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The Regulatory Life Cycle and Regulatory Concerns for the Utilities of the Northern Mariana Islands

ABSTRACT

In its endeavor to exercise its newly recognized right of local self-governance, the Commonwealth of the Northern Mariana Islands, consisting of government officials, business leaders, and members of the general public, has been considering how to develop the Commonwealth's infrastructure so that it can become more self-sufficient. The Commonwealth, until recently, was governed by the United States and now must implement its own methods of regulation in order to sustain and develop its economy and protect its citizens and its environment. As part of its growth toward economic and regulatory self-sufficiency, the Commonwealth has, beginning in 1986, focused on whether it should privatize its government-owned utility structure. This article analyzes the Commonwealth's steps toward privatization and concludes that the government should continue to develop its regulatory infrastructure so that it can regulate the management and operation of each utility in order to ensure fair, equitable, and cost-effective utility services for all residents.

INTRODUCTION

This article discusses the development on the part of the Commonwealth of the Northern Mariana Islands (the Commonwealth) of a regulatory infrastructure in its endeavors to become economically and politically self-sufficient. Attention is also given to the Commonwealth's regulatory development by analyzing its deliberation over whether or not it should privatize its government-owned and operated utility system. The analysis and discussion provided in this article are useful not only to achieve a better understanding of the Northern Mariana Islands, but also to better understand how government regulation begins and why it is so

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crucial in enabling a newly independent government to protect its citizenry and provide for economic growth and stability.

This article first provides the reader with a background of the demographics, the political history and structure of the Northern Mariana Islands, and the applicable statutory law governing public utilities in the Northern Mariana Islands. Next, the article explains problems associated with the current utility structure and discusses the impetus for privatizing this structure. The potential benefits, drawbacks, and impediments to privatization are then analyzed. This discussion includes interrelated topics concerning government and regulatory principles, the operation and maintenance of the Commonwealth Utilities Corporation (CUC), and certain economic, political, and legal issues affecting the privatization of the CUC and the Commonwealth's development of its newly formed regulatory infrastructure. Finally, the article concludes with recommendations for how the Commonwealth Government should proceed in its steps toward privatizing the CUC.

Demographics of the Northern Mariana Islands

The Northern Mariana Islands are situated in Micronesia, which is a geographical region within Oceania.¹ Oceania is a large area that is comprised of approximately ten thousand islands spread throughout the Pacific Ocean.² Among the principal insular geographical divisions that have emerged from Oceania are three cultural island areas that include Micronesia, "small islands," Melanesia, "black islands," and Polynesia, "many islands."³ Polynesia includes the Hawaiian Islands, Western and American Samoa, Tonga, Nuie, and French Polynesia (Tahiti).⁴ Melanesia is southwest of Polynesia, and is north of Australia and New Zealand.⁵ It includes such islands as Papua New Guinea, the Solomons, Vanuatu, Fiji, and New Caledonia.⁶ Micronesia is right above Melanesia and includes such islands as the Northern Mariana Islands, Guam, the Federated States of Micronesia, Belau, the Carolina Islands, and the Marshall Islands.⁷ The residents of these islands are culturally diverse, with differences in

1. See DOUGLAS L. OLIVER, *THE PACIFIC ISLANDS* 3, 76 (2d ed. 1961).

2. See *id.* at 3.

3. See *id.* at 23, 64, 76.

4. See *id.* at 64.

5. See *id.* at 37.

6. See *id.*

7. See *id.* at 76-77.

language, religious beliefs, social organization, and technological development.⁸

Micronesia comprises the northern-most cluster of islands in Oceania and consists of approximately 2,100 islands.⁹ The Mariana Islands consist of Guam and the Northern Mariana Islands,¹⁰ which are separated into two distinct political entities, both of which are in political union with the United States.¹¹ The Northern Mariana Islands are comprised of fourteen islands located above Guam.¹² The Northern Mariana Islands include Rota, Aguijuan, Tinian, Saipan, Farallon de Medinilla, Anatahan, Sariguan, Guguan, Alamagan, Pagan, Agrigan/Agrihan, Asuncion, Maug, and Farallon de Pajaros (Uracas).¹³ These islands have one of the most equitable climates in the world.¹⁴

The total land area of the Northern Mariana Islands is 176.5 square miles¹⁵ and, as of 1997, is home to approximately 62,300 people.¹⁶ The three largest and most populated islands are Saipan, Tinian, and Rota.¹⁷ Saipan is the largest island, with a land area of 47.5 square miles,¹⁸ and is home to approximately ninety percent of the Commonwealth's population, approximately one-third of which are indigenous to the Mariana Islands.¹⁹ Saipan lies about 3,200 miles west of Honolulu, about 5,800 miles southwest of San Francisco, about 1,200 miles south of Tokyo, and about 2,000 miles from Seoul.²⁰ Tinian is the second largest island, with a land area of

8. See *id.* at 16-25, 77; John M. Romisher, *A Study about Community Education in the Trust Territory of the Pacific Islands 8* (1974) (unpublished Ph.D. dissertation, University of Nebraska (Lincoln)) (on file with University of Nebraska Library).

9. See OLIVER, *supra* note 1, at 76.

10. See *id.*

11. See *id.* at 400-03, 420-22; Commonwealth of the Northern Mariana Islands, Government, *History and Politics* (visited Apr. 27, 2000) <<http://www.mariana-islands.gov.mp/history.htm>> [hereinafter *CNMI History & Politics*].

12. See OLIVER, *supra* note 1, at 76; Commonwealth of the Northern Mariana Islands, Government, *Geography* (visited Apr. 27, 2000) <<http://www.mariana-islands.gov.mp/geog.htm>> [hereinafter *CNMI Geography*].

13. See *CNMI Geography*, *supra* note 12.

14. See *id.*

15. See *id.*

16. See Bank of Hawaii, CNMI Economic Report, *Commonwealth of the Northern Mariana Islands Economic Report: CNMI Summary & Map* (1997) <<http://www.boh.com/econ/pacific/cnmi/02.asp>> [hereinafter *CNMI Summary & Map*].

17. See *CNMI Geography*, *supra* note 12.

18. See *id.*

19. See Bank of Hawaii, CNMI Economic Report, *Commonwealth of the Northern Mariana Islands Economic Report: Economic Indicators* (1997) <<http://www.boh.com/econ/pacific/cnmi/06.asp>> [hereinafter *CNMI Economic Indicators*].

20. See *CNMI Geography*, *supra* note 12; *CNMI Summary & Map*, *supra* note 16.

39.3 square miles,²¹ and is home to approximately 2,600 people, about half of which are indigenous to the Mariana Islands.²² The third largest is Rota Island, which measures 32.9 square miles²³ and is home to approximately 3,500 people, about half of which are indigenous to the Mariana Islands.²⁴ The remaining eleven islands are much smaller and are significantly less populated, if populated at all. For example, Farallon De Pajaros (0.8 square miles), Maug (0.8 square miles), Asunsion (2.8 square miles), Sagrigan (1.9 square miles) and Aguijuan (2.8 square miles) are all uninhabited.²⁵ In addition, Pagan (18.7 square miles) is uninhabited due to volcanic activity, Guguan (1.6 square miles) is uninhabited and serves as a wildlife sanctuary, and Farallon De Medinilla (0.4 square miles) is uninhabited and is used by the United States for military exercises.²⁶ The remaining islands are sparsely populated. For example, Agrigan/Agrihan (18.3 square miles) houses approximately 20 people, Alamagan (4.4 square miles) houses approximately 70 people, and Anatahan (12.5 square miles) houses approximately 65 people.²⁷

The population of the Commonwealth continues to grow. The CNMI (Commonwealth of Northern Mariana Islands) Population Report showed that in 1973 the total population was 14,495; in 1980 it reported a population of 16,780; and by 1990 and 1995, it reported that the figure had grown significantly to a population of 43,345 and 58,846 respectively.²⁸ In 1997 the population increased to approximately 62,300 people.²⁹ About one-third of the population is comprised of citizens of the United States that are not citizens of the Commonwealth.³⁰ Interestingly, the comparison of the population to the total number of visitors per year to the Commonwealth is staggering. For example, the Governor's Office reported that 596,033 persons visited the islands in 1994; 676,161 in 1995; 737,117 in 1996; 694,797 in 1997; 490,165 in 1998; and 501,788 in 1999.³¹

21. See CNMI Geography, *supra* note 12.

22. See Letter from Frank S. Rosario, Press Secretary, Public Information & Protocol Office, Office of the Governor, to Lydia C. Romisher, author 4 (Mar. 16, 2000) (on file with author) (citing 1995 CNMI Mid-Decade Census Report tbl.1.12: Birthplace by Island 1995).

