IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

STANLEY M. TORRES and JACK A. ANGELLO,
Plaintiffs-Appellants,

v.

COMMONWEALTH UTILITIES CORPORATION,
Defendant-Appellee.

SUPREME COURT NO. 2008-SCC-0017-CIV
SUPERIOR COURT NO. 07-0098E

Cite as: 2009 MP 14

Decided September 28, 2009

Wesley M. Bogdan, Saipan, Northern Mariana Islands, for Plaintiff-Appellant
Timothy M. Connor, Assistant Attorney General, