

1 FOR PUBLICATION

2
3
4
5 **IN THE SUPERIOR COURT**
6 **FOR THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 **COMMONWEALTH OF THE NORTHERN)**
9 **MARIANA ISLANDS,)**

CRIMINAL CASE NO. 11-0262D

10 **Plaintiff,)**

11 **vs.)**

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

12 **JOANA CHONG PAI and COLUMBIA I.)**
13 **CHONG,)**

14 **Defendants.)**

15 **I. INTRODUCTION**

16 **THIS MATTER** was heard on December 20, 2011, in Courtroom 217A on a motion to dismiss
17 the information. The Commonwealth of the Northern Mariana Islands (“Government”) was represented
18 by Shelli Neal, Esq. Joanna C. Pai (“Pai”)¹ was represented by Rexford C. Kosack, Esq. and Columbia
19 I. Chong (“Chong”) (collectively, “Defendants”) was not present. The Court, having had the benefit of
20 documentary evidence, written briefs, and oral argument from counsel, now enters this written Order.

21 ///

22 ///

23 _____
24 ¹ This motion to dismiss is brought by Defendant Pai. Defendant Chong has not been served with the Penal Summons.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 On or about August 30, 2011, Commonwealth Utilities Corporation (“CUC”) inspectors were
3 performing a meter inspection at Chong’s Corporation. While replacing the electric meter the CUC
4 inspectors noticed that multiple electric items were still running even though the main breaker had been
5 turned off and the meter had been disconnected. The inspectors discovered that there had been a
6 “sophisticated workaround” of the electrical system which allowed for a bypass of the electric meter.
7 When the CUC inspectors asked to speak to the owner of the business a Chong’s Corporation employee
8 contacted Pai who then arrived at the scene.

9 The CUC account was in the name of Columbia I. Chong, Pai’s mother and the Co-Defendant in
10 this case. Chong, an elderly woman, had been off-island for an extended period and left Pai to run
11 Chong’s Corporation and attend to her affairs on Saipan in her absence. On September 20, 2011 Chong
12 signed a power of attorney (“Power of Attorney”) which gave Pai the authority to represent her in all
13 CUC matters. On September 22, 2011, Pai signed a customer agreement (“Customer Agreement”) so
14 CUC would restore electrical services to Chong’s Corporation.

15 On October 19, 2011, Pai was served with an information and penal summons. On November
16 14, 2011, at her arraignment, Pai filed and served the Government with a Motion to Dismiss the
17 Information (“Motion”).

18 On November 22, 2011, at a status conference, the Government requested leave to amend the
19 information. The Court granted the request and on November 28, 2011, the Government filed their First
20 Amended Information with an incorrect case number. The following day, the Government filed their
21 corrected Second Amended Information (“SAI”) which contained the correct case number.

22 On December 6, 2011, the Government filed their opposition to the Motion (“Opposition”)
23 arguing that the Motion was moot in light of the SAI which corrected the deficiencies of the original
24

1 information. On December 14, 2011, Pai filed her reply (“Reply”) setting forth numerous arguments as
2 to why the SAI is still deficient and should be dismissed with prejudice.

3 **III. ANALYSIS**

4 Pai’s Motion was framed in response to the original information. The SAI did correct most of
5 the deficiencies of the original information. Therefore, the Court will focus on the arguments which
6 remain and are highlighted in Pai’s Reply memorandum.

7 Pai offers two arguments as to why the SAI should be dismissed with prejudice. *First*, Pai
8 argues that the SAI is still deficient because it fails to include an element of the crime charged.
9 Specifically, Pai argues that 6 CMC § 1609(c) is the “threshold requirement” for charging a defendant
10 with theft of utility services and because the SAI makes no mention of § 1609(c), or essential facts
11 relating thereto, the SAI must be dismissed. Further, Pai argues that under § 1609(c) only a “customer”
12 can be charged with theft of utility services and because Pai is not a customer the SAI should be
13 dismissed with prejudice as to her.

14 *Second*, Pai contends that the SAI should be dismissed with prejudice as to both Defendants
15 because the Government’s case theory is that Chong’s Corporation, and not the Defendants, allegedly
16 committed the crime. To support this contention, Pai initially makes note of the “Facts” section of the
17 Government’s Opposition which alleges that “Chong’s Corporation, had benefited from electric service”
18 and “Defendants are the only two shareholders for Chong’s Corporation.” Pai argues that in general,
19 shareholders are not liable for the criminal acts of a corporation. Furthermore, § 1609(b)(4), the section
20 under which the SAI charges the Defendants, a defendant must receive a “direct benefit” from the utility
21 theft. Here, if the corporation received the direct benefit, then all the Government can possibly allege is
22 that the Defendants received an “indirect benefit” and therefore the SAI should be dismissed with
23 prejudice as to both Defendants.