23. See CNMI Geography, *supra* note 12.

24. See Letter from Frank S. Rosario to Lydia C. Romisher, *supra* note 22, at 4.

25. See CNMI Geography, *supra* note 12.

26. See *id.*

27. See *id.*

28. See Letter from Frank S. Rosario to Lydia C. Romisher, *supra* note 22, at 8 (tbl.A.2.0: CNMI Population by Citizenship and Sex, 1973 to 1995).

29. See CNMI Summary & Map, *supra* note 16.

30. See *id.*; CNMI Economic Indicators, *supra* note 19.

31. See Letter from Frank S. Rosario to Lydia C. Romisher, *supra* note 22, at 2 (citing the Mariana Visitor Center, tbl.8.1: CNMI Visitors Arrival by Month: Calendar Years 1994-1999); Bank of Hawaii, CNMI Economic Report, *Commonwealth of the Northern Mariana*

The Commonwealth's economy is primarily supported by taxes generated by tourism, garment manufacturing, service companies, and retail stores.³² Even though the Commonwealth has recently experienced considerable economic growth, the economy is very fragile and is primarily controlled by outside markets and certain federal laws of the United States, like those pertaining to textile industries. At the present time, the Commonwealth's economy is experiencing numerous challenges, namely from substantial fiscal reduction based on reduced tourism and the United States Government's present interference with the Commonwealth's textile industry and immigration and labor laws.³³ On a positive note, however, the garment or textile industry has shown a 37 percent increase in revenue.³⁴ Such increases mitigate some revenue loss from the downturn in tourism and other non-apparel industries.³⁵

POLITICAL FRAMEWORK OF THE NORTHERN MARIANA ISLANDS

Historical Background

Over the years, the indigenous inhabitants of the Northern Mariana Islands have been governed by administrations from several different nations.³⁶ From 1521 to 1899, Spain governed the islands.³⁷ In 1899, Germany paid Spain \$4.5 million for the acquisition of the Mariana Islands (excluding Guam since it was already a U.S. Territory) and the Carolina Islands.³⁸ Germany governed the islands until 1914, when Japan declared

Islands Economic Report: Economy by Sector (1997) <<http://www.boh.com/econ/pacific/cnmi/07.asp>> [hereinafter *CNMI Economy by Sector*].

32. See *CNMI Economy by Sector*, *supra* note 31; *CNMI Summary & Map*, *supra* note 16.

33. See U.S. GENERAL ACCOUNTING OFFICE, NAT'L SEC. & INT'L AFFAIRS DIV. REPORT NO. B-255486, U.S. INSULAR AREAS-DEVELOPMENT STRATEGY AND BETTER COORDINATION AMONG U.S. AGENCIES ARE NEEDED app. II (GAO/NSIAD94-62, 1994) (available at 1994 WL 809975); Bank of Hawaii, *CNMI Economic Report, Commonwealth of the Northern Mariana Islands Economic Report: Introduction* (1997) <<http://www.boh.com/econ/pacific/cnmi/04.asp>>; Governor Pedro P. Tenorio, *CNMI Testimony at U.S. Senate Committee on Energy and Natural Resources Hearing 1* (Sept. 14, 1999) (available at *Commonwealth of the Northern Mariana Islands, Government, Speeches and Press Releases* (Sept. 14, 1999) <<http://net.saipan.com/cftemplates/exec/senate.htm>> [hereinafter *Tenorio Senate Testimony*].

34. See *Tenorio Senate Testimony*, *supra* note 33, at § III.C (Economic Outlook).

35. See *Tenorio Senate Testimony*, *supra* note 33, at §§ III.B (Strategic Economic Planning), III.C (Economic Outlook).

36. See HAROLD F. NUFER, *MICRONESIA UNDER AMERICAN RULE: AN EVALUATION OF THE STRATEGIC TRUSTEESHIP* (1947-77) 3-10, 26-30 (1978).

37. See *id.* at 4.

38. See *id.* at 6.

war on Germany and the Japanese navy seized the islands.³⁹ Japan retained control of the islands until 1945.⁴⁰ During Japan's administration, the League of Nations formulated the objectives for the Japanese administration of the Islands.⁴¹ Then, in 1945 the United States Navy took control of the islands from Japan.⁴² In 1947, the United Nations designated Micronesia as a Strategic Trust Territory and placed the Northern Mariana Islands under the administration of the United States.⁴³

Beginning in 1951, the United States began governing the Mariana Islands through the Department of Interior.⁴⁴ The Department of Interior restricted entry to the Northern Mariana Islands and used the islands for various military activities.⁴⁵ Under the Trusteeship Agreement the United States pledged to "[p]romote the economic advancement and self-sufficiency of the inhabitants...by encouraging the development of fisheries, agriculture and industries."⁴⁶ Economic development, however, did not really begin for approximately thirty years, until the Trusteeship Agreement was replaced with the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (the Covenant).⁴⁷

The trustee relationship between the United States and the Northern Mariana Islands ended on November 3, 1986, when the Covenant became effective.⁴⁸ Discussion of the termination of the Trusteeship Agreement began in 1970.⁴⁹ In 1975, the people of the Northern Mariana Islands held a plebiscite in which 78 percent of the eligible voters voted to negotiate a covenant with the United States.⁵⁰ The goal in negotiating the Covenant was to establish a commonwealth of the Northern Mariana Islands in political union with the United States so that the people of the Northern Mariana Islands could become more politically and economically

39. See *id.* at 10.

40. See *id.* at 26.

41. See Romisher, *supra* note 8, at 16.

42. See NUFER, *supra* note 36, at 36.

43. See *id.* at 43, 45.

44. See *id.* at 49.

45. See *id.*; CNMI History & Politics, *supra* note 11.

46. Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History). See also NUFER, *supra* note 36, at 29.

47. See Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History).

48. See Proclamation No. 5564 § 1, 51 Fed. Reg. 40,399; 40,399 (1986) reprinted in 48 U.S.C. § 1801 note (1994) (Proclamations).

49. See CNMI History & Politics, *supra* note 11.

50. See CNMI History & Politics, *supra* note 11; Proclamation No. 4534, 42 Fed. Reg. 56,593; 56,593 (1977) reprinted in 48 U.S.C. § 1801 note (1994) (Proclamations).

self-sufficient.⁵¹ The Covenant between the Northern Mariana Islands and the United States became effective in 1976 after it was approved by a majority of indigenous voters in the Northern Mariana Islands, adopted by the Mariana Island's District Legislature, adopted by the Congress of the United States, and signed by the President of the United States.⁵²

As a result of its commonwealth status, the Commonwealth of the Northern Mariana Islands is now a self-governing political entity that will be in permanent political union with the United States. The relationship embodied in the Covenant is patterned after the relationship between the United States and Puerto Rico as well as the relationship between the United States and Guam.⁵³ The Covenant of the Northern Mariana Islands does, however, contain unique provisions that are not present in either the agreement between the United States and Puerto Rico or the agreement between the United States and Guam.⁵⁴

The provisions of the Covenant establish the political relationship between the United States and the people of the Northern Mariana Islands and provide guidelines to assist the Commonwealth in becoming self-governing.⁵⁵ Toward this end, the Covenant provides for the formulation and amendment of a constitution of, for, and by the people of the Northern Mariana Islands; guidelines concerning citizenship and nationality; judicial, legislative, and executive authority; and the creation, implementation, and enforcement of the Commonwealth's own revenue and taxation mechanism.⁵⁶ The Covenant also specifies which United States constitutional and statutory provisions apply to the Commonwealth, provides for representation of the Commonwealth by its own officials in Congress, and outlines the availability of financial assistance from the United States.⁵⁷ Most importantly, the Covenant reiterates the commitment of the United States to assist the government of the Northern Mariana Islands in its efforts to achieve a progressively higher standard of living for its people and to develop the economic resources needed to meet the financial

51. See *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, 48 U.S.C. § 1801 note (1994) (Text of Covenant) [hereinafter *The Covenant*]; Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History); CNMI *History & Politics*, *supra* note 11.

52. See Proclamation No. 4534, 42 Fed. Reg. 56,593; 56,593 (1977) reprinted in 48 U.S.C. § 1801 note (1994) (Proclamations).

53. See MARIANAS POLITICAL STATUS COMM'N, SECTION BY SECTION ANALYSIS OF THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 2 (1975).

54. See *id.*

55. See *id.* at 2-5.

56. See generally *The Covenant*, 48 U.S.C. § 1801 note (1994) (Text of Covenant). See also MARIANAS POLITICAL STATUS COMM'N, *supra* note 53.

