



By Order of the Court, Associate Judge JOSEPH N. CAMACHO

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

COMMONWEALTH UTILITIES CORPORATION,)	CIVIL CASE NO. 13-0226
)	
)	
Plaintiff,)	ORDER DENYING
)	COMMONWEALTH'S MOTION TO
v.)	DISMISS FOR LACK OF CAPACITY
)	
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,)	
)	
Defendant.)	

I. INTRODUCTION

This matter came before the Court on June 24, 2014 at 1:30 p.m. in Courtroom 220 on motion of the Defendant, the Commonwealth of the Northern Mariana Islands. The Commonwealth was represented by Assistant Attorney General David Lochabay. Plaintiff Commonwealth Utilities Corporation ("CUC") was represented by Michael A. White.

On December 13, 2013, CUC filed the complaint in this case seeking payment for utility services provided by CUC to Commonwealth agencies and offices. On February 12, 2014, the Commonwealth filed the instant motion to dismiss arguing that CUC, as a governmental entity, lacks capacity to sue the CNMI government, CUC's creator. CUC filed a memorandum in opposition to the motion to dismiss on May 13, 2014 to which the Commonwealth replied on June 18, 2014.

1 Based on a review of the filings, oral argument and applicable law, the Court finds that the
2 Commonwealth Legislature explicitly granted CUC the power to bring lawsuits, and specifically
3 mandated that CUC bill government consumers for utility services. Thus, the Court denies the
4 Commonwealth's motion to dismiss for lack of capacity.

5 **II. LEGAL STANDARD**

6 Rule 12(b) of the Commonwealth Rules of Civil Procedure allows certain defenses to be
7 made by motion. NMI R. Civ. P. 12(b). A motion for lack of capacity is not specifically listed in
8 Rule 12(b); however, it is common practice in the federal courts to allow the defense of lack of
9 capacity to be raised by motion under Rule 12(b).¹ *See, e.g., Klebanow v. New York Produce Exch.*,
10 344 F.2d 294, 296 n.1 (2d Cir. 1965).

11 "The capacity of a corporation to sue or be sued shall be determined by the law under which
12 it was organized." NMI R. Civ. P. 17(b). To determine whether a governmental entity has the
13 capacity to sue and be sued, federal courts look to the statutes creating the entity at issue. *See, e.g.,*
14 *Hearn v. Hudson*, 549 F. Supp. 949, 952 n.1 (W.D. Va. 1982); *and Mayes v. Elrod*, 470 F. Supp.
15 1188, 1192 (N.D. Ill. 1979). Even if the legislature grants a governmental entity the general power
16 to sue and be sued, a governmental entity may lack the capacity to sue its creator. *See City of New*
17 *York v. State of New York*, 655 N.E.2d 649, 651-62 (N.Y. Ct. App. 1995).

18 **III. DISCUSSION**

19 The issue of whether a governmental agency has capacity to sue the Commonwealth is an
20 issue of first impression in this jurisdiction.² However, the Commonwealth Code explicitly states
21

22 ¹ Because the Commonwealth Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, the
23 Court looks to interpretation of federal rules for guidance. *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 9 ¶ 16.

24 ² The Commonwealth Superior Court has issued a judgment in favor of a governmental entity against the
Commonwealth in at least one prior case, however, there was no discussion or ruling on the issue of capacity in that
case. *See N. Mariana Islands Ret. Fund v. Commonwealth*, Civ. No. 06-0367 (NMI Super. Ct. June 29, 2009)
(Amended Judgment for Damages and Order Thereon).

1 that CUC may bill and collect fees from government utility consumers. 4 CMC §§ 8122(b) &
2 8143(a). Additionally, the Commonwealth Code unambiguously imposes liability for breach of
3 contract on the Commonwealth: “Any civil action or claim against the Commonwealth government
4 founded upon any law of this jurisdiction or any regulation issued under such law, or upon any
5 express or implied contract with the Commonwealth government,” may be brought against the
6 Commonwealth government. 7 CMC § 2251.

