving the obligation to register with the Attorney General). *See Aldan-Pierce v. Mafnas*, 2 N.M.I. 122, 161 (1991), *rev'd on other grounds*, 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116, 115 S. Ct. 913, 130 L. Ed. 2d 794 (1995) ("For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time.")

Another applicable principle of judicial construction is that an enactment should be read, if at all possible, according to its plain meaning. *See, Northern Marianas Housing Corp. v. Northern Marianas Land Trust*, 5 N.M.I. 150, 1998 MP 1, 1998 WL 34073630 (CNMI 1998) (The basic principle of statutory construction is that language must be given its plain meaning); *Camacho v. Northern Marianas Retirement Fund*, 1 N.M.I. 362 (CNMI 1990) (Plain meaning rule of statutory construction applies to constitutions, to give plain meaning to provisions).

The Constitution is unambiguous, providing that TT law should continue in place unless CNMI law comes to provide otherwise. The Commonwealth Register is the only proper place to look to determine whether TT regulations have been repealed or replaced.

With respect to the instant issue the Registrar repealed only the for-profit business regulations. The Register offers no changes or repealers for the other regulations in question. The Registrar deliberately left in place the unrepealed provisions and, indeed, relies on them daily. The distinction between the repealed and preserved regulations was clear and simple. This distinction has operated to preserve, as law, the partnership and nonprofit business corporation regulations.

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[11]The *Taitano* Court held that, given there were no regulations to govern the particular dispute, it would resort to common law to determine what bylaws were proper for the challenged nonprofit corporation:

> In order to address the plaintiff's allegations concerning NMIASA bylaw violations, the court first turns to Title 4, Division 4 of the Commonwealth Code entitled Corporations, Partnerships and Associations. Title 4 empowers the Governor to grant charters of incorporation for the establishment of private nonprofit corporations but offers no guidance with respect to alleged by-law violations occurring in nonprofit corporations. 4 CMC § 4101 et seq. On August 13, 1990, the legislature enacted the Commonwealth Business Corporation Regulations (CBRC). Although Section 10.20 and 10.22 of the CBRC offer some guidance for amendment to bylaws, the drafters of CBRC effectively limited the scope of the corporate regulations to profit making corporations by defining "corporation" as "domestic corporations . . . for profit." 12 Com. Reg. at 6918 (1990) (emphasis added). Thus, the CBRC does not offer the court any guidance with respect to the actions of the nonprofit corporation, NMIASA. In the absence of CNMI written or [pg. 8] customary law to the contrary, the court resorts to the common law. 7 CMC § 3401.

Taitano v. Northern Marianas Softball Ass'n., No. 93-0356 (N.M.I. Super. Ct. 1994) (Castro, J). The TT regulations were silent on amendments to nonprofit corporate bylaws.

This conclusion, that the partnership and nonprofit regulations continue in force, is consistent with the second quoted transitional section. The framers sought to continue smoothly the operations of business during the political transition from Trust to Commonwealth status. Interpreting the Registrar's actions as a preservation of the partnership and nonprofit regulations enhances the transition.

Thus, the provisions left in place are the nonprofit corporation regulations and the partnership regulations, identified *supra*. These provisions are valid and in full force and effect.

Conclusion

The old TT partnership and nonprofit regulations are in force and effect, and should be compiled into the LRC's new Administrative Code.

Alan J. Barak, Asst. AG, Civil Division — Date: August 12 2005

Date: August 12, 2005

Concurred by: Pam Brown, Attorney General

0 TT regs continuation pshp nonprof corp - AG Op 0512.wpd

PUBLIC NOTICE

Of Intent to Enter Into a Programmatic Agreement Between

USDOI Office of Insular Affairs, CNMI Capital Improvement Projects Coordinator, CNMI Historic Preservation Office, and The Advisory Council on Historic Preservation

The United States Department of Interior's Office of Insular Affairs (OIA) hereby notifies the public that it intends to enter into a Programmatic Agreement between itself, the CNMI Capital Improvement Projects (CIP) Coordinator, the CNMI Historic Preservation Office, and the Advisory Council on Historic Preservation. The purpose of the Programmatic Agreement is to delegate OIA's responsibility to review individual CIP projects, in regards to compliance with the National Historic Preservation Act, to the CNMI CIP Administrator. The proposed Programmatic Agreement is intended to ensure that all CNMI CIP projects receive a complete assessment of any potential effects to the CNMI's cultural and historical resources.