57. See generally *The Covenant*, 48 U.S.C. § 1801 note (1994) (Text of Covenant). See also MARIANAS POLITICAL STATUS COMM'N, *supra* note 53.

responsibilities of local self-government.⁵⁸ Along these lines, the provisions of the Covenant include economic development tools that (1) grant the Commonwealth control over immigration into the Commonwealth, (2) exempt the Commonwealth from the minimum wage provisions of federal law, (3) exclude the Northern Mariana Islands from the customs territory of the United States, and (4) permit goods from the Commonwealth to enter the United States in the same manner as do goods from Guam.⁵⁹

The political structure of the Commonwealth government is fashioned after the political structure of the United States so that the powers of the various branches of government are balanced and the citizens of the Islands have equal representation.⁶⁰ Similar to the political structure of the United States, the Islands now have a central government that consists of an elected governor, an executive administration appointed by the Governor, a bicameral legislature, and a judicial system comprised of a superior court and a supreme court.⁶¹ Appeals from the Commonwealth's Supreme Court are directed to the United States Ninth Circuit Court of Appeals and then to the United States Supreme Court.⁶² There is also a United States District Court on Saipan and a United States Attorney General's Office for the Commonwealth.⁶³ Additionally, the Commonwealth has a resident representative to the United States who is a non-voting delegate in Washington, D.C.⁶⁴

The executive branch of the Commonwealth government is headed by a Governor and a Lieutenant Governor that are elected on the same platform for a term of four years.⁶⁵ The legislature is a bicameral body and currently includes a nine-member Senate and an eighteen-member House of Representatives.⁶⁶ The Senate is made up of nine elected members, three from each of the following: from Rota, from Saipan and the islands north of it, and from Tinian and Aguijuan combined.⁶⁷ The House of Representatives, which is apportioned according to population, has 16 representatives from Saipan, one from Rota, and one from Tinian and Aguijuan combined.⁶⁸ The seat of the Commonwealth Government is situated in

58. See The Covenant, 48 U.S.C. § 1801 note (1994) (Text of Covenant), at art. VII.

59. See Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History); The Covenant, 48 U.S.C. § 1801 note (1994) (Text of Covenant), at §§ 503, 603.

60. See The Covenant, 48 U.S.C. § 1801 note (1994) (Text of Covenant), at art. II, § 203.

61. See generally N. MAR. I. CONST.; CNMI *History & Politics*, *supra* note 11.

62. See CNMI *History & Politics*, *supra* note 11.

63. See *id.*

64. See *id.*; N. MAR. I. CONST. art. V.

65. See N. MAR. I. CONST. art. III; CNMI *History & Politics*, *supra* note 11.

66. See N. MAR. I. CONST. art. II; CNMI *History & Politics*, *supra* note 11.

67. See N. MAR. I. CONST. art. II, § 2; CNMI *History & Politics*, *supra* note 11.

68. See N. MAR. I. CONST. art. II, § 3; CNMI *History & Politics*, *supra* note 11.

Saipan.⁶⁹ The legislative branch of the Commonwealth Government has the power to enact legislation for the public good as long as such legislation is not inconsistent with treaties or international agreements of the United States, the Covenant, and laws of the United States that are applicable to the Northern Mariana Islands as part of the Trust Territory of the Pacific Islands or applicable separately to the Northern Mariana Islands.⁷⁰

Local island governments are headed by elected mayors. For example, currently there is a mayor for the island of Rota, a mayor for the Island of Tinian, a mayor for the Island of Saipan, and a mayor for the remaining Northern Islands combined.⁷¹ Additionally, the islands of Rota, Tinian, and Saipan have their own elected city councils that have the power to legislate their own local laws.⁷²

One of the changes created by the Constitution through the Covenant was that the Commonwealth Government received greater responsibility for administering governmental services and implementing laws for the benefit of its peoples' health, safety, and general welfare, such as public utilities.⁷³ Public utilities were managed by the United States Navy during the early 1940s and later by the United States Department of Interior through the Trust Territory's Public Works Department.⁷⁴ The Commonwealth is currently in charge of providing road maintenance, electricity, water, and sewer services.⁷⁵ The Commonwealth's governmental infrastructure, as inherited from the Trust Territory era, however, was "weak, incomplete and needed significant improvements."⁷⁶ However, with the help of Capital Development funding from the United States and funds generated by the Commonwealth's textile industry, the Commonwealth is working to build its regulatory infrastructure so it can better serve and protect its constituents.⁷⁷

69. See *CNMI History & Politics*, *supra* note 11.

70. See Dep't of the Interior, Secretarial Order No. 2989 pt. III § 6, 41 Fed. Reg. 15,892; 15,894 (1976).

71. See N. MAR. I. CONST. art. VI.

72. See *id.* at art. VI, § 6(a).

73. See *id.* at art III, § 17.

74. See NUFER, *supra* note 36, at 43, 45, 49; Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History).

75. See CH2MHILL, FINAL REPORT, FEASIBILITY STUDY: PRIVATIZATION OF VARIOUS UTILITIES OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 1-1 (1997).

76. Tenorio Senate Testimony, *supra* note 33, at § III.A (Economic History).

77. See Governor Pedro P. Tenorio, CNMI Testimony at U.S. House of Representatives Committee on Resources § II (Sept. 16, 1999) (*available at* Commonwealth of the Northern Mariana Islands, Government, *Speeches and Press Releases* (Sept. 16, 1999) <<http://net.saipan.com/cftemplates/exec/house.htm>> [hereinafter Tenorio House of Representatives Testimony]).

Federal Jurisdiction in the Commonwealth

Not all federal laws are applicable in the Commonwealth. Article V, Section 502 of the Covenant provides that some laws of the United States in existence at the time the Covenant was adopted and laws of the United States that apply to Guam as a territory of the United States are also applicable to the Commonwealth.⁷⁸ In addition, Article V, Section 503 of the Covenant provides that laws of the United States not explicitly applicable to the Trust Territory of the Pacific Islands or the Commonwealth do not apply to the Commonwealth.⁷⁹ Thus, federal utility laws generally do not apply to the Commonwealth.

The Federal Government, through the Department of Interior's Office of Insular Affairs, does, however, exercise close oversight of the development and operations of the Commonwealth's utility structure.⁸⁰ The Department of Interior exercises oversight by imposing conditions on certain activities of the Commonwealth's utility structure, the Commonwealth Development Authority (CDA), and the Commonwealth Government.⁸¹ These conditions are mainly designed to improve utility services provided to consumers of the Commonwealth and are imposed because the Commonwealth has entered into a series of funding grants and loan agreements with the United States.⁸² Some of these conditions fall within the areas of supervising fiscal management accountability, conducting management assessments of utility operations, and enacting legislation to create a utility regulatory commission.⁸³

Status of the Commonwealth's Regulatory Infrastructure

Prior to 1985, public utilities such as power, water, and sewer systems were managed as a division of the Commonwealth Public Works Department and called the Commonwealth Utility Rate Commission.⁸⁴ On October 1, 1985, the Commonwealth Legislature enacted Public Law 4-47,

78. The Covenant, 48 U.S.C. § 1801 note (1994) (Text of Covenant), at art. V, § 502.

79. *Id.* at art. V, § 503.

80. See DELOITTE & TOUCHE, COMMONWEALTH UTILITIES CORPORATION: INDEPENDENT AUDITORS' REPORTS ON COMPLIANCE WITH LAWS AND REGULATIONS, YEAR ENDED SEPTEMBER 30, 1995 14, 16 (1996); METZLER & ASSOC., MANAGEMENT AUDIT OF THE COMMONWEALTH UTILITIES CORPORATION 8-9 (1994).

81. See DELOITTE & TOUCHE, *supra* note 80, at 14; METZLER & ASSOC., *supra* note 80, at 8-9.

82. See DELOITTE & TOUCHE, *supra* note 80, at 14.

83. See *id.*

84. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8121(b) (Supp. 1994); METZLER & ASSOC., *supra* note 80, at 6.

which changed the previous public utility regulatory structure by creating the Commonwealth Utilities Corporation (CUC).⁸⁵ The Commonwealth legislature first attempted to enact utility regulation through Public Law 4-47 and Public Law 3-11, Sections 603 and 604, by imposing price controls on electric and water charges.⁸⁶ The purpose of Public Law 4-47, as amended by Public Law 6-30, was to create a public utility that would provide utility services, including the delivery of electric, water, sewer, cable television and telephone services, to the inhabitants of the Commonwealth.⁸⁷

The CUC is a semi-autonomous public corporation that consists of a nine-member Board of Directors appointed by the Commonwealth Governor for a term consisting of four years.⁸⁸ The Board has a legal and fiduciary duty to protect the interests of the CUC for the betterment of the Commonwealth.⁸⁹ In addition, the Board is responsible for the operation and maintenance of public utilities in the Commonwealth.⁹⁰ This responsibility includes the following duties:

1. Supervising the construction, maintenance operations, and regulation of all utility services, including power, sewage, refuse collection, road maintenance, telephone, cable television, and water.⁹¹ For example, Section 8122(b) and 8123(k) of P.L. 4-47 as amended by P.L. 6-30, sections 16, 17, and 18; and P.L. 8-23, section 18, gives the CUC the power to "regulate cable, telephone and other utility services to the extent permitted by applicable federal law and the contractual obligations of the Commonwealth [G]overnment."⁹²
2. Establishing rates for utility services, conducting metering and billing for services used, and collecting fees in a fair and rational manner from all customers of utility services.⁹³ Section (m) also provides CUC with the power and authority to set rates "[t]o the extent the Corporation deems lawful and necessary, to review and establish utility rates and other fees for water, sewer, telephone, cable television, and electrical

85. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8121(a) (Supp. 1994).

