

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

STANLEY T. TORRES and)
JACK A. ANGELLO,)
)
Plaintiffs)
)
vs.)
)
COMMONWEALTH UTILITIES)
CORPORATION, Commonwealth of the)
Northern Mariana Islands, acting through,)
Anthony G. Guerrero, Executive Director,)
Commonwealth Utilities Commission,)
)
)
Defendants.)
_____)

Civil Action No. 07-0098E

**ORDER REVERSING HEARING
OFFICER’S DECISION IN PART**

I. INTRODUCTION

THIS MATTER came for hearing on August 30, 2007 at 1:30 p.m. Plaintiffs Stanley Torres and Jack Angello (hereinafter referred to as “Plaintiffs”) appeared and were represented by Counsel Wesley M. Bogdan. Counsels Steven M. Newman and Edward Manibusan appeared on behalf of Defendants, Commonwealth Utilities Corporation and Anthony G. Guerrero (hereinafter collectively referred to as “CUC”). At the hearing both parties made final oral arguments on the merits of the case. The Court took the case under advisement at the conclusion of the hearing. After considering the oral and written

1 arguments of the parties, legal authorities, and the material facts, the Court renders its final ruling on the
2 matter.

3 4 **II. FACTUAL HISTORY**

5 Although not stipulated to by the parties, the following presentation of facts represents the
6 undisputed material fact history of this case:

7
8 On January 27, 2006 Governor Fitial declared a State of Disaster Emergency with respect to
9 CUC's inability to purchase fuel to keep electrical generators in operation.

10
11 To address the purported disaster emergency, the Governor invoked article III, Section 10 of the
12 Commonwealth Constitution (Emergency Power) and 3 CMC § 5101 (Disaster Relief Act) and
13 assumed full control of CUC.

14
15 The Governor further suspended all regulatory statute provisions, suspended the CUC Board of
16 Director's powers, authority and/or responsibilities, and began reprogramming all monies
17 necessary to CUC to address the problem.

18
19 On January 27, 2006 the Governor issued Executive Order 2006-1 which contained CUC
20 Reorganization Plan No. 1 of 2006.

21
22 Reorganization Plan No. 1 allocated CUC to the Department of Public Works (Utilities
23 Division), established as its head a Chief Executive Officer, and abolished the Board of Directors
24 of CUC.

1 As authority to do these things, the Governor cited article III, section 15 (Executive Branch
2 Departments) of the CNMI Constitution.

3
4 On March 29, 2006 the Governor renewed his Declared State of Emergency to protect the health
5 and safety of the people in the event should inadequate water and electricity services occur
6 and/or a “disaster in the Utilities Division of DPW.”

7
8 The Governor ordered that Utilities Division of DPW would remain under a state of emergency
9 and that he would exercise all necessary powers to address the CNMI utility disaster. Moreover,
10 the Governor recognized that since Reorganization Plan No. 1 had been submitted 60 days
11 earlier to the legislature—and that because the Plan had not been modified or disapproved of by a
12 majority of the members of each house of the legislature—the transfer of CUC to the DPW
13 became law pursuant to article III of the Commonwealth Constitution..

14
15 On May 5, 2006, the Governor executed Executive Order No. 2006-4 which contained
16 Reorganization Plan No. 2.

17
18 Executive Order No. 2006-4 rescinded Executive Order 2006-1 (which contained
19 Reorganization Plan No. 1) and declared that CUC was once again a public corporation, but
20 added that CUC's Board of Directors was “advisory” only and that CUC would, from that day
21 forward, have as its head an executive director.

22
23 Executive Order No. 2006-4 also rescinded fuel surcharge fee regulations which had been
24 enacted by CUC’s board of directors February, 2005 and “amended” in several other ways 4
25 CMC Section 8111 et seq. (CUC’s Substantive Enabling Statute) and CUC regulations published

1 as “Rate Schedules.”

2
3 Executive Order No. 2006-4 amended 4 CMC § 8123 (Commonwealth Utilities Corporation:
4 Powers) by inserting into that statute the provision that the corporation “acting through its
5 executive director and his or her designees” shall have all the powers conferred by law on a
6 public corporation.

7
8 Executive Order No. 2006-4 amended 4 CMC § 8123(m) by completely deleting from that
9 statute the provision that restricted utility rates and other fees for water, sewer and electrical
10 power to the “actual cost to the corporation to connect customers to corporation facilities.