The Programmatic Agreement is proposed pursuant to the authority of P.L. 3-39, 1 CMC § 2131 *et seq.*, the United States National Historic Preservation Act of 1966, 16 U.S.C. § 470, *et seq.*, and Advisory Council on Historic Preservation regulations, 36 C.F.R. 800. *et seq.*

The proposed Programmatic Agreement has been published in the August edition of the Commonwealth Register. A copy of the proposed regulations is also available for public inspection at the office of the CNMI Historic Preservation Office, and at the following website: **www.cnmiago.gov.mp**.

Written comments on the proposed Programmatic Agreement will be accepted until the close of business on September 22, 2005. Written comments should be submitted to: CNMI Field Office, Office of Insular Affairs, US DOI, P.O. Box 5095, Saipan, MP, 96950.

Keith W. Aughenbaugh
Office of Insular Affairs

Pursuant to 1 CMC § 2153(g) (AG approval of contractual obligations of the Commonwealth) and 1 CMC § 9102(c) (AG approval of agency rules) the proposed regulations attached hereto have been reviewed and approved as to form and legal capacity by the CNMI Attorney General and shall be published.

Dated the ____ day of August, 2005.

____
PAMELA S. BROWN,
Attorney General

Filed by:

Date: 8/19/05

____
Bernadita B. Dela Cruz
Commonwealth Registrar

NOTISIAN PUPBLIKU

POT I INTENSION NA PARA U HÅLOM NI MA'OTGANISA NA KONTRÅTA GI ENTALO I USDOI OFISINAN I INSULAR AFFAIRS, I COORDINATOR GI CNMI CAPITOL IMPROVEMENT PROJECTS, I OFISINAN I PRISETBAN I HISTORIAN I CNMI, YAN I KONSILION ATBISUN I PRISETBAN HISTORIA

I Ofisinan I United States Department of Interior's Insular Affairs (OIA) a notitisia I pupbliku na ma intension para u hålom ni ma'otganisa na kontråta gi entalo I USDOI Ofisinan I Insular Affairs, I Coordinator gi CNMI Capitol Improvement Project (CIP), I Ofisinan I Prisetban Historian CNMI, yan I Konsilion Atbisun I Prisetban Historia. I propositun este na kontråta pot para u otden I Ofisinan I Insular Affairs responsiblidåt para u ma'ina I Capitol Improvement Projects indibiduåt, pot para u kinonfotma ni Akton National Historic Preservation, para I Atministradot I CNMI Capitol Improvement Project. I mapropone na kontråta ma intensiona para na asigura na todu I Cpatiol Improvement Projects I CNMI marisibe' kabåles na ebaluasion gi maseha håfa ni pusible para u afekta I Kuttura yan guinahan I Historian CNMI. I mapropone na kontråta sigun I aturidåt I Lai Pupbliku3-39, 1 CMC Seksiona 2131 et. seq., I Akton National Historic Preservation gi 1966, 16 U.S.C. Seksiona 470, et. seq., yan I Regulasion I Konsilion Atbisun I Prisetban Historia, 36 C.F.R. 800. et. seq. Ma pupblika I mapropone na kontråta gi Agosto ni tinilaika siha gi Rehistradoran I Commonwealth. Kopian I mapropone na regulasion siha man guaha para u ma'ina ni pupbliku gi ofisinan I Prisetban Historian I CNMI, yan gaige lokkue gi website: **www.cnmiago.gov.mp**.