86. See User Fees, 4 N. MAR. I. CODE §§ 1603, 1604 (Supp. 1990); Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8143 (Supp. 1990).

87. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8121 (Supp. 1994).

88. See *id.* at § 8131; METZLER & ASSOC., *supra* note 80, at 7.

89. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8131 (Supp. 1994); METZLER & ASSOC., *supra* note 80, at 7.

90. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8134 (Supp. 1992).

91. See *id.* at § 8122(a).

92. Act of Oct. 1, 1985, Pub. L. No. 4-47 § 1, amended by Pub. L. No. 6-30 § 16.

93. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8122(b) (Supp. 1994).

- power; except that no fee for water, sewer and electrical power shall be charged which is higher than the actual cost to the Corporation to connect customers to Corporation facilities."⁹⁴
3. Exercising entry and exit controls of utility services.⁹⁵
 4. Providing life-line utility services at lower rates for the benefit of low-income consumers.⁹⁶
 5. Administering CUC's assets, liabilities, operations, and unexpended capital such that the CUC can work toward becoming financially independent of appropriations by the Commonwealth Legislature.⁹⁷ In fact, in July 1985, in a Special Representative Agreement negotiated between the Commonwealth Government and the United States Government, the Commonwealth Government agreed that the utility system would be placed on a full cost recovery basis within three years after passage of the enabling statute.⁹⁸ Unfortunately, full cost recovery has not yet been achieved by the CUC.⁹⁹

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, 1985.¹⁰⁰

Public Law 4-47 also gives the CUC the option to either operate and maintain public utilities on its own, or to contract these functions out through privatization agreements with privately owned utilities.¹⁰¹ Public Law 4-47, as amended by Public Law 6-30, section 15, also gives the CUC the ability to regulate private entities that provide utility services.¹⁰² The statute specifies that "if a service has been turned over to the private sector...the Compliance Division shall monitor the performance, rates, and

94. *Id.* at § 8123(m).

95. *See id.* at § 8122(b).

96. *See id.* at § 8141(d).

97. *See id.* at § 8122(b); DELOITTE & TOUCHE, COMMONWEALTH UTILITIES CORPORATION: REPORT ON THE AUDIT OF FINANCIAL STATEMENTS IN ACCORDANCE WITH OMB CIRCULAR A-128, YEAR ENDED SEPTEMBER 30, 1995 7 (1996); METZLER & ASSOC., *supra* note 80, at 6-7.

98. *See* METZLER & ASSOC., *supra* note 80, at 6.

99. *See id.*

100. Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8122(b) (Supp. 1994).

101. *See id.* at §§ 8123(h), (i).

102. *See id.* at § 8123(k).

contractual compliance of the private sector enterprise."¹⁰³ The Act further states that "whenever feasible the Corporation shall contract for private business to assume its duties with respect to one or more of its divisions."¹⁰⁴ Furthermore, the Act gives the Board the authority to promulgate standards and rules to regulate its utilities.¹⁰⁵

The Act thus provides the CUC with the appropriate mechanism to carry out its duties and responsibilities, with or without privatization, through contractual arrangements for services and indicates that the CUC has the authority to adjust to economic developments in the Northern Mariana Islands.

REGULATORY PRINCIPLES AND THE REGULATORY LIFE CYCLE

Goals and Purposes of Regulating Utilities

Regulating utilities is an important government role that involves social, economic, environmental, and political considerations in delivering crucial services to people. The aim of governmental regulation of utility services is to ensure that people receive safe, affordable, and dependable utility services.¹⁰⁶ Because the social, economic, environmental, and political factors involved in providing safe, affordable, and reliable utility services changes over time, it is crucial that governmental regulation be able to respond to these changes.¹⁰⁷ The response of a regulatory agency to changes in such factors has been described as a "regulatory life cycle."¹⁰⁸

In the regulatory life cycle described by Shapiro and Tomain there are six stages.¹⁰⁹ The first stage is marked by little or no regulation.¹¹⁰ In this stage, goods and services are provided by the free market.¹¹¹ The second stage begins when the free market fails.¹¹² This occurs when services are not adequate, or become too expensive, or the market does not protect the environment or other socially recognized goods.¹¹³ In response, the government enters stage three with regulatory solutions for the problems

103. *Id.* at § 8121(d).

104. *Id.* at § 8122(a).

105. *See id.* at § 8123(o).

106. *See* SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY 38-39 (1993).

107. *See id.* at 56-57.

108. *See id.* fig.2-1.

109. *See id.*

110. *See id.* at 57.

111. *See id.*

112. *See id.*

113. *See id.*

created by the market failures.¹¹⁴ Stage four occurs when the regulatory solutions implemented by the government begin to fail.¹¹⁵ This happens because circumstances surrounding and impacting the industry being regulated change or regulatory enforcement or implementation of the regulatory solutions are inadequate to fix the problems.¹¹⁶ In stage five, the government attempts to fix the regulatory failures through regulatory reform.¹¹⁷ Often regulatory reform is successful and the regulatory cycle oscillates between stage four, regulatory failure, and stage 5, regulatory reform.¹¹⁸ In rare circumstances, the government may decide to enter into stage six of the regulatory life cycle and deregulate the subject industry.¹¹⁹ If this path is chosen, the cycle begins anew with stage one, the free market.¹²⁰

Evaluation of the Commonwealth's Regulatory Life Cycle

In the beginning of the Commonwealth's newly found self-governance it experienced a vacuum of government regulation. This created certain problems. Some examples of problems in the Commonwealth caused by insufficient regulations pertain to the use of private water wells, private power generators, and private septic tanks. First, private water wells are drilled on private property in the Commonwealth by the occupant. The water in the drilled well comes from a government-owned water lens that separates fresh water from seawater. The danger of breaking the water lens is a valid concern that has already been realized. As a result, fresh water is hard to obtain and most people have to buy bottled drinking water. Another example is the use of a power generator purchased by an individual to provide electricity. This generator is installed on private property. It produces sound and air pollution that amounts to a public nuisance. In addition, private persons dig their own sewage tanks on their private property. A small contractor builds it on a part-time basis. There is no interest in having it inspected for safety and quality by the government. A serious danger exists. The effluent is not properly controlled and seeps into the water lens causing contamination. Furthermore, concern exists in the Commonwealth about the amount of pollution coming from the exhaust of power generators. There is additional concern about ground pollution resulting from empty diesel fuel containers

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

left unattended beside the power plant. These problems are the result of a lack of governmental regulation.

In response to these problems the Commonwealth moved away from the free market and implemented regulations that require that citizens obtain permits to drill water wells and build septic tanks.¹²¹ In addition, the Commonwealth has been analyzing how to strengthen its regulatory infrastructure so that it can provide safe, economical, and reliable utility services to its constituents.¹²² Toward this end, the Commonwealth enacted Public Law 4-47 in response to the failure of private markets to function adequately and the government's interest in regulating the conduct of persons and firms in order to provide affordable, safe, and reliable utility services.¹²³

The next problem, however, is that the CUC is not yet economically self-sufficient. Financially, the CUC is insolvent.¹²⁴ The cash flow of the CUC "has been near zero or negative in nearly every year since 1989."¹²⁵ For example, total current assets for the CUC reported in 1995 amount to \$19,942,321.¹²⁶ The total current liabilities of the CUC, however, amount to \$116,140,786.¹²⁷ Recently, the Saipan Tribune reported that equity conversion remains an option for CUC's \$100 million liability (debt).¹²⁸

In 1994 the CUC was unable to meet the need for increased generation to satisfy economic development demands for power generation, power distribution, and water.¹²⁹ Peak demand for electricity grew during 1988-1993 from 32 MW to over 50 MW for an average increase of approximately eight percent per year.¹³⁰ At the same time, a number of new hotels and developments provided their own power using self-generating units and water desalinization units.¹³¹ The CUC needs to develop an adequate reserve margin because the Commonwealth is located in an island environment where neighboring utilities are not available from

121. See Regulations Governing the Use of CUC Water System, Authority and Purpose § 2 (1988); Regulations Governing the Use of Public Sewers, Authority and Purpose § 2 (1988).

122. See Tenorio House of Representatives Testimony, *supra* note 77, at § II (Covenant Section 702 Grants are Expended on Vital Projects).