11
12 Executive Order No. 2006-4 also amended 4 CMC § 8131 by inserting into that statute the
13 provision that the corporation shall have a board of directors that “shall serve the corporation in
14 an advisory capacity and shall defer to the executive director with respect to the management
15 and administration of the corporation.”

16
17 Prior to the amendment noted immediately above, 4 CMC § 8131 provided that CUC “shall be
18 governed by a board of directors composed of eight members” and 4 CMC § 8157 provided that
19 the “board” may issue regulations necessary to carry out the purposes of CUC’s enabling statute.

20
21 Executive Order No. 2006-4 also amended 4 CMC § 8141(c) by adding language which
22 mandated that the executive director adjust rate schedules s’ufficient to recover the costs
23 associated with the operation, maintenance, transmission, generation, and delivery of electric
24 services and the repayment of any debt associated with that service.” Moreover, the amended
25 code section, like its predecessor, defined the term “cost” as including “adequate financial

1 reserves for debt service, if any, and the replacement of obsolete or damaged equipment.”

2
3 On July 21, 2006, CUC promulgated emergency regulations containing the statutory provisions
4 the Governor put into place in Executive Order 2006-4--Reorganization Plan No. 2. Comm.
5 Reg., Vol. 28, No. 07 July 21, 2006 p. 25937.

6
7 CUC, acting through its executive director, made effective immediately (upon publication—as
8 provided by the Commonwealth Administrative Procedures Act), new electricity rates that
9 allowed CUC to recover all costs associated with its delivery of electrical utilities services and
10 to, among other things, pay off past debt and replace obsolete or damaged equipment.

11
12 Subsequent to the enactment of the new rate schedule under the emergency provisions of the
13 APA, Plaintiffs were billed at the new rates and timely filed their initial billing disputes.

14
15 The emergency regulations amending Part 24 (CUC Rate Schedules) were promulgated a
16 second time on or about September 27, 2006.

17
18 Plaintiffs objected to paying CUC’s new utility rate schedule for the electricity consumed in
19 their billing disputes by supplementing their original billing disputes in October, 2006.

20
21 Plaintiffs’ billing disputes were denied, found to be without merit and the Plaintiffs timely
22 initiated administrative hearing procedures to resolve the disputed billings.

23
24 On October 24 2006, Public Law 15-35 became effective creating a public utilities commission
25 and the public utilities commission that has yet to meet, has no confirmed members serving on it

1 and has not set or reviewed electric utility rates.

2
3 On October 30, 2006 CUC published and adopted in final form its amendment to Part 24 (CUC
4 Rate Schedules).

5
6 On December 22, 2006 Public Law 15-40 became effective amending Public Law 15-35.

7
8 Neither Public Law 15-35 nor Public Law 15-40 contain retroactive application dates.

9
10 Public Law 15-35 and Public Law 15-40's effective dates are after the date Plaintiffs began their
11 billing disputes and Motion for Summary Adjudication.

12
13 On February 26, 2007, CUC issued its Administrative Order: Motion for Summary Adjudication
14 denying Plaintiffs' the relief they had requested in their Motion for Summary Adjudication and
15 in their Billing Disputes.

16
17 CUC's Administrative Hearing Officer found in his Administrative Order that "Executive Order
18 2006-4 and the ensuing electric rate-making regulations went far beyond the types of statutory
19 changes permitted by Article III, Section 15, and were therefore invalid, despite the failure of the
20 Legislature to exercise its 'legislative veto.'"

21
22 Specifically referring to the enactment of Public Law 15-35 and Public Law 15-40, CUC's
23 Administrative Hearing Officer found that: "Given the extensive affirmative involvement of the
24 CNMI legislature in the CUC electric rate-making process, the constitutional objections to
25 Executive Order 2006-4 no longer apply. Therefore although Executive Order 2006-4 was

1 constitutionally defective when issued, its defects have been cured by legislative action.”

2
3 In denying Plaintiff’s Motion for Summary Adjudication, CUC’s February 26, 2007 Order
4 explicitly provided that Plaintiffs “shall pay withheld electric charges to CUC within thirty (30)
5 days after the date of this Order, or make arrangements with CUC for a repayment schedule
6 within the time period.”

7
8 On March 27, 2007 Plaintiffs submitted payment proposal’s to pay withheld electric charges to
9 CUC as required by the Administrative Order.

10
11 On April 4, 2007, the proposed payment plans were rejected by CUC and Plaintiffs were put on
12 notice that unless additional monies were paid and promissory notes executed by no later then
13 the close of the next business day following receipt of this notice, failure to pay and execute the
14 promissory notes “shall constitute a basis for discontinuance of electric service by CUC.”

15
16 On April 5, 2007, Plaintiffs executed, with “under protest” written on the signature page, the
17 promissory notes demanded by CUC to prevent their accounts from being disconnected and paid
18 the additional money also demanded by CUC that “must” be paid to prevent disconnection.

19
20 Plaintiffs brought this matter to this Court for judicial review pursuant to 3 CMC § 4446, 4
21 CMC § 8158, and under the CNMI Administrative Procedure Act, 1 CMC §§ 9110 and 9112. In
22 addition to seeking judicial review of CUC’s actions regarding the increased electrical rate
23 structure, Plaintiffs request this Court to enjoin CUC from disconnecting electrical service of
24 Plaintiffs for non-payment of withheld and disputed billing amounts until the conclusion and
25 disposition of this judicial review.

1 **III. ISSUES PRESENTED**

2 **1. Whether the Governor acted in excess of the authority appointed to the Executive Branch by**
3 **the CNMI Constitution when he issued Executive Order 2006-4, which effectively changed the**
4 **laws governing the administration of the Commonwealth Utilities Commission?**

5
6 **2. If the Governor’s issuance of Executive Order 2006-4 violated the constitutional doctrine**
7 **mandating the separation of powers, then did the legislature’s passage of Public Laws 15-35 and**
8 **15-40 cure the constitutional defect, and, if so, to what extent was the constitutional defect cured?**

9
10 **IV. STANDARD OF REVIEW**

11 1 CMC § 9112(f) prescribes the standard of review the Superior Court must apply when
12 reviewing agency actions within the Administrative Procedure Act. *Camacho v. Northern Marianas*
13 *Retirement Fund*, 1 N.M.I. 362 (1990). In their administrative appeal, Plaintiffs ask this Court to set
14 aside the Hearing Officer’s determination that although the Governor’s reorganization of CUC through
15 Executive Order 2006-4 was unconstitutional because it violated the separation of powers doctrine the
16 constitutional defect was cured by subsequent legislative action affirmatively endorsing the
17 reorganization, and, moreover, that the increased utility rates which served as the tangible point of
18 dispute between CUC and Plaintiffs were ultimately valid. Because Plaintiffs have failed to specifically
19 cite which subsections of 1CMC § 9112(f)(2) serve as the basis for their appeal, the Court will assume
20 that Plaintiffs are appealing under all subsections relevant to this dispute.

21 Accordingly, as suggested by CUC, the Court will presume that the Plaintiffs are appealing the
22 Hearing Officer’s decision pursuant to 1 CMC § 9112(f)(2)(i), (ii), and (iii). Specifically, section
23 9112(f)(2), mandates that a court set aside agency action if it finds the action is found to be “(i)
24 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (ii) contrary to
25 constitutional right, power, privilege, or immunity..., or (iii) in excess of statutory jurisdiction, authority,

1 or limitations, or short of statutory rights.” 1 CMC § 9112(f)(2)(i), (ii), (iii). Although each of these
2 grounds appears to call for a different type of review, because all material facts are undisputed, only one
3 standard is required for this Court’s analysis in this case: Whether the Hearing Officer’s determination
4 was consistent with the CNMI Constitution and laws. Consequently, the Court will accord great
5 deference to the Hearing Officer’s findings of fact, but shall review the Hearing Officer’s Findings of
6 Law *de novo*.

8 **V. ANALYSIS AND DISCUSSION**

9 **A. Separation of Powers Doctrine in the Commonwealth.**

10 In holding that Executive Order 2006-4 was unconstitutional because it violated the separation of
11 powers doctrine, the Hearing Officer concluded the following:

12 Executive Order 2006-04 was defective because it invaded the realm of the Legislature by
13 making substantive statutory changes to CUC enabling statutes that led directly to a
14 wholesale revision of the prevailing electric rate structure in the CNMI. The failure of the
15 Legislature to reject the executive order within sixty days did not constitute legislative
16 adoption of the statutory changes contained in the executive order.

17 Administrative Order: Motion for Summary Adjudication, B.D. Nos. 06-0001-1, 06-0002-2, 06-
18 0004-5, Page 10 (In the Matter of the Billing Disputes of Stanley T. Torres and Jack A. Angello, C.U.C.
19 Customers).

20 Though Plaintiffs devote nearly all of their briefing to disputing the Hearing Officer’s conclusions
21 that notwithstanding his holding above, the Commonwealth Legislature cured any constitutional defect by
22 affirmatively approving of the reorganization by passing Public Laws 15-35 and 15-40, Plaintiffs fail to
23 provide any mandatory reason that this reviewing body should refrain from examining the Hearing Officer’s
24 first conclusion for error. Thus, before reaching any argument regarding whether a legislature can cure an
25 executive action taken in contravention to the separation of powers doctrine, the Court will examine whether
the Governor’s reorganization of CUC through Executive order 2006-4 to determine whether the Governor
acted beyond his constitutionally delegated authority.

1 It is legally undisputed that the constitutional doctrine of separation of powers applies in the
2 Commonwealth. See *Sablan v. Tenorio*, 4 N.M.I. 351 (1996) (“The separation of powers concept came into
3 being to safeguard the independence of each branch of government and protect it from domination and
4 interference by others.”); and *Camacho v. Civil Service Commission*, 666 F.2d 1257 (9th Cir. 1982),
5 overruled on other grounds by *In re McLinn v. F/V Fjord*, 739 F.2d 1395, 1397 (9th Cir. 1984)(en banc).
6 Therefore, the question to be answered here, is whether Executive Order 2006-4 violates the CNMI
7 constitution insofar as it runs afoul of the separation of powers doctrine. And in order to answer the former
8 question, the Court must determine the boundaries of executive power as provided in the Commonwealth
9 Constitution. Though traditionally the role of the executive is limited to enforcing and implementing those
10 laws created by a legislature, the Constitution, which endows the executive branch with its power, defines
11 the executive branch’s role with some specificity. In the Commonwealth, as within the U.S. Government,
12 the boundaries of Executive power extend beyond mere enforcement and implementation of legislation.
13 Indeed, article III of the Commonwealth Constitution, which enumerates the powers of the executive branch,
14 authorizes the Executive branch to create law under certain circumstances:

15 **Executive Branch Departments.** Executive branch offices, agencies and instrumentalities
16 of the Commonwealth government and their respective functions and duties shall be
17 allocated by law among and within not more than fifteen principal departments so as to
18 group them so far as practicable according to major purposes. Regulatory, quasi-judicial and
19 temporary agencies need not be a part of a principal department. The functions and duties
20 of the principal departments and of other agencies of the Commonwealth shall be provided
21 by law. The legislature may reallocate offices, agencies and instrumentalities among the
22 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 the members of each house of the legislature.*
N.M.I. Const. art. III, § 15 (*emphasis added*).

23 It is undisputed that Executive Order 2006-4 effected changes in existing law by substantively
24 modifying several subsections within the CUC-enabling statutory scheme. It is further undisputed that
25 Executive Order 2006-4 was submitted to the legislature by the Governor, and that the legislature failed to

1 disapprove the order within sixty days of its submission. Given that the article III explicitly endows the
2 Executive Branch with the power to make changes which affect existing law through executive orders, the
3 Court must then ask the following questions,: 1) Whether CUC is subject to the re-organization power by
4 the governor under article III?; 2) What, if any, are the limits of the reorganization power under article III?;
5 and 3) Whether the Governor overreached his lawmaking authority when he changed the CUC-enabling
6 statutory scheme through Executive Order 2006-4?
7

8 **B. CUC is an Instrumentality Within the Executive Branch Subject to Reorganization**
9 **Pursuant to article III of the Commonwealth Constitution.**

10 To determine whether CUC is subject to the Governor’s article III reorganization power, the
11 Court must examine whether CUC falls under the entities listed under article III, i.e. “offices, agencies
12 and instrumentalities” of the executive branch. Because CUC’s official moniker is that of “corporation”
13 for statutory purposes, it does not obviously fall within one of the three entities specified by article III.
14 However, the fact that CUC was allocated to the Department of Public Works by Executive Order 94-3,
15 and again by Executive Order 2006-1, indicates that CUC is an instrumentality within the executive
16 branch subject to the reorganization power of the Governor pursuant to article III. *See* Executive Order
17 94-3, § 304(b).¹