1 **A. Legal Standards**

2 **1. Sufficiency of Information**

3 The Sixth Amendment of the United States Constitution provides that “[i]n all criminal
4 prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the
5 accusation.” The notice guarantee of the Sixth Amendment is—by virtue of the Covenant to Establish a
6 Commonwealth of the Northern Mariana Islands in Political Union with the United States of America,
7 48 U.S.C. § 1801 note, *reprinted in CMC* at 1xxxix, § 501(a)—applicable to prosecutions in the CNMI.

8 No principal of procedural due process is more clearly established than
9 that notice of the specific charge, and a chance to be heard in a trial of the
10 issues raised by that charge, if desired, are among the constitutional rights
11 of every accused in a criminal proceeding in *all courts, state or federal*.

12 *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (emphasis added). The fundamental right that a defendant
13 receive “reasonable notice of a charge against him,” *In re Oliver*, 333 U.S. 257, 273 (1948),
14 “contemplates that the accused be . . . informed [of the nature of the charges] sufficiently in advance of
15 trial or sentence to enable him to determine the nature of the plea to be entered and to prepare his
16 defense if one is to be made,” *id.* at 279 n.1 (Rutledge, J., concurring).

17 As a matter of fundamental due process, an information must include “a plain, concise and
18 definite written statement of the essential facts consisting of the offense charged.” NMI R. Crim. Proc.
19 7(c)(1). “In order for an accusation of a crime . . . to be proper under the common law, and thus proper
20 under the codification of the common-law rights in the Fifth and Sixth Amendments, [the information]
21 must allege all elements of that crime” *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000). *See*
22 *also Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (“An indictment must set forth each
23 element of the crime that it charges.”).

24 ///

///

1 **2. Rule 12**

2 Rule 12(b) ensures judicial efficiency by allowing a defendant to raise defenses “which [are]
3 capable of determination without the trial of the general issue” before trial. NMI R. Crim. P. 12(b). The
4 Supreme Court has noted that under Rule 12, a defense is “capable of determination without trial of the
5 general issue . . . if trial of the facts surrounding the commission of the alleged offense would be of no
6 assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57, 60
7 (1969). Moreover, the “general issue” has been defined as “evidence relevant to the question of guilt or
8 innocence.” *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987). In ruling on a 12(b)
9 motion, the Court may consider factual issues. Rule 12(e) explicitly provides that “where factual issues
10 are involved in determining a motion, the court shall state its essential findings on the record.” NMI R.
11 Crim. P. 12(e). Thus, a court may dismiss a charging document pretrial for insufficient evidence when
12 the facts are essentially undisputed. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994).

13 **B. Discussion**

14 Defendants were charged with Theft of Utility Services. 6 CMC § 1609(b)(4). The SAI states:

15 On or about August 30, 2011, on Saipan, Commonwealth of the Northern
16 Mariana Islands, the Defendant, **JOANNA C. PAI and COLUMBIA I.**
17 **CHONG**, intended to obtain utility services for their benefit or for the
18 benefit of another without paying the full lawful charge by using or
19 receiving the direct benefit of all or a portion of utility services with
20 knowledge or reason to believe that a diversion, prevention of accurate
measuring function, or unauthorized connection existed at the time of use
or that the use or receipt was otherwise without the authorization or
consent of the utility, to wit: the Defendant obtained utility services in
excess of the amount of \$51,000.00, in violation of 6 CMC § 1609(b)(4),
and made punishable by 6 CMC § 1609(d).

21 (SAI at 1 (emphasis in original).)

22 In general, it is the burden of the Government to prove every element of a crime beyond a
23 reasonable doubt. Accordingly, if as a matter of law, an element of the crime charged cannot be proved,
24 the information must be dismissed. *See United States v. Levin*, 973 F.2d 463, 469 (6th Cir. 1992)

1 (affirming the district court’s dismissal of an indictment when “undisputed extrinsic evidence”
2 demonstrated that “the government was, as a matter of law, incapable of proving” an element of the
3 offense). The elements which the Government must prove under the crime charged are as follows: (1)
4 defendant had the intent to obtain utility services for the defendant’s own or another’s use without
5 paying the full lawful charge; and (2) the defendant used or received the direct benefit of all or a portion
6 of the utility services with knowledge or reason to believe the use was unlawful or unauthorized; and (3)
7 the theft accrued to the benefit of any customer where the value of the theft of utility services exceeded
8 \$50.