Tinige opinion pot I mapropone na kontråta man ma'aksepta estaki I mahuchom I bisnis gi Septembre 22, 2005. Debi di u mana fan halom gi : Ofisinan I CNMI Field, Ofisinan I Insular Affairs, US DOI, gi P.O. Box 5095, giya Saipan, MP 96950.

____
Keith W. Aughenbaugh
Ofisinan I Insular Affairs

Sigun I lai 1 CMC Seksiona 2153 (g) (ma'aprueban I Abugådo Heneråt ni obligasion I kontråta gi Commonwealth) yan I CMC Seksiona 9102 (c) (ma'aprueban I Abugådo Heneråt pot I areklamenton I ahensia) I mapropone na regulasion siha ni man che'che'ton man ma'ina yan ma'aprueba pot para u fotma yan ligåt ginen I Abugådo Heneråt I CNMI ya debi di u mapupblika.

Mafecha gi este mina ____________ na ha'åne gi Agosto, 2005.

PAMELA S. BROWN
Abugao Heneråt

Pinelo' as:

Fecha: 8/19/05

Bernadita B. Dela Cruz
Rehistradoran I Commonwealth

ARONGORONGOL TOULAP
Igha ebwe toolong llol appelughulughul leefilal

USDOI Bwulasiyool Insular Affairs,
CNMI Capital Improvement Projects Coordinator,
Bwulasiyool Historic Preservation, me Advisory Council llol Historic Preservation

United State Depattamentool Interior's Bwulasiyool Insular Affairs (OIA) ekke arongaar aramas toulap igha mángemángiy bwe ebwe toolong llól Appelúghúlúghúl Programmatic agreement leefilal schagh, CNMI Capital Improvement Projects (CIP) Coordinator, Bwulasiyool CNMI Historic Presevation, me Advisory Council mellól Historic Preservation. Bwulúl mille Programmatic Agreement igha eyoor bwángil OIA's reel ebwe amweri aramasal CIP projects, sángi alúghúlúghúl National Historic Preservation Act, ngáli CNMI CIP Administrator. Pomwol Programmatic Agreement yeel nge re aghiyeghi bwelle alongal CNMI CIP project kka re bwughil nge aa ammwelló mwóghútúl llól alongal weires kka emmwel ebwe ghula kkol CNMI me historical resources.

Mille Programmatic Ageement nge re pomwoli sángi bwángil Alléghúl Toulap ye 3-39, 1 CMC Tálil 2131 et seq., United States National Historic Preservation Act llól 1966, 16 U.S.C. Tálil 470, et seq., me Advisory Council ngali alleghul Historic Preservation, 36 C. F. R. 800. et seq.

Pomwol Programmatic Ageement yeel nge aa fasúl akkatééló ótol Agusto mellól Commonwealth Register. Tilighial pomwol allegh kkaal nge emmwel rebwe amweri mereel Bwulasiyool Alléghúl CNMI Historic Preservation, mereel website yeel: www.cnmiago.gov.mp.

Ischil pomwol Programmatic Agreement yeel nge rebwe acceptaay ótol angaang wóól Setembre 22, 2005. Ischil yeel nge ebwe atotoolong reel: CNMI Field Office, Bwulasiyool Insular Affairs, US DOI, P. O. Box 5095, Seipel, MP, 96950.

Keith W.Aughenbaugh
Bwulasiyool Insular Affairs

Sángi allégh ye 1 CMC Talil 2153 (g) (alúghúlúghúl AG reel contractual obligations mellól Commonwealth) me 1 CMC Tálil 9102 (alúghúlúghúl AG ngáli alléghúl agencies) pomwol allegh kkaal ikka raa takkal amweri me aléghéléghéló mereel CNMI Sów Bwungúl Allégh Lapalap me ebwe akkatééwow.

Ráliil ye ________ llól maram Agusto, 2005.