18 Moreover, local case law lends further support to the notion that CUC, in spite of its label as a
19 “corporation ,” is merely an instrumentality of the executive. In *MVB v. Commonwealth*, the
20 Commonwealth Superior Court found that the Governor’s reorganization power extended to encompass
21 publicly created organizations which are not obviously allocated within a particular department within
22 the executive branch. *See Marianas Visitors Bureau v.. Commonwealth*, Civ. No. 94-0516,
23

24 ¹“(b) Commonwealth Utilities Corporation. The Commonwealth Utilities Corporation is
25 allocated to the Department of Public Works for purposes of administration and coordination.”

1 (N.M.I.Super.Ct.) (Memorandum Decision and Order)(June 23, 1994) at 21. Particularly, in *MVB*, the
2 Court determined that an organization could be treated as an agency in spite of its corporate designation
3 so long as the government exhibited significant control over the entity. *Id* at 20 quoting *Mendrala v.*
4 *Crown Mortgage Company*, 955 F.2d 1132 (7th Cir. 1992) (“The Court weighed the following five
5 factors: 1) the government’s ownership interest in the entity; 2) government control over the entity’s
6 activities; 3) the entity’s structure; 4) government involvement in the entity’s finances; and 5) the
7 entity’s function or mission.”).

8 Here, like the Visitor’s Bureau, the function of CUC belies its corporate status. First, though
9 CUC appears to be roughly organized like a corporation, there are no private, non-government,
10 shareholders. Such is plain in light of the constant public calls for privatization of CUC. Therefore,
11 although the government’s ownership interest is not spelled out in the enabling statute, CUC is a
12 creation of the Commonwealth government, and remains under government control, with only an
13 unrealized goal of private ownership. Secondly, the Commonwealth government, for better or worse,
14 exercises substantial control over CUC’s activities. Like the Visitor’s Bureau, the enabling statute
15 designates that the Governor shall appoint the CUC board of directors with the advice and consent of the
16 Senate. *See* 4 CMC § 8131. Moreover, the annual CUC administrative budget must be submitted to the
17 Governor and the legislature. 4 CMC § 8134(c)(4). Thirdly, as mentioned before, CUC’s structure
18 resembles that of a corporation, but like the Visitor’s Bureau, there is no specific corporate language in
19 its enabling statute.

20 Lastly, CUC’s function or mission is simply to deliver electrical, water, and sewer services to
21 people in the Commonwealth. *See* 4 CMC § 8112, et seq. CUC is not the type of organization which
22 would require a policy of autonomy or independence which would guarantee an investigation or
23 deliberation which is free from impediment or influence by the Governor’s office. Rather, CUC’s
24 primary function is to deliver vital utilities to those residing in the Commonwealth and is simply an
25 instrumentality of the Commonwealth. In light of the foregoing, the Court must reach the inevitable

1 conclusion that CUC is an instrumentality of the Commonwealth which is subject to the reorganization
2 power of the Governor under article III. The next question is to what extent can the Governor change
3 legislatively enacted law through executive law-making power pursuant to article III.
4

5 **C. The Executive Branch has Broad Powers to Change the Laws Governing Executive**
6 **Agencies, Offices, and Instrumentalities through Executive Order Pursuant to Article III of the**
7 **Commonwealth Constitution.**

8 In his opinion finding that the Governor overstepped his authority when he issued Executive
9 Order 2006-4, the Hearing Officer correctly concluded that although the Commonwealth Constitution
10 explicitly permits the Governor to make changes that affect existing law, such power is not
11 unconditional. Rather, changes made to the law via the article III reorganization power are limited to
12 those changes “necessary for efficient administration” and “administrative reorganization.” However,
13 the Hearing Officer then proceeded to define the boundaries of the Governor’s powers through an
14 example which fails to cleave to the plain language of the constitution or any local interpretation of
15 such:

16 For Example, the Governor may use an executive order to change the name of Department
17 of Labor and Immigration to the Department of Labor, moving the Division of Immigration
18 to the Attorney General’s Office. This requires statutory changes, but such changes are
19 merely to promote efficient administration through executive branch reorganization as
20 contemplated by the Constitution and its Analysis. *There is a world of difference between*
21 *this type of administrative reorganization and the wholesale restructuring of CUC and its*
22 *electrical rate-making authority that occurred pursuant to Executive Order 2006-4.*
23 Therefore, CUC Cannot rely on a plain reading of the Constitution or its Analysis to support
24 its argument that the executive order was the type of administrative reorganization permitted
25 by Article III, Section 15.