7 The Commonwealth argues that CUC is an organ of the state, and as such, cannot sue itself.
8 The Commonwealth argues that the prolonged and prominent role of the Governor in CUC’s legal
9 existence since 2006 demonstrates that CUC lacks capacity to bring a lawsuit against the
10 Commonwealth. The Commonwealth relies on a general rule that has developed in other
11 jurisdictions that political subdivisions of the state lack the capacity to bring actions that challenge
12 the validity of state law. *City of New York*, 655 N.E.2d at 651. The Commonwealth then cites to a
13 variety of cases in other contexts where courts consider whether a government agency should be
14 considered to be the government. *See, e.g., Alaska Comm. Fishing & Agriculture Bank v. O/S*
15 *Alaska Coast*, 715 P.2d 707, 710-11 (Alaska 1986) (considering precedent that analyzed whether
16 the University of Alaska qualified for Alaska’s statutory ban on jury trials in actions against the
17 state); *Challam County v. United States*, 263 U.S. 341, 345 (1923) (considering whether a
18 corporation owned by the federal government was exempt from state taxation); *and Emergency*
19 *Fleet Corp. v. Western Union*, 275 U.S. 415 (1928) (addressing whether a corporation owned by the
20 federal government should receive government rates on Western Union telecommunications).

21 CUC maintains that it was designed by the Commonwealth Legislature to be a separate,
22 autonomous entity, with the power to recover the expenses of utility production from utility
23 consumers, including the Commonwealth. CUC argues that there is no statutory authority for the
24 Commonwealth’s position that CUC lacks capacity to bring this action against the Commonwealth.

1 CUC notes that executive orders are only in effect for thirty days, and that none of the executive
2 orders concerning CUC exempted the Commonwealth from paying for utilities consumed by
3 government entities. CUC urges the Court to follow the plain language of the Commonwealth Code
4 rather than apply the common law rule advanced by the Commonwealth. Additionally, CUC argues
5 that the common law rule advanced by the Commonwealth is inapplicable in this matter because
6 CUC is not bringing a claim to invalidate a local law, but is instead seeking to enforce a contract
7 implied by Commonwealth statute. However, CUC argues, even if the Court were to apply the
8 common law rule that a political subdivision lacks capacity to sue the state of its creation, CUC
9 would fall into several exceptions to the general rule, because CUC has a proprietary interest in the
10 funds sought, and failure to bring this action would cause CUC to violate both Commonwealth
11 statute and a federal court order. *See City of New York*, 655 N.E.2d at 652. Finally, CUC suggests
12 that it could be instructive for the Court to use the factors that federal courts review in cases
13 concerning whether a state agency qualifies for sovereign immunity, and that application of those
14 factors to CUC would demonstrate that CUC is independent of the Commonwealth. *See Mitchell v.*
15 *Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081
16 (1989).

17 The statute governing CUC is the Commonwealth Utilities Corporation Act of 2008 (“the
18 Act”) found in Title 8, Division 4, Chapter 1 of the Commonwealth Code. The Act establishes CUC
19 as a public corporation with a board of directors, encouraged to contract with private entities to
20 provide utility services, and mandated to be financially independent from legislative appropriations
21 by recovering the full cost of its utility provision through fair and rational fee collection from all
22 consumers. *See, e.g.*, 4 CMC §§ 8121(a), 8131, 8122(a) & (b), 8143(a). CUC has the power to sue
23 and be sued in its corporate name. 4 CMC § 8123(c). CUC also has the power, subject to the
24 process outlined in the Public Utilities Commission Act (4 CMC §§ 8401 *et seq.*), to review and

1 establish utility rates and fees, but the fees may not “be higher than the actual cost to the
2 corporation to connect customers and provide the utility.” 4 CMC § 8123(m). CUC is directed to
3 “establish rates, meter, bill, and collect fees in a fair and rational manner from all consumers of
4 utility services it has not privatized so that the corporation will be financially independent of all
5 appropriations by the Commonwealth Legislature by October 1, 2009, or as soon as possible
6 thereafter.” 4 CMC § 8122(b). CUC is mandated to “bill all consumers, including government
7 consumers and all government buildings, for electrical power, water consumption, and sewer
8 services . . . at not less than the full cost of production, operation and maintenance of those
9 services.” 4 CMC § 8143(a). The Commonwealth Legislature could have provided for the free
10 provision of utility services to the Commonwealth, but instead, the Act specifically provides that
11 CUC bill government utility consumers. *Compare* 4 CMC § 8143(a) *with New Orleans v. New*
12 *Orleans Water Works Co.* 142 U.S. 79, 84 (1891) (describing a statutory scheme in Louisiana
13 where a state-created water utility provided water to the city free of charge).