123. See SHAPIRO & TOMAIN, *supra* note 106, at 41.

124. See METZLER & ASSOC., *supra* note 80, at 1.

125. *Id.*

126. See DELOITTE & TOUCHE, *supra* note 97, at 3.

127. See *id.* at 4.

128. See Aldwin R. Fajardo, *Equity Conversion Remains an Option for CUC's \$100-M Liability*, SAIPAN TRIB., Mar. 24, 2000, at *1, *1 (Online Edition) (available at <<http://www.tribune.co.mp>>).

129. See METZLER & ASSOC., *supra* note 80, at 4-5.

130. See *id.* at 4.

131. See *id.*

which to buy power, and where frequent typhoons can disrupt power generation and distribution capability.¹³² Otherwise, major businesses have to become self-sufficient to hedge against inadequate utility services.¹³³ Additional reasons for businesses being self-sufficient are that (1) major developments are required by the Coastal Resources Management Office to document that they are building a facility that is self sufficient in power and water in order to receive their permit to begin construction, and (2) the power service usually provided by the CUC is inefficient and is often more expensive to use by a developer.¹³⁴

Services provided by the CUC, and its capability to collect revenue from these services, are considered pivotal economic activities.¹³⁵ The Commonwealth Government is losing revenue by allowing other companies to operate their own power generators instead of tapping into the CUC system.¹³⁶

In order to accomplish regulatory reform, the CUC is working on amending its existing regulations and is discussing the possibility of privatizing its utility structure. Toward this end, the Commonwealth Government, upon inception of its Commonwealth Status, embarked upon creating its own economic development roadmap as evidenced by the 1986 Economic Development Priorities: A Blue Print for Good Growth.¹³⁷ This report, as discussed *infra*, takes the position that privatizing the Commonwealth's utilities will help reduce governmental expenditures and improve the reliability, efficiency, and affordability of utility services to residents and businesses.¹³⁸

The Commonwealth Government's regulatory role, regardless of whether it engages in the privatization of its remaining public utilities, is to amend its laws to provide the CUC with sufficient authority to regulate private enterprises that provide utility services. Such changes should mirror the regulatory authority that is normally afforded to public utility commissions in the United States. In any event, even if the government decides to continue to operate its utilities itself, the CUC should be given expanded power to regulate businesses that impact the Commonwealth's ability to provide utility services.

132. See *id.*

133. See *id.*

134. See *id.* at 21-24.

135. See CH2MHILL, *supra* note 75, at S-7.

136. See METZLER & ASSOC., *supra* note 80, at 4.

137. SAIFAN CHAMBER OF COMMERCE & ECON. DEV. LOAN FUND, ECONOMIC DEVELOPMENT PRIORITIES: A BLUEPRINT FOR GOOD GROWTH (1986) [hereinafter BLUEPRINT FOR GOOD GROWTH].

138. See *id.* at 5-7.

EVALUATION OF PRIVATIZATION AS A SOLUTION

General Principles

There are numerous reasons why any government, either in the United States or internationally, chooses to privatize their utilities.¹³⁹ For example, governments may choose to privatize their utilities due to the capital-intensive nature of providing utility services and the fact that the cost of operating its utilities on its own drains limited government resources.¹⁴⁰ Other reasons to privatize are to improve the efficiency and reliability of the utility, to lower utility rates, and to facilitate economic growth.¹⁴¹ In addition, governments often desire to privatize their utilities in an effort to downsize government spending and involvement in operating their public utilities.¹⁴² This desire is often motivated by the philosophical belief that businesses are run more economically and efficiently by private industry.¹⁴³

Contracting-out and franchising are the most common methods of privatizing utility services. Contracting-out, also known as "outsourcing," is by far the most common means of privatization in the United States.¹⁴⁴ There are many different approaches the CUC could take to privatize utility services. For example, assets could be leased to private operators who would then provide utility services to the public subject to regulation by the CUC.¹⁴⁵ Franchise arrangements could be made under which the CUC would grant the right to one or more firms to provide specified services subject to conditions such as the obligation of the franchisee to pay the CUC either a percentage or a flat fee of the revenues received from consumers.¹⁴⁶ Joint ventures could be arranged between the CUC and private entities.¹⁴⁷ CUC assets could be transferred to consumer cooperatives that would then provide utility services.¹⁴⁸ A joint venture between CUC employees and the Commonwealth Government could be arranged.¹⁴⁹ The CUC could divest its power distribution business and sell

139. See CH2MHILL, *supra* note 75, at 1-5.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.* at 1-1 to 1-4.

145. See *id.* at 1-1.

146. See *id.*

147. See *id.*

148. See Laurence S. Belinsky, *Municipal Power Systems Should Consider Privatization*, ELECTRIC LIGHT & POWER, Sept. 1, 1997, at 11, 11 (available at 1997 WL 9399100).

149. See *id.*

its assets outright, offering their poles and wires to the private sector in exchange for a healthy deposit to the Commonwealth treasury, or the Commonwealth Government may choose to privatize gradually, outsourcing functions such as billing and collections to an outside firm.¹⁵⁰

Should the government disengage from the retail side of their utility business in this way, it provides power retailers with a unique opportunity to get ahead of their competitors, assuming that there are competitors interested in operating a Commonwealth utility.¹⁵¹ This option is not very feasible, however, because it is unlikely that the small population of the Commonwealth could support competition among utilities.

In 1986, the Saipan Chamber of Commerce introduced the first economic development plan to address the need for future expansion of public utilities in order to help foster continued economic development of the Islands.¹⁵² "The Economic Development Plan, the Blueprint for Good Growth," addressed the issue of public power as a "[n]eed for [a] reliable power generation and distribution system where outages are infrequent and power supply is of consistent and correct voltage."¹⁵³ The Blueprint for Good Growth also recognized the importance of planning for adequate infrastructure for utilities by stating that the Commonwealth needs "[a] well planned, reliable generation and distribution system which takes into consideration renovation and expansion to correct current problems and meet increasing economic growth."¹⁵⁴

The Blueprint for Good Growth further proposed that the Commonwealth Government consider removing government subsidies for power over time by adjusting rates and turning the power generation and distribution responsibilities over to a private firm.¹⁵⁵ Under a long-term arrangement, a private firm would, thus, manage, develop, maintain, and distribute electricity to Northern Mariana residents.¹⁵⁶

The privatization of public power generation in the Commonwealth, however, comes with anticipated problems. Possible concerns indicated by the Blueprint for Good Growth are the "[f]ear of loss of government jobs through privatization; possible increased utility rates; [and] general resistance to change."¹⁵⁷ Proper planning is, therefore, needed to avoid the possibility that privatization of power generation may result in increased unemployment rates, elevated utility rates that may be

150. See *id.*; CH2MHILL, *supra* note 75, at 1-2 to 1-4.

151. See Belinsky, *supra* note 148, at 11.

152. See BLUEPRINT FOR GOOD GROWTH, *supra* note 137, at § 4 (Infrastructure Resources).

153. *Id.* at 8 § 4.12.

154. *Id.*

155. See *id.*

156. See *id.*

157. *Id.*

unreasonable for residents to pay, and heightened dissatisfaction of residents stemming from the Government's decision to allow a private firm to take over their utilities.

Other considerations that may impede privatization are as follows: (1) the types, extent, and magnitude of the agreements between the United States and the Commonwealth Government regarding the public utilities and other development projects; (2) funding conditions and stipulations imposed by the federal government that may have some effect on the management and operation of the CUC; (3) the type, extent, and magnitude of the existing fiscal indebtedness of the CUC and future indebtedness to which the CUC has already obligated itself; (4) the inadequacy of existing CUC laws and regulations; (5) other federal actions such as the imposition of a federal minimum wage and control over immigration and labor and environmental laws; (6) the issue of employment and availability of local labor force; (7) shipment costs of fuel; (8) availability of public land; (9) the geographic isolation of the Commonwealth in relation to resources; (10) the distance between each main island area for utility services; (11) the overall costs to upgrade and maintain equipment; and (12) the fact that it is more expensive to provide utility services when the population is small and spread out over several islands.¹⁵⁸

Constraints to Privatization

Some immediate and foreseeable constraints to privatization include the economic impact on existing CUC employees, employment of more non-resident workers, and rate increases.¹⁵⁹ Other possible obstacles to privatization may include the ownership of land, payment of taxes, and regulations enacted and contracts entered into to regulate the private utility.¹⁶⁰

Real Property Ownership and Use Restrictions in the Commonwealth

Real property ownership and leasing is subject to restrictions in the Commonwealth based on the Commonwealth's Covenant and Constitution. If the potential "buyer" of a CUC utility is a non-indigenous person and is not from the Northern Mariana Islands, the Commonwealth Constitution's Articles XI and XII may pose ownership obstacles because only persons of Northern Mariana descent may own land in the Common-

158. See CH2MHILL, *supra* note 75, at S-3 to S-5, tbl.S-2, 4-1 to 4-10.

159. See *id.* at 4-3 to 4-4.

160. See *id.* at 4-1 to 4-2, 4-5 to 4-10.

wealth.¹⁶¹ All others must lease public land from the government or private land from an indigenous Commonwealth landowner.¹⁶²

If the "buyer" of a Commonwealth utility is a corporation, then it shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares (i.e. common or preferred) one-hundred percent of which are actually owned by persons of Northern Marianas descent as defined by Section 4.¹⁶³

Private firms owned by non-indigenous persons are also able to overcome obstacles by using private properties. For example, the Constitutional guidelines provide that a non-indigenous person may lease public land for not more than 25 years from the Commonwealth Government.¹⁶⁴ The largest single plot of public land that such a person can lease without legislative approval is five hectares.¹⁶⁵ Furthermore, an individual may lease private land from an indigenous person for up to 55 years.¹⁶⁶

Assuming the Commonwealth Government's role is to encourage and assist the non-indigenous "buyer," some additional governmental strategies might be available to help, such as (1) offering limited tax incentives, (2) developing a healthy investment climate in which other private entities that are not owned by "persons of Northern Marianas descent" are investing in and successfully conducting business in the Commonwealth, (3) initiating legislative action that extends public land leases to 40 years, (4) instituting a lease-back contract by the government at the expiration of the land lease agreement to assure that investors recover their investments at the end of the lease term, and (5) encouraging joint-venture arrangements between the private sector and the government or the private sector and the general public through the CDA.