____
PAMELA S. BROWN
Sów Bwungúl Allégh Lapalap

Aisis sángi:

Rál: 8/19/05

Bernadita B. Dela Cruz
Commonwealth Registrar

PROGRAMMATIC AGREEMENT
CONCERNING
CAPITAL IMPROVEMENT PROJECTS
IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
ASSISTED BY THE DEPARTMENT OF THE INTERIOR,
OFFICE OF INSULAR AFFAIRS

WHEREAS pursuant to Section 702 of the Commonwealth Covenant between the United States and the Commonwealth of the Northern Mariana Islands (CNMI), the Department of Interior, through the Office of Insular Affairs (OIA) provides financial assistance (Section 702 grants) to the CNMI for Capital Improvement Program (CIP) projects; and

WHEREAS the CIP projects have the potential to affect districts, sites, buildings, structures and objects included in or eligible for the National Register of Historic Places (historic properties), and are therefore subject to review under Section 106 of the National Historic Preservation Act and the implementing regulations (36 CFR 800) of the Advisory Council on Historic Preservation (Council); and

WHEREAS CIP projects are carried out by the CNMI Government with general oversight by OIA, in accordance with a CIP master plan developed by the CNMI and approved by OIA; and

WHEREAS the CIP program is coordinated by the CIP Administrator in the Office of the Governor, CNMI, with individual projects administered by the Department of Public Works, the Commonwealth Utilities Corporation; and other executive and independent agencies of the CNMI (project administrators); and

WHEREAS in most cases the CNMI submits CIP project proposals to OIA for concurrence in two phases, the first proposing architect and engineer (A/E) design work and the second proposing construction in accordance with the concurred-in design, though occasionally only a single proposal for design and construction work (single phase application) is submitted; and

WHEREAS OIA's indirect involvement in individual CIP projects makes it unrealistic for OIA to conduct the review of such individual projects under 36 CFR 800, and OIA has determined that a Programmatic Agreement (PA) is appropriate to provide an efficient mechanism for achieving compliance with 36 CFR 800; and

WHEREAS OIA has consulted with the CNMI Historic Preservation Officer (HPO) and the Council pursuant to 36 CFR 800.14(b)(2)(i) to seek realistic ways to meet the requirements of Section 106, 36 CFR 800, and related legal requirements concerning the review of project impacts on historic properties; and

NOW, THEREFORE, OIA, the CIP Administrator, the CNMI HPO, and the Council agree that:

Delegation

The CIP Administrator will act as OIA's agent in carrying out review of CIP projects under 36 CFR 800, provided that:

In the event it is necessary under 36 CFR 800 to seek the determination of the Keeper of the National Register (Keeper) as to the eligibility of any property for inclusion in the National Register, the CIP Administrator shall refer the matter to OIA, which shall seek such determination; and

In the event the parties consulting under 36 CFR 800 are unable to reach agreement on ways to avoid or mitigate adverse effects on historic properties, the CIP Administrator shall refer the matter to OIA, which shall seek to resolve the matter with the Council or seek and consider the comments of the Council, in accordance with 36 CFR 800.

All documents exchanged between the parties to this agreement shall be deemed 'received', for the purposes of 36 CFR 800 time limits, at the time and date of the original document's facsimile transmission confirmation stamp. The original of any document delivered by facsimile transmission shall be sent by first-class mail as soon as practicable after the facsimile transmission.

Grant Conditions

OIA will routinely condition its Section 702 grants to require the CNMI to comply, on OIA's behalf, with 36 CFR 800 and pertinent Council guidance, and will require the CIP Administrator to ensure:

That each project administrator responsible for a given CIP project initiates consultation with the HPO when developing the application for A/E work or, in the case of a single-phase application, early in the process of application preparation, to develop a scope of work for coordinated compliance with Section 106 and the CNMI Historic Preservation Act, and that this scope of work, with documentation of the HPO's concurrence, is included in the application for A/E work or the single phase application sent by the CNMI to OIP for approval; and

That the scope of work is consistent with the requirements of the National Historic Preservation Act, including but not limited to Sections 110(a)(2)(E), 110(b), 110(d), 110(k), and 111, and other pertinent legal requirements including but not limited to Executive Orders 12898 and 13006; and