9 The SAI alleged Defendants’ mental state, i.e. whether the Defendants had the requisite intent, as
10 well as that the value of the theft exceeded \$50. Assuming arguendo, that Defendants acted with the
11 requisite intent and the value of the theft exceeded \$50, that theft would not be culpable unless
12 Defendants actually received a direct benefit. 6 CMC § 1609(b)(4). Therefore, in addressing Defendant
13 Pai’s Motion, the Court is limited to the threshold inquiries of (1) whether the SAI contained the
14 essential factual matter along with all the elements of the crime and (2) whether it was legally possible
15 that Defendants received a direct benefit from the theft. These issues will be addressed in turn.

16 **1. The Second Amended Information is deficient for the failure to allege 6 CMC § 1609(c) and**
17 **essential facts thereto.**

18 Pai contends that the SAI must be dismissed because it fails to reference 6 CMC § 1609(c) which
19 is the “threshold requirement” before the Government can charge a defendant with theft of utility
20 services. The Government did not offer a responsive argument to this contention. Nevertheless, in the
21 original information the Government treated § 1609(c) as an offense in and of itself. Thus, the Court
22 must determine whether § 1609(c) is a threshold element, a separate offense, or something else
23 altogether.
24

1 It is well settled that “[o]ne statutory provision should not be construed to make another
2 provision [either] inconsistent or meaningless.” *Saipan Achugao Resort Members’ Ass’n v. Wan Jin*
3 *Yoon*, 2011 MP 12 ¶ 23 (quoting *Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995)). Moreover, “[i]n
4 determining legislative intent, the statute must be read as a whole, and not as isolated words contained
5 therein.” *Id.* (quoting *Calvo v. NMI Scholarship Advisory Board*, 2009 MP 2 ¶ 22).

6 It is undisputed that 6 CMC § 1609(b) contains elements of the crime “theft of utility services.”
7 Section 1609(b) states

8 A person commits the offense of theft of utility services if the person, with
9 intent to obtain utility services for the persons [sic] own or anothers [sic]
10 use without paying the full lawful charge therefor, or with intent to
11 deprive any utility of any part of the full lawful charge for utility services
12 it provides, commits, authorizes, solicits, aids, or abets any of the
13 following:

14 (1) Diverts, or causes to be diverted utility services, by any means
15 whatsoever;

16 (2) Prevents any utility meter, or other device used in determining the
17 charge for utility services, from accurately performing its measuring
18 function;

19 (3) Makes or causes to be made any connection or reconnection with
20 property owned or used by the utility to provide utility services, without
21 the authorization or consent of the utility; or

22 (4) Uses or receives the direct benefit of all or a portion of utility services
23 with knowledge or reason to believe that a diversion, prevention of
24 accurate measuring function, or unauthorized connection existed at the
time of use or that the use or receipt was otherwise without the
authorization or consent of the utility.

6 CMC § 1609(b). Clearly, the first paragraph of § 1609(b) lays out the “intent” element of the crime.
The following four subparts of § 1609(b) essentially define the theft and narrow the essential facts by
describing various actions a person can take in committing the crime. In this case, the SAI charges
Defendants under § 1609(b)(4).

In determining whether 6 CMC § 1609(c) is a threshold element, a separate offense, or
something else, the Court must begin with the plain language of the statute. Section 1609(c) states

1 A person commits the offense of theft of utility services in cases where the theft:

2 (1) Accrues to the benefit of any customer where the value of the theft of utility services exceeds \$50; or

3 (2) Is obtained through the services of a person hired to commit the theft of utility services; in which event, both the person hired and the person
4 responsible for the hiring shall be punished under this section[.]

5 6 CMC § 1609(c). The first sentence of § 1609(c) presupposes that a theft of utility services has
6 occurred. However, § 1609(c) does not define the theft. Indeed, one must look back to § 1609(b) and
7 one or more of its four subparts to define the theft and its essential facts. Therefore, § 1609(c), and its
8 two subparts, cannot operate as offenses separate from those outlined in § 1609(b).