21 Administrative Order: Motion for Summary Adjudication, B.D. Nos. 06-0001-1, 06-0002-2, 06-
22 0004-5, Page 7 (In the Matter of the Billing Disputes of Stanley T. Torres and Jack A. Angello, C.U.C.
23 Customers) (*emphasis added*).

24 Essentially, the Hearing Officer, pursuant to his interpretation of article III and his understanding
25 of *Sonoda v. Cabrera*, 1997 MP 5 (CNMI Supreme Court Certified Question No. 96-001), determined

1 that the Governor’s power under article III should be narrowly limited to changing office titles and
2 shifting offices among the major executive departments. The Court disagrees. First, the plain language
3 of article III fails to articulate the limitations of executive reorganization power in terms of the example
4 provided above. Secondly, according to this Court’s understanding of *Sonoda*, *Sonoda* addresses a very
5 narrow discussion of article III, section 15 powers when the exercise of which came into conflict with
6 another constitutional provision vesting control of the civil service in the legislature; a discussion which
7 is substantively distinct from the fact situation under review here. Lastly, though article III may appear
8 to provide the executive branch excessive law-making authority, such authority is not granted without
9 the consent of the legislature.

10 In his decision the Hearing Officer insisted that the plain language of article III failed to provide
11 a basis upon which the Governor could so invasively reorganize CUC and its electrical rate-making
12 authority. True, article III power allows the Governor to “make changes in the allocations of offices,
13 agencies and instrumentalities.” But the Hearing Officer’s interpretation of article III limits the
14 executive reorganization power to changing the names of offices, agencies and instrumentalities and
15 shifting them among the major executive departments. Instead, the plain language of article III endows
16 the Governor with broader powers. Specifically, the Court finds that the plain language of article III
17 also allows the governor to make changes to the organization of offices, agencies and instrumentalities
18 “in their functions and duties that are necessary for efficient administration.” Thus, it is this Court’s
19 reading of article III, section 15, that the Governor has the authority not only to redistribute offices,
20 agencies and instrumentalities among the major departments of the executive branch, but also has the
21 power to reorganized the administrative functions and duties within the offices, agencies and
22 instrumentalities.

23 A more expansive interpretation of the Governor’s article III powers derives support through the
24 analysis of the Commonwealth constitution and case law. To be sure, the Analysis recognized that
25 article III not only vests the power to reorganize the executive branch with the legislature, but also

1 “provides that the governor may take the initiative in administrative reorganization.” ANALYSIS OF THE
2 CONSTITUTION OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) at 83-84. Moreover, such was
3 subsequently recognized in *Mafnas v. Camacho*:

4 The language of the analysis is clear and unambiguous. The framers of the constitution gave
5 the Governor the right to initiate changes that may be needed to carry out the administrative
6 affairs of the executive branch. At the same time, the framers limited this power by
7 requiring the Governor to submit executive orders to the legislature whenever they affect
8 existing laws. In the instant case, the Order was submitted to the legislature and the required
9 number of days had lapsed with neither house taking any action modifying or disapproving
10 the Order. The Order therefore became effective upon the expiration of the sixty-day period.
11 1 CR 302 (D.N.M.I. App. Div. 1982).

12 Here, Executive Order 2006-4 affected the existing enabling statutes of CUC in several ways,
13 however, each amendment primarily changed the duties and responsibilities between the board of
14 directors and the executive directors, and modified the structure of the CUC’s administration. Hence,
15 most substantive changes to the statutes (and later regulations governing rate-setting) resulting from the
16 reorganization, although likely anticipated by reorganization’s architects, were ultimately bi-products of
17 the administrative reorganization.