That those elements of the scope of work dealing with the identification of historic properties and the assessment of effects on such properties are implemented during the A/E work on the project; and

That in the case of projects requiring two phases of OIA review and concurrence, a revised scope of work for concluding project review and implementing proposed mitigation measures (if any) must be included in the application for construction authorization submitted by the CNMI to OIA; and

That in the case of single phase applications, the original scope of work must provide for adjustments to be made, as needed, to accommodate the results of historic property identification and effect determination, to complete review, and to implement mitigation as needed; and

That sufficient funds are included in each project budget to implement each scope of work; and

That any contractual services required to carry out work pursuant to the scope of work, or otherwise to complete compliance with 36 CFR 800, are procured competitively in accordance with CNMI Procurement regulations by the project administrator, in consultation with the CNMI HPO, with work proposal quality being the primary selection criteria; and

That work required to comply with 36 CFR 800, and each project scope of work, is carried out in a manner coordinated with CIP project planning, National Environmental Policy Act review, CNMI Coastal Resources Management Act review, public review, and project implementation, to minimize costly conflicts and ensure efficient operations and effective public involvement.

Administration of this Programmatic Agreement (PA)

Duties. OIA will require the CIP Administrator to have potential undertakings assessed and analyzed for potential effects on historic properties by those meeting the professional qualifications and provide the CNMI-HPO staff archaeologist with the findings for review and;

Professional Qualifications. OIA will require that CIP Administrator, in consultation with the CNMI HPO, ensure that all historic preservation work performed under contract with regard to a CIP project, including but not limited to archeological survey, archeological data recovery, architectural documentation and historic structure rehabilitation, be carried out by or under the direct supervision of a person or persons meeting the standards applicable to the pertinent profession in the Secretary of the Interior's Personnel Qualifications (36 CFR 61.11).

Resolving Objections:

Should any party to this PA object in writing to the CIP Administrator or OIA regarding any proposed or ongoing CIP project action that may adversely affect a historic resource or regarding implementation of this PA, OIA shall require the CIP Administrator to consult with the party to resolve the objection. If after initiating such consultation the CIP Administrator determines that the objection cannot be resolved through consultation, OIA shall consult with the CIP Administrator, CNMI HPO, and others as needed in an attempt to resolve the objection. If this consultation fails to resolve the objection, OIA shall forward all documentation relevant to the objection to the Council, including OIA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, the Council shall exercise one of the following options:

a) Advise OIA that the Council concurs in OIA's proposed response to the objection, whereupon OIA will respond to the objection accordingly;

b) Provide OIA with recommendations, which OIA shall take into account in reaching a final decision regarding its response to the objection; or

c) Notify OIA that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4), and proceed to refer the objection and comment. OIA shall take the resulting comment into account in accordance with 36 CFR 800.7(c)(4) and Section 110(l) of NHPA.

Should the Council not exercise one of the above options within 30 days after receipt of all pertinent documentation, OIA may assume the Council's concurrence in its proposed response to the objection.

OIA shall take into account any Council recommendation or comment provided in accordance with this stipulation with reference only to the subject of the objection; OIA's responsibility to carry out all actions under this PA that are not the subjects of the objection shall remain unchanged.

At any time during implementation of the measures stipulated in this PA, should an objection pertaining to this PA or the effect of the undertaking on historic properties be raised by a member of the public, OIA shall notify the parties to this PA and take the objection into account, consulting with the objector and, should the objector so request, with any of the parties to this PA to resolve the objection.

Monitoring Progress.