9 The Court agrees with Pai’s argument that § 1609(c) operates as a threshold requirement in
10 charging a defendant with theft of utility services. Therefore, a person does not become culpable for the
11 actions described in § 1609(b) unless the theft (1) accrues to the benefit of any customer where the value
12 of the theft exceeds \$50; or (2) is obtained through the services of a person hired to commit the theft.
13 An information must allege either of these two threshold requirements before a defendant can be
14 charged with theft of utility services.

15 Pai’s argument that § 1609(c) requires the defendant to be a “customer” is unconvincing. The
16 plain language of § 1609(c) contemplates that “a person hired to commit the theft of utility services” can
17 be charged with the crime. Thus, § 1609(c) does not require that a defendant be a customer to be
18 charged with theft of utility services.

19 The SAI fails to allege this threshold requirement or any essential facts related thereto.
20 Therefore, the SAI must be dismissed. The remaining issue is whether the SAI should be dismissed
21 with or without prejudice.

22 ///

23 ///

1 **2. Under the Government’s own undisputed facts it cannot show that Pai received a direct**
2 **benefit from the theft of utility services.**

3 Pai asserts that the SAI must be dismissed with prejudice as to her because there is no way the
4 Government can prove that she received a “direct benefit” from the theft. To support this assertion, Pai
5 points to the undisputed facts that the CUC account is not in her name and that Chong’s Corporation was
6 in possession of the property that used the services. Pai contends that, at most, all the Government could
7 tend to show is that she received an “indirect benefit” from the theft. The Government argues that Pai
8 did receive a direct benefit from the theft because Pai “took responsibility” for the corporation by
9 responding to the CUC inquiry in the matter. The Court finds this argument unconvincing.

10 The determination of whether § 1609(b)(4) applies to Defendant Pai hinges on the language
11 “direct benefit,” as contained in the statute. It is well settled that criminal statutes must be strictly
12 construed against the government and liberally construed in favor of the accused. *See e.g.,*
13 *Commonwealth v. Lee*, 2005 MP 19 ¶ 12 (“Courts applying criminal laws must strictly construe the
14 plain language of a statute.”); *Commonwealth v. Manglona*, 1997 MP 28; *Commonwealth v. Nethon*, 1
15 NMI 458, 461 (1990). Further, it is well established in the CNMI that statutory language will be given
16 its plain, ordinary and usual meaning unless a different purpose is clearly manifested by the statute itself.
17 *Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 14.

18 In this case, the term “direct benefit” is not defined in the statute; therefore, the Court will
19 construe the term by its usual meaning. Black’s Law Dictionary (6th Ed., 1990) defines “direct” as:
20 “immediate; proximate; by the shortest course; without circuitry; operating by an immediate connection
21 or relation, instead of operating through a medium; the opposite of indirect.” The term “benefit” is
22 defined there, in part, as: “Advantage; profit; fruit; privilege; gain; interest.” As stated, it is undisputed
23 that Chong is the named account holder of the utility service, and furthermore, that Chong’s Corporation
24 took possession of the property and made use of the utility service. Therefore, under these undisputed

1 facts, either Chong or Chong's Corporation could be determined to have received a "direct benefit" from
2 the theft and found liable under § 1609(b)(4).

3 While Pai may manage the corporation's day-to-day business, it is the corporation that receives
4 the electrical services; therefore, any benefit Pai could have received, in all practical respects, would
5 have been funneled through the corporation to Pai. Defendant Pai would have received, in the plainest
6 sense of the word, an indirect benefit. Accordingly, the Government cannot show, under its own factual
7 allegations, that Pai received a direct benefit from the theft of utility services.

8 Because the facts in this case are undisputed, the Court is not invading the province of the jury or
9 determining an element of the offense charged. *See United States v. Nukida*, 8 F.3d 665, 669-70 (9th
10 Cir. 1993). To be clear, the Court is not dismissing the Second Amended Information as to Joanna C.
11 Pai because the Government will be unable to prove its case; rather, because there is no case to prove.

12 **IV. CONCLUSION**

13 Based on the foregoing reasons the Second Amended Information is hereby **DISMISSED**. The
14 Government has ten (10) days to file an amended information.

15 IT IS SO ORDERED this 30th day of April, 2012.

16
17 /s/
18 PERRY B. INOS, Associate Judge
19
20
21
22
23
24