Commonwealth Taxes as an Obstacle to Privatization

All private entities that own or operate a business in the Northern Mariana Islands are expected to pay gross revenue taxes.¹⁶⁷ At the present

161. N. MAR. I. CONST. arts. XI, XII.

162. *See id.* at art. XI, § 5(c).

163. *Id.* at art. XII, § 5, as amended.

164. *See id.* at art. XII, § 5(c).

165. *See id.* at art. XI, § 5(d), as amended.

166. *See id.* at art. XII, § 3, as amended.

167. *See* Commonwealth of the Northern Mariana Islands, Government, *Taxation* (visited Apr. 27, 2000) <<http://www.mariana-islands.gov.mp/tax.htm>>.

time, because the CUC is a government entity, it is not paying this tax.¹⁶⁸ However, a private enterprise is expected to pay this tax and is compelled to consider this cost because it increases costs of doing business in the Commonwealth under a privatization arrangement.¹⁶⁹ Should the CUC decide to privatize one of its utilities, the Commonwealth Government, by amending its statutes, may be able to alleviate concerns regarding taxation as an obstacle to privatization by negotiating taxes owed over time or by implementing a limited tax-free period for the gross revenue tax for the utility company.

Employment Obstacles in the Commonwealth

Employment obstacles in the Commonwealth are found with both local resident workers and alien workers.¹⁷⁰ Political leaders are usually concerned about possible rate increases and loss of jobs, which would have a negative impact on their voting constituents. Since World War II, the economy of the Northern Mariana Islands has been dominated by public employment.¹⁷¹ The CUC employs over five hundred persons, including mostly local but some non-resident workers.¹⁷² This makes the CUC one of the larger employers in the Commonwealth.¹⁷³ These employees represent more than five percent of the eligible voters, which makes their political influence important.¹⁷⁴

Though the minimum wage in the Commonwealth is presently only \$3.05, which is below the minimum wage in the United States, it is higher than that of the foreign countries and the rest of Micronesia from which non-resident workers emigrate to work in the populated areas of the Commonwealth.¹⁷⁵ As a result, the Commonwealth's labor market is filled with people from Micronesia and Asia.¹⁷⁶ The hiring of non-resident workers is, however, a very controversial issue. On the one hand, the Commonwealth must rely to a large extent on foreign workers to develop the tourism industry and to implement economic diversification activities initiated by the Commonwealth Government,¹⁷⁷ due to the fact that the available skills among the resident workforce are not well aligned with

168. *See id.*

169. *See id.*

170. *See* CH2MHILL, *supra* note 75, at 4-3 to 4-4.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* at § I(K) (Minimum Wage).

176. *See id.*

177. *See* Tenorio Senate Testimony, *supra* note 33, at § III.B (Strategic Economic Planning).

existing overall job demand conditions in the Commonwealth.¹⁷⁸ On the other hand, these non-resident workers have placed a tremendous strain on the social, political, and economic structure of the Commonwealth and its local citizens.¹⁷⁹

The average salary scale within the CUC is a little above private sector wages paid in the Commonwealth.¹⁸⁰ If privatization were to take place today, chances are that a reduction in the CUC's workforce would occur.¹⁸¹ Such a possibility threatens the job security of government employees and can become a volatile political issue. A private firm at the inception of privatization would most likely seek to cut operating costs. One option would be to reduce wages and salaries of utility employees. Such a reduction in wages and salaries would tend to encourage the employment of nonresident workers to take over jobs or positions presently held by local resident workers. Additionally, the private firm would most likely retain only a few individuals who are skillful in their trades while others would be released and replaced with the private firm's staff or with less expensive foreign workers. Displacing some local voting employees who have many voting family members is an example of a local political issue that privatization might create.

A private company endeavoring to purchase a Commonwealth utility must also be aware of local labor and immigration requirements.¹⁸² A sample benefits package that private companies might be expected to pay non-resident workers employed in the Commonwealth would include (1) paying the Commonwealth's minimum wage; (2) providing free benefits including housing, local transportation, transportation from their point of recruitment and back, and medical and health care coverage; (3) paying overtime and night differentials if applicable; and (4) providing other fringe benefits. Private companies choosing to hire non-resident workers must also work closely with the Commonwealth Employment Division of the Department of Labor and Immigration.

The Commonwealth can minimize job displacement trauma by providing training in technical and professional areas so that local workers have a competitive edge in getting and keeping their employment. Another alternative would be for the Commonwealth Government to provide a quota on the number of foreign workers and monitor the ratio of the number of resident workers to non-resident workers hired by the private

178. See *id.* at 4-3 to 4-4.

179. See *id.* at § I.

180. See CH2MHILL, *supra* note 75, at 4-3.

181. See *id.* at 4-3.

182. See generally Labor & Immigration, 3 N. MAR. I. CODE (Supp. 1994); Tenorio Senate Testimony, *supra* note 33, at § I.

company, or the private company could be required to keep a certain percentage of existing employees. Those employees whose jobs are not to be immediately curtailed by utility services could be phased out within a given period of time or incorporated into other government services. Also, the Commonwealth Government might choose to offer incentives to those local employees who venture to the private sector for employment or engage in an entrepreneurial endeavor. If they decide to start their own business, the Commonwealth Government might assist these local workers to become entrepreneurs by offering small business development loans to help with start-up capital. The Commonwealth Government can also help displaced employees find other jobs in the private sector. For example, the Government could utilize the Job Training Partnership Agency's services for job counseling, assistance in securing new employment, and retraining.

Additionally, the Commonwealth Government could buy out a local employee's remaining contract to include lump-sum cash payments, education vouchers for re-training, and prepaid health insurance. These strategies would ensure that the transition from public service to private service would be consistent with the Commonwealth Code requirement "[t]o 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 customers."¹⁸³

Stumbling Blocks to Utility Rates

The CUC is permitted to establish utility rates for services rendered to its customers.¹⁸⁴ The existing statutes and regulations, however, do not define rates or provide a method to calculate rates.¹⁸⁵ It is important for the Commonwealth Government and the CUC to determine their working definition of a utility rate and establish a formula for calculating rates prior to considering privatization. Otherwise, the private company is permitted to present their definition of a utility rate and present their formula for setting their rates for Commonwealth customers. The state of Pennsylvania defines the term as

not simply the cost per unit of commodity; rather it is... "[e]very...fare, toll, charge, rental, or other compensation whatsoever of any public utility...made, demanded, or received for any service"...differences in rates between classes based on various recognized factors "are not only

183. Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8123(i) (Supp. 1994).

184. See *id.* at § 8123(m).

185. See *id.*

permissible but often desirable and even necessary to achieve reasonable efficiency and economy of operation."¹⁸⁶

Assuming that the above definition is applicable to the CUC, the probability of an increase in rates is high because the CUC is heavily subsidized with loans and grants to meet its capital needs. Such a change in rates would impose economic hardship on Commonwealth residents in general and low-income residents in particular. In addition, the CUC is currently unable to meet its debt payments.¹⁸⁷ This indebtedness, or economic gloom, poses a great concern that rates would increase quickly under private ownership in order to keep the CUC profitable.

Privatization of utilities does not preclude a natural political concern for a rate increase resulting in an economic hardship on everyone residing in the Commonwealth. The following are some suggestions for reducing the obstacle of excessive rates: (1) Developing a comprehensive and detailed privatization plan that would focus on improved service with a reduction in rates. This plan may also include the Government's reduction of its ownership of the utility infrastructure to a certain percentage during the initial portion of privatization with an eventual phasing out of government involvement over an agreed period of time; and (2) Requiring the private firm to continue subsidizing higher cost residents so that Commonwealth residents continue to pay the same rate. Saipan is the most populated and most commercialized island area of the Commonwealth. As such, it produces the greatest utility revenues of any island jurisdiction in the Commonwealth. Tinian, Rota, and the other islands cost more to serve. In order to equalize rates so that all residential and business users pay similar rates some of the revenues generated by customers in Saipan go to make rates for Tinian, Rota, and the other islands more economical and equal to the rates residents pay on Saipan.