14 Despite these clear provisions of the Act, the Commonwealth argues that the reality of the
15 relationship between CUC and the Commonwealth is not reflected in Commonwealth statute. The
16 Commonwealth argues that because of the series of executive orders issued by the Governor from
17 2006 until present, the Act has been suspended in its entirety. The Commonwealth points to no
18 single executive order or group of such orders that suspends the Act in its entirety. Even so, the
19 Court reviewed all of the executive orders cited by the Commonwealth, but found no order that
20 suspended the Act or exempted the Commonwealth from being billed for utility services provided
21 to governmental entities. Instead, the executive orders maintained the basic structure of CUC as
22 designed by the Act, but removed certain statutory restrictions, including the restriction on number
23 of foreign workers allowed to be employed; certain procurement regulations and contract approval
24 requirements; the debt ceiling; and requirements for membership on the Board of Directors, by

1 vesting the power of CUC’s Board of Directors and Executive Director in either the Governor, or
2 the Executive Director appointed by the Governor. *See, e.g.*, Exec. Order 2008-08, 30 Comm. Reg.
3 09 at 28771 (removing debt ceiling in 1 CMC § 8123(e)); Exec Order 2009-01, 31 Comm. Reg. 1 at
4 29185 (suspending certain procurement regulations and PUC advance review of CUC contracts);
5 Exec. Order 2009-09, 32 Comm. Reg. 10 at 30859 (vesting powers of the Board of Directors in
6 Executive Director and suspending statutory limitation on number of foreign workers allowed to be
7 employed by CUC); *and* Exec. Order 2012-07, 34 Comm. Reg. 7 at 32572 (assuming all powers of
8 CUC Board of Directors and Executive Director, suspending PUC oversight of CUC, and removing
9 limitation on number of foreign workers employed by CUC).

10 The Commonwealth also argues that this Court is bound by 7 CMC § 3401 to apply the rule
11 developed in other jurisdictions that political subdivisions of the state lack the capacity to bring
12 actions that challenge the validity of state law. The Court is not persuaded by this argument for
13 several reasons.

14 The Commonwealth asserts that it is well-settled law that a creature of the state may not sue
15 the state. However, the Court finds this assertion to be an overgeneralization, as the analysis of
16 whether a state entity may sue the state always first involves a review of applicable statutory
17 authority.³ To support its assertion, the Commonwealth relies on case law from New York that sets

19 ³ For example, the case cited to support this proposition, *Alternatives Unlimited-Special, Inc. v. Ohio Department of*
20 *Education*, 861 N.E.2d 163 (Ohio App. 2006), is not a case involving a lawsuit between a state agency and a state. In
21 that case, the court considered whether the Ohio Department of Education and the State of Ohio were the same real
22 party in interest for purposes of collateral estoppel. The *Alternatives Unlimited-Special* court states, “Thus, for the same
23 reason that one agency of the state cannot sue another for money damages in the Court of Claims – a party may not sue
24 itself – the state generally should not be permitted to advance a position on an issue, litigate the issue to final
adjudication, and later relitigate the issue under the cloak of a different agency.” 861 N.E. 2d at 176. There is an Ohio
case that addresses the issue of one agency suing another, and in that case, interpretation of the relevant Ohio statute
was central to the court’s decision. *Ohio Dep’t of Human Servs. v. Ohio Dep’t of Transp.*, 605 N.E.2d 1007 (1992). In
that case, the Court of Appeals of Ohio looked to the statutory definition of the term “state” to determine that the two
parties were actually the same. *Id.* at 1008. The Ohio court then found that, “[a]s departments of the state, appellees *are*
the state for purposes of suit as provided by the Court of Claims Act” and as such, the claim was dismissed for lack of
capacity. *Id.* at 1009 (emphasis in original).