On or before January 30 of each year until OIA, the CNMI HPO, and the Council agree in writing that this PA is no longer needed to ensure that CIP projects in the CNMI are carried out in compliance with Section 106, OIA will require the CIP Administrator to

prepare and provide an annual report to the CNMI HPO, OIA, and the Council addressing the following topics:

a) CIP projects on which planning was initiated during the preceding year;

b) CIP projects completed during the preceding year;

c) CIP projects in progress at the time of reporting;

Status of compliance with the terms of this PA on each CIP project in categories (a) through (c) above;

Any objections raised and resolved during the preceding year;

Any problems or unexpected issues encountered during the year; and

Any changes that the CIP Administrator believes should be made in the implementation of this PA.

OIA shall require the CIP Administrator to ensure that the annual report is made available for public inspection, that potentially interested members of the public are made aware of its availability, and that interested members of the public are invited to provide comments to OIA, the CNMI HPO and Council as well as to the CIP Administrator.

OIA, the CNMI HPO, and the Council shall review the annual report and provide comments to the CIP Administrator. At the request of any party to this PA, OIA shall ensure that a meeting or meetings are held to facilitate review and comment, to resolve questions, or to resolve adverse comments.

Based on this review, the signatories to this PA shall determine whether this PA shall continue in force, be amended, or be terminated.

OIA shall provide an annual training course on Saipan to insure that the CIP Administrator, project administrators, and the CNMI HPO are aware of their responsibilities for compliance with the National Historic Preservation Act, National Environmental Policy Act, and other federally mandated planning requirements.

Amendments

Any party to this PA may propose to OIA that the PA be amended, whereupon OIA shall consult with the other parties to this PA to consider such an amendment. 36 CFR 800.6(c)(1) shall govern the execution of any such amendment.

Termination

If OIA determines that it cannot implement the terms of this PA, or if the CNMI HPO or Council determines that the PA is not being properly implemented, such party may propose to the other parties to this PA that it be terminated.

The party proposing to terminate this PA shall so notify all parties to this PA, explaining the reasons for termination and affording them at least 27.5 days to consult with each other and seek alternatives to termination..

Should such consultation fail, OIA, the CNMI HPO, or the Council may terminate the PA by so notifying all parties.

Should this PA be terminated, OIA shall immediately terminate its delegation of responsibilities under 36 CFR 800 to the CIP Administrator, and thereafter itself carry out such responsibilities.

Execution of this Programmatic Agreement by OIA, the CNMI HPO, and the Council, and implementation of its terms, evidence that OIA has afforded the Council an opportunity to comment on the CNMI Capital Improvement Program and its effects on historic properties, and that through implementation of this Programmatic Agreement OIA is taking into account the effects of the CNMI Capital Improvement Program on historic properties.

OFFICE OF INSULAR AFFAIRS, DEPARTMENT OF THE INTERIOR

BY_________________________________ Date: ________________
Print Name and Title:____

HISTORIC PRESERVATION OFFICER, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BY_________________________________ Date: ________________
Epiphanio E. Cabrera, Jr.,
CNMI Historic Preservation Officer

ADVISORY COUNCIL ON HISTORIC PRESERVATION

BY________________________________ Date: ________________

Print Name and Title____

CONCUR: CAPITAL IMPROVEMENT PROGRAM ADMINISTRATOR, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BY ________________________________ Date: ________________

Virginia Villagomez, CIP Administrator

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR JUAN A. SABLAN MEMORIAL BLDG., CAPITOL HILL, SAIPAN, MP 96950
TELEPHONE: 664-2341
TELECOPIER: 664-2349

OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

MEMORANDUM

To: To All Agency Heads

From: Pamela Brown, Attorney General
through Bernadita Dela Cruz, Registrar for the Commonwealth Register

Date: August 4, 2005

Re: Commonwealth Register

Please be advised that from this month (August, 2005) going forward, all agencies submitting materials to be published in the Commonwealth Register shall be required to submit an ***electronic copy of all materials***, in addition to the normal hard copy.

No materials will be published in the Register unless there is an accompanying electronic copy - floppy disc or CD.

The Office of the Commonwealth Register has been instructed not to accept materials which are not in conformance to this requirement.

This measure is being implemented to facilitate a more user-friendly, on-line format.

Thank you for your attention to this matter.