Assuming the definition of rate and a formula for its calculation are clarified, the Commonwealth Government can then begin developing a desirable privatization model. Also, the Commonwealth Government may have to impose a schedule for separate utility service rates for different islands, residential users, commercial users, industrial users, or other categories of consumption as stipulated in Commonwealth statutes.¹⁸⁸ The ultimate goal for operators of public utilities, as well as privatized companies, is to accomplish full cost recovery while providing reliable, efficient, and economical utility services to customers.¹⁸⁹

186. *Allegheny Ludlum Corp. v. Pennsylvania Public Utility Comm'n*, 612 A.2d 604, 611 (1992).

187. See CH2MHILL, *supra* note 75, at 1-5.

188. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE § 8141(d) (Supp. 1990).

189. See CH2MHILL, *supra* note 75, at i-1, 1-1 to 1-6.

Privatization Contract Concerns

A well-written contract is important to ensuring the successful privatization of any CUC utility. The development of a good working knowledge about privatization is imperative for Commonwealth officials to have and use in their planning and policy meetings and in developing and implementing privatization contracts.

Also, the Commonwealth Government should retain the assistance of someone who is experienced in negotiating and drafting a contract for the privatization of utilities. If a utility is bid for privatization, the bidders should be experienced and knowledgeable in negotiating. This is an important factor that would help to "level the playing field" in negotiating an agreement between the CUC and a successful bidder. Since it is the duty of the Commonwealth Government to make privatization decisions in the best interest of its constituents, the Government should ensure that the private firm is willing to guarantee safe, reliable, and reasonably priced utility services. The Commonwealth Government is also responsible to assure that the private firm allows the promotion of non-economic services that include and satisfy various social, health, and allocation issues.¹⁹⁰ Additionally, the Commonwealth Government is obligated to request detailed specifications and performance standards in the privatization contract.¹⁹¹

The private firm is also concerned about its privatization contract with a utility agency or CUC in this hypothetical situation. A private firm is interested in obtaining some assurances from the Commonwealth Government that CUC does not act in an arbitrary and capricious manner by changing utility regulations or rules once a contract is signed.

Also, the private firm is interested in having some flexibility to administer and operate the utility without political interference in meeting its obligations. This is premised on the private firm complying with its contract. The private firm should be made aware that there are specific, but limited, contractual arrangements the Commonwealth Government is willing to accept.

Presently, the CUC's Procurement Regulations identify these three different types of contracts:

1. the prohibited cost-plus-a-percentage-cost and percentage of construction cost methods of contracting;

190. *See id.* at 1-1.

191. *See id.*

2. a contract that utilizes a firm fixed price unless use of a cost reimbursement contract is justified under Paragraph 3 of CUC Procurement Regulations; or
3. a cost reimbursement contract is used when the CUC Director determines in writing, which is attached to the contract, that
 - a. uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a fixed price contract,
 - b. the use of a firm fixed price contract seriously affects the contractor's financial stability or result in payment by CUC for contingencies that never occur, or
 - c. the use of a cost reimbursement contract is likely to be less costly to CUC than any other type due to the nature of the work to be performed under the contract.¹⁹²

Additionally, a private firm must also understand that it is obligated to provide the essential services as contracted. The firm is also entitled to receive a fair and reasonable rate of return for its services. Also, all employees are to be treated fairly. Finally, the firm is expected to comply with all Commonwealth laws.

In summary, there are several policy concerns that need to be addressed before the Commonwealth Government is ready to implement privatization. As a sole provider of public water, power, and sewer services to consumers, the CUC plays a vital role in the social, political, and economic health of the Commonwealth. Specific and more immediate policy concerns are usually centered around the economic impact of privatization on the welfare of existing employees and the possibility of rate hikes for utility services provided.

SUGGESTED ELEMENTS FOR THE PROPOSED ENACTMENT OF A REGULATORY COMMISSION FOR PUBLIC UTILITIES IN THE COMMONWEALTH

In moving toward privatization, the CUC should retain ownership of its assets if possible. The CUC should also clarify or define the level and quality of service to be provided by a private firm to Commonwealth consumers. Additionally, the CUC should establish a realistic and reasonable price to be paid for services by consumers and pay the proposed management firm directly for its services.

192. See Commonwealth Utility Commission, Proposed Procurement Regulations, 12 N. MAR. I. REG. 7069, 7087-88 pt. D, § 3-401 (1990) (Types of Contracts) (regulations became final by Public Notice, 13 N. MAR. I. REG. 7853, 7853 (1991)).

The Commonwealth does not have an existing regulatory commission for public utilities. As a result, the following discussion proposes suggested elements that the Commonwealth should consider in developing a stronger public utility regulation commission. This model centers on the following: (1) the jurisdiction of the Commission; (2) qualifications of its commissioners; (3) a process for selecting commissioners; (4) a process for removing commissioners; (5) agency practices and procedures; (6) staff recruitment and job protection guidelines; (7) fringe benefits offered by the agency; (8) a disability insurance plan; (9) local and off-island travel expenses; (10) paid holidays; (11) health, medical, and hospitalization insurance plans; (12) a retirement plan; (13) a life insurance plan; (14) sick leave; and (15) other benefits.¹⁹³

Proposed Jurisdiction of the Commission

A model regulatory commission for public utilities in the Commonwealth should contain in its policy handbook provisions about the Commission's jurisdiction. The Commonwealth is served by several kinds of utility services. These include (a) public and private electric plants; (b) telephone agencies; (c) cable television companies; (d) common radio carriers; (e) water, sewer services, and trash services; (f) water carriers; (g) motor passenger carriers, including buses, taxis, and tour related transportation; and (h) vessels and aircraft operating from sea ports and airports in the Commonwealth.

The model regulatory commission for public utilities in the Commonwealth should contain clarification of which utilities are within its jurisdiction to reduce confusion about its role in regulating utilities.

Proposed Qualifications of Commissioners

A model regulatory commission for public utilities in the Commonwealth should contain qualifications of commissioners in its policy handbook. These qualifications should include provisions that state the following: a commissioner (a) may not own any bonds or stocks in any public utility, be employed by, or have any pecuniary interest in any utility; (b) must be domiciled in the Northern Mariana Islands; (c) must be a qualified voter of the Commonwealth; (d) must not have been found guilty of any serious crime; and (e) must be a graduate of an accredited school of law, engineering, finance, accounting, economics, business, or public administration. In addition, it may be advisable to stipulate that the

193. See generally PAUL RODGERS, 1989 ANNUAL REPORT ON UTILITY AND CARRIER REGULATION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS (1989).

commission has at least two members who are consumers of the utility's services. Other helpful stipulations are that commissioners must devote full time to their duties as members and may not hold any other public offices or employment during their terms of office. This should be helpful in ensuring that members of the commission are focused on their jobs.

Proposed Selection of Commissioners

A model regulatory commission for public utilities in the Commonwealth should contain guidelines for the proposed selection of commissioners in its policy handbook. Some suggestions are that (a) no more than three of the members may be affiliated with the same political party and any appointment to fill a vacancy shall be for the unexpired term; (b) five members shall be appointed by the governor to four year terms with the advice and consent of both houses, or elected at large; and (c) the commission chairman shall be appointed by the governor.

The proposed process to remove a commissioner is by the governor, by and with the consent of the majority of the legislature after due notice and a formal hearing for (a) inefficiency, (b) neglect of duty or malfeasance in office, (c) corruption, (d) incompetence, or (e) conflict of interest. Reasons for removal may be based on active participation in political management or campaigns by any commissioner and shall constitute cause for removal. There must be sufficient proof of such involvement by the accuser.

Proposed Agency Practices and Procedures

A model regulatory commission for public utilities in the Commonwealth should contain proposed agency practices and procedures in its policy handbook. Issues to be considered are determining who has standing to request relief from the agency, and who has standing to intervene in an agency proceeding. Other issues include providing that (a) any person may make a request for relief from the commission and any person who may be affected by the outcome of the case may intervene in its proceedings; (b) any interested person or public utility may make a formal complaint to the commission on any matters subject to the jurisdiction of the commission; and (c) any person not a party of a proceeding may make written application for leave to intervene showing the extent of their interest in the matter. Upon its granting, the person shall thereafter be an intervenor in the proceeding.