1 forth the general rule that a political subdivision of the state may not file a claim to invalidate state
2 law. *City of New York*, 655 N.E.2d at 651. The Commonwealth also asserts that the definition of
3 political subdivision is very broad and includes public corporations, but cites no legal authority to
4 support this exact proposition. Instead, the Commonwealth cites a multitude of cases in contexts
5 different from the matter at hand where courts consider whether a governmental agency is
6 equivalent to the state for purposes such as tax exemption, sovereign immunity, exemption from
7 jury trial, or qualification for governmental telecommunication fees. *See Alaska Comm. Fishing*,
8 715 P.2d at 710-711; *Challam Cty*, 263 U.S. at 345; and *Emergency Fleet Corp.*, 275 U.S. 415. In
9 reviewing the cases cited by the Commonwealth, however, the Court finds that the term political
10 subdivision has a distinct meaning, referring to entities such as counties and municipalities. *See*
11 *e.g., Alternatives Unlimited-Special*, 861 N.E.2d at 176 n.10 (explaining that the relevant Oregon
12 statute specifically exempted “political subdivisions” from the definition of “state”); and *City of*
13 *New York*, 655 N.E.2d at 650-52 (describing cities and counties as political subdivisions).

14 The Commonwealth also makes the assumption that the rule articulated in *City of New York*
15 applies to any action against the state, not just to actions that seek to invalidate state legislation.
16 However, the exceptions to the general rule demonstrate that such an extension is inappropriate.
17 Political subdivisions often have the capacity to bring a claim against the state when doing so is in
18 line with state law. *See City of New York*, 655 N.E.2d at 651. All “creatures” of the government
19 have only those powers granted to them by the state legislature. *Id.* at 651-52. So it follows, and has
20 been held by other courts, that if the legislature grants the express authority to bring suit against the
21 state, or grants a proprietary interest in a specific fund of money, then a state creature may file suit
22 against the state. *Id.* at 651 (listing the exceptions to the general rule).

23 The facts of the case at hand are distinct from the line of New York cases. Here, the plaintiff
24 is a utility corporation, not a political subdivision such as a municipality. In the case at hand, CUC

1 is not challenging the validity of the Commonwealth’s legislation, but is instead seeking to collect
2 the money owed by government consumers for a service provided by the utility company. In this
3 case, Commonwealth statute grants a proprietary interest in a specific fund of money to CUC by
4 explaining that CUC is required to cover its costs by collecting fees from consumers, and by
5 specifically stating that government consumers should be billed for utilities consumed at no less
6 than the cost of production. *See* 4 CMC §§ 8122(b), 8143(a).

7 Finally, the Court is only bound by the common law as generally understood or applied in
8 the United States “in the absence of written law or local customary law to the contrary.” 7 CMC
9 § 3401; *and In re Buckingham*, 2012 MP 15 ¶ 12 (describing written law, which includes NMI
10 statutes, as the “top of the hierarchy” of applicable law in the CNMI). Here, there is written law that
11 conflicts with the common law rule put forth by the Commonwealth. The Commonwealth Code
12 both creates a contract between CUC and the Commonwealth and imposes contract liability on the
13 Commonwealth. *See* 4 CMC § 8143(a) and 7 CMC § 2251(b).

14 Accordingly, this issue is controlled by the provisions of the Commonwealth Code. The
15 Code clearly establishes CUC as a public corporation, mandates CUC to obtain financial
16 independence through billing and fee collection, and directs CUC to bill governmental utility
17 consumers at “not less than the full cost of production, operation and maintenance” of the utility
18 services. 4 CMC §§ 8121(a), 8122(b), and 8143(a). Nothing in the Code or the executive orders
19 cited by the Commonwealth indicates that the Commonwealth is exempt from paying utility bills,
20 or from a claim seeking to collect the fees owed by government consumers for utilities provided by
21 CUC.

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IV. CONCLUSION

Thus, under the express mandate of the Commonwealth Legislature in the Commonwealth Code, CUC has the capacity to bring this claim for non-payment of utilities against the Commonwealth. The Commonwealth’s motion to dismiss is **DENIED**.

IT IS SO ORDERED this 3rd day of September, 2014.

_____/s/
JOSEPH N. CAMACHO,
Associate Judge