18 For example, Executive Order 2006-4 amended several sections of the CUC enabling statutory
19 scheme to remove authority from the reconstituted board of directors and vest it in the executive
20 director. *See* 4 CMC § 8123 which inserted the provision that the corporation “acting through its
21 executive director and his or her designees” shall have all the powers conferred by law on a public
22 corporation. *See also* 4 CMC § 8131 (inserting language which reduced the role of the board of
23 directors to an advisory capacity and instructed that the board “shall defer to the executive director with
24 respect to the management and administration of the corporation” and reducing the number of directors
25 from eight to five).² Moreover, in most other areas in CUC’s enabling statute, Executive Order 2006-4

²It should be noted that this shifting of duties and powers from the board to the executive officer
under 4 CMC § 8131 could doubtfully occur without collateral impact on the board’s authority to issue

1 shifted duties and responsibilities away from the board and to the executive director. *See* 4 CMC §
2 8141(a)-(h) as amended by Executive Order 2006-4. These changes, which restructure the
3 administrative staff of CUC are well within the boundaries of the Governor’s article III reorganization
4 power.

5 In addition, Executive Order 2006-4 changes some of the wording to the statutory sections which
6 establish the basis for calculating its connection fees and rate schedules. *See* 4 CMC § 8123(m) as
7 amended by Executive Order 2006-4 (deleting the provision that restricted utility rates and fees for
8 water, sewer and electrical power to the “actual cost to the corporation to connect customers to
9 corporation facilities.”); *see also* 4 CMC § 8141(c) as amended by Executive Order 2006-4 (inserting
10 provisions that allowed the executive director to adjust rate schedules sufficient to recover the costs
11 associated with the operation, maintenance, transmission generation and delivery of electric services and
12 repayment of any debt associated with that service, “[t]he term “cost” shall include adequate financial
13 reserves for debt service, if any, and the replacement of obsolete or damaged equipment.”).³

14 _____
15 regulations necessary to carry out the purposes of CUC’s enabling statute under 4 CMC § 8157. It
16 follows then that the executive director assumed the regulation-making authority under 4 CMC § 8157
17 as amended by Executive Order 2006-4.

18 ³Plaintiffs additionally stated in its statement of undisputed facts that “Executive Order No.
19 2006-4 containing Reorganization Plan No. 2 amended 4 CMC § 8142 (Rates and Charges; Public
20 Hearings) by “inserting” into that statute the provision that would allow CUC to ‘temporarily’ charge its
21 customers more (adopt a new rate schedule) for electricity before holding public hearings.” Upon
22 comparing the former § 8142 and § 8142 as amended by Executive Order 2006-4, the Court found no
23 discrepancy other than the shifting of duties from the board of directors to the executive director. The
24 Court hopes that this was error rather than artifice.
25

1 Here, the statutory change made to section 8123(m), which deletes the provision requiring the
2 connection fees for water, sewer and electricity to be restricted to the actual cost of connection appears
3 to be inconsistent with the Governor's article III powers "to make changes in the *allocation of offices,*
4 *agencies and instrumentalities and in their functions and duties* that are necessary for efficient
5 administration." Though eliminating this restriction on connection fees may have suited the Governor's
6 overall motivation for reorganization, i.e. to add more revenue in order to place CUC on more stable
7 financial standing, and therefore seen as necessary for the efficient administration of CUC in terms of its
8 recovery of costs and disposition of its debt, its logical relationship to the allocation of functions and
9 duties within CUC is attenuated. Notwithstanding the Court's quibble with the section, the legality of
10 this statutory change does not affect Plaintiff's case because they are contesting billings over power
11 consumption and not connection fees.

12 Furthermore, though statutory changes made to section 8141(c) also bear an attenuated
13 relationship to the Governor's powers of reorganization under article III, examination of the actual
14 changes made to the statute reveal that the substantive language remains unchanged. Where under the
15 previous section 8141(c) the board was charged with adjusting the utilities services collection and rate
16 structure, the amended version vests this responsibility with the executive director. Secondly, under the
17 original section 8141(c), the service collection and rate structure were to be adjusted to "recover the
18 costs associated with the operation and delivery of the particular utility service," the amended section
19 8141(c) simply changes the language to reflect the individual expenses incurred in the operation and
20 delivery of utility service, i.e. "the costs associated with the operation, maintenance, transmission,
21 generation, and delivery of electricity service and the repayment of any debt associated with that
22 service." 4 CMC § 8141(c) as amended by Executive Order 2006-4. Lastly, the definition of "costs" for
23 the purposes of section 8141(c) was left unchanged by Executive Order 2006-4. Thus, the change in
24 section 8141(c)'s statutory language made by Executive Order 2006-4, with the exception of relieving
25 the board of its duties and shifting them to the executive director, amounts to little more than

1 clarification of what amounted to “costs.” Accordingly, the Court cannot find that the Governor
2 overstepped his authority.