An appearance before the commission should not constitute the practice of law, however, parties and intervenors may be represented by attorneys. The admissibility of evidence in commission proceedings does not constitute the practice of law and parties do not need to be represented

by attorneys. The admissibility of evidence in the proceeding is to be determined by the relevancy and competency of the evidence. Also, the commission should be required to follow limitations, if any, that are placed on the cross-examination of witnesses and on oral arguments before the agency. If necessary, the presiding officer is to use his discretion in limiting the cross-examination of witnesses or oral arguments in any proceeding.

The time and place for regular and executive meetings of the commission can be determined by the commission. All meetings, except executive sessions of the commissioners, should be open to the public with advance notice of the meeting being provided to the public. Executive sessions should not be open to the public and should only be used to consider litigation, enforcement proceedings, and personnel matters. In cases where emergencies arise, the process for this situation needs to be stated in writing. Also, public notice and the opening of executive sessions to the public need to be clarified.

In addition, the commissioners and staff personnel should be governed by a written code of conduct. Such code should prohibit commissioners and personnel from engaging in conflicts of interest and should provide guidance as to the ethical performance of their duties.

Proposed Staff Recruitment and Job Protection

A model regulatory commission for public utilities in the Commonwealth should contain proposed staff recruitment and job protection statements in its policy handbook. It is desirable that most Commission employees be covered by the merit system of the Commonwealth Government, except for positions such as attorney, public information officer, comptroller, and other key management positions that should be under competitive appointment procedures adopted by the Office of Personnel Management. In addition, advisors to Commissioners and the Executive Director and their immediate personal staff also qualify under competitive appointment procedures.

Proposed Agency Fringe Benefits

A model regulatory commission for public utilities in the Commonwealth should contain agency fringe benefits in its policy handbook. For example, annual leave should be based on Commonwealth Civil Service standards for all Civil Service employees and should include 21 working days of annual leave per year for commissioners and staff members under competitive appointment procedures.

Disability insurance should be made available to all probationary, permanent, or temporary employees who work for a certain minimum number of hours per week. Provisions should be made for long-term

disability insurance to be paid for by the Commonwealth with additional insurance available at group rates to be paid by employees.

In addition, worker's compensation should be provided by the Commonwealth Government. If an employee becomes incapable of performing regular duties due to physical, visual, or mental disability occasioned at work, he or she should be allowed to retire at any age subject to approval of the Disability Office and based on a qualified physician's prognosis. Employees with a qualifying disability should be entitled to income benefits depending on the temporary, long-term, or permanent nature of the disability. In addition, disabled persons should not be barred from securing part-time employment, not to exceed \$1,000 per month.

Local and Off-Island Travel

A model regulatory commission for public utilities in the Commonwealth should contain local and off-island travel guidelines in its policy handbook. For example, per diem rates should be set at different base rates for different areas within and outside of the Commonwealth. Government automobiles may be permanently assigned to Commissioners and, as needed, to selected staff members. All actual and reasonable travel and subsistence expenses necessarily incurred in the performance of the Commissioner's job should be reimbursed. If a pool vehicle is not available, employees should be allowed to use personal automobiles and receive reimbursement at a rate based on the standard Commonwealth rate. Finally, no entertainment expense should be allowed without approval from the Governor.

Proposed Paid Holidays

A model regulatory commission for public utilities in the Commonwealth should contain a list of proposed paid holidays in its policy handbook. The list of paid holidays should be based on Commonwealth law.

Proposed Health, Medical, and Hospitalization Insurance

A model regulatory commission for public utilities in the Commonwealth should contain health, medical, and hospitalization insurance provisions in its policy handbook. The Commonwealth should contribute a portion of the costs.

A Proposed Retirement Plan

A model regulatory commission for public utilities in the Commonwealth should contain a proposed retirement plan in its policy handbook. The best approach is to have contributions paid by both the Commission and the employee based on existing Commonwealth government guidelines at the time an employee is hired. Non-resident workers should not qualify for and should not contribute to the fund based on Commonwealth provisions.

A Proposed Life Insurance Plan

A model regulatory commission for public utilities in the Commonwealth should contain a proposed life insurance plan in its policy handbook. The plan should be based on the Commonwealth Government's insurance plan. Also, an additional payment of six months salary should be paid to the employee's estate if an employee dies while employed by the Commission.

Proposed Sick Leave Plan

A model regulatory commission for public utilities in the Commonwealth should contain a proposed sick leave plan in its policy handbook. This plan should be differentiated according to these guidelines: (a) senior management, such as commissioners, executive director, public information officer, comptroller, and attorneys should not have sick leave but should have a higher level of annual leave; (b) sick leave for noncompetitive positions should be based on the existing Commonwealth-Civil Service policy; and (c) employees eligible for sick leave should be permitted to use accrued sick leave for family illness or injuries.

Other Proposed Benefits

A model regulatory commission for public utilities in the Commonwealth should contain other proposed benefits in its policy handbook. Employees should be given a choice of contributing to Social Security, the Commonwealth Retirement Fund, or to both programs. Consideration of other benefits is recommended. Examples are (a) a deferred compensation plan; (b) educational assistance or tuition reimbursement for job-related college credit; (c) funeral or bereavement leave; (d) jury duty; (e) sabbatical leave; (f) an achievement bonus for professional certification; (g) maternity and paternity leave according to Commonwealth provisions; and (h) registration, tuition, travel, and per diem paid for approved seminars, courses, and conventions for Commissioners and key staff members.

Educational leave should be recommended with pay for up to one year and without pay for more than one year unless approved by the Governor.

CONCLUSION

The public's economic perspective in the Commonwealth, especially on Saipan, focuses on the fear of loss of government jobs resulting from privatization and the possibility of increased utility rates to satisfy full cost recovery. These concerns are important to understand since power operations in Tinian and Rota are currently subsidized from revenues generated by power operations on Saipan.

The Commonwealth operates the CUC under Public Law 4-47, which provides the CUC with a mechanism to regulate, manage, and operate public utility services in the Northern Mariana Islands.¹⁹⁴ However, Public Law 4-47 needs to be amended to reflect existing problems and needs, as discussed herein, so that the CUC will be able to provide more efficient, reliable, affordable, safe, and environmentally friendly public utility services. Legally, some federal or Commonwealth laws seem to pose outright hindrances and may need to be changed before privatization alternatives are implemented. In other cases, a law may not require amending but may present slight obstacles to privatization alternatives by imposing undue duties or obligations on the new private entity or by increasing its cost of doing business. As a start, the CUC's Board needs to sponsor a comprehensive revision of the CUC's operating regulations for its utilities and should solicit input from the Commonwealth Legislature to ensure successful passage of recommended changes.

Also, the CUC Board needs to establish themselves as a functional regulatory board that oversees all Commonwealth utilities and establishes fair and reasonable rates and fees in accordance with statute.¹⁹⁵ As a short-term alternative, the Commonwealth Government needs to amend its existing enabling legislation to provide regulatory powers to the CUC like those provided by regulatory commissions in the United States. Finally, Public Law 4-47 stipulates that the CUC's Board is responsible for approving utility rates that provide a reasonable return on investment.¹⁹⁶ There is no doubt that general authority is given to the Board to set rates by Public Law 4-47, but the main question is whether this grant of authority is adequate authority since it is not clearly defined.

194. See Commonwealth Utilities Corporation, 4 N. MAR. I. CODE §§ 8111-74 (Supp. 1994).

195. See *id.* at §§ 8123(k), (m).

196. See *id.* at § 8122(b).

Unless the CUC is in full cost recovery, privatization of the CUC utilities may not be in the best interest of Commonwealth residents. A private firm may not be able to provide fair, equitable, and cost-effective utility services if it is taking over an insolvent utility company, since it may not be able to get a fair and equitable return on its investment. However, should the Commonwealth Government decide to privatize, the Government should conduct fact-finding visits to similar utility communities that have privatized their utility services in order to obtain on-site information about the privatization process and its pitfalls. The Commonwealth Legislature should be involved in the privatization discussion because this would ensure a smoother transition from the CUC operating public utilities to private ownership and operation of the utilities.

Once the Commonwealth Government decides upon the model or models of privatization it desires for utility services, the responsibilities of the CUC should be expanded and more clearly defined so that the CUC can regulate private owners of the utilities serving the Commonwealth. If the Commonwealth Government decides to contract only a partial activity of a utility, it must define the scope and legal aspects of the contract.

The Commonwealth Government might also consider retaining a team of experts to assist in the establishment of procurement objectives, strategies, procedures, and detailed action plans for privatization. These experts could be assigned to prepare the entire set of documents from start to finish. Also, this team could set criteria needed to evaluate prospective purchasers and recommend other documents needed by the Commonwealth Government.

The idea and concept of privatization is attractive for many reasons. On the other hand, taking such a drastic step could have some negative consequences for the Commonwealth. Overall, privatization is an appealing option to help the Commonwealth reduce its costs and turn the operation of its utilities over to a firm that has the technical know how, as well as the management and leadership skills, to run the operation as effectively, efficiently, and consistently as possible.