3 Further, the Hearing Officer and Plaintiffs’ reliance on *Sonoda* as a broad restriction of the
4 Governor’s power to reorganize executive offices, agencies and instrumentalities is misplaced. True,
5 *Sonoda* held unconstitutional the former governor’s removal of certain government positions from the
6 protection from the CNMI civil service system through an executive order pursuant to article III,
7 however, *Sonoda* is ultimately distinguishable from this case. Specifically, the *Sonoda* decision turned
8 on the legal point that the power to remove a government position from the protection of the civil
9 service system was constitutionally vested in the legislature by article XX. Therefore, because the
10 legislature was constitutionally endowed with this power, the Governor could not usurp it by granting
11 himself the power to appoint and remove executive positions which previously received civil service
12 protection.

13 Though the hearing officer places substantial significance on the separation of powers
14 underpinnings of the *Sonoda* court’s analysis, the finding that “when the Constitution is silent, the
15 power rests with the people through their elected representatives, to create, make or change laws
16 including appointing individual positions that are not enumerated in the Constitution,” ultimately stands
17 for the Court’s conclusion that the Governor was allotted no general appointment power under the
18 Constitution, and thus he was also prevented from creating positions not subject to the civil service
19 system. *Sonoda* at 2. Therefore, this Court cannot adopt the Hearing Officer’s broad interpretation of
20 *Sonoda* to hold that the availability of a legislative veto as provided in article III is insufficient to check
21 the executive’s law-making power through article III reorganization. In other words, the Court must
22 reject the Hearing Officer’s contention that affirmative legislative action is necessary to constitutionally
23 effectuate any change in law made pursuant to an article III reorganization of an executive entity.

24 Lastly, the Court acknowledges that its analysis above renders an expansive interpretation of the
25 Governor’s reorganization powers through article III of the Commonwealth constitution. Such power,

1 however, is not without inherent limitation, as the drafters saw fit to require that any change of law
2 resulting from the use of such powers be presented to the Commonwealth legislature for consideration.
3 Thus, if the publicly elected representatives of the Commonwealth citizenry felt that the Governor's
4 actions pursuant to article III, section 15 extended beyond his constitutionally delegated power, or if the
5 legislature simply disagreed with the changes, they were provided with ample opportunity to modify or
6 completely disavow the Governor's actions.

7 Here, the Governor transmitted Executive Order 2006-4 to the legislature for modification or
8 disapproval as required by the plain language of article III. The legislature, however, took no action to
9 modify or disapprove the changes to the CUC enabling statute which resulted from the Governor's
10 issuance of Executive Order 2006-4 within the sixty day period provided in article III. Consequently,
11 the legislature chose not to exercise it's own check on the executive branch's law-making power under
12 article III, and this Court finds no compelling reason to impose further scrutiny on the lawful operation
13 of these branches

14
15 **D. Whether Subsequent Actions by the Commonwealth Legislature Cured any**
16 **Constitutional Defect in Executive Order 2006-4?**

17 Because the Court has ruled, *supra*, that for the purposes of Plaintiff's complaint, the changes to
18 statutory law made through Executive Order 2006-4 were constitutionally valid, the Court will not
19 proceed to answer the hypothetical question of whether subsequent acts of legislation effectively cured
20 any apparent constitutional defect in Executive Order 2006-4.

21
22 **VI. CONCLUSION**

23 For the foregoing reasons, the decision by the hearing officer that Executive Order 2006-4 was
24 unconstitutional as it violated the doctrine of separation of powers is REVERSED. However, the
25 ultimate disposition of the matter, which upheld rates which established CUC's billings of the Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

is AFFIRMED on the separate grounds articulated herein.

SO ORDERED this 17th day of April, 2008.

/s/ _____
DAVID A. WISEMAN
Associate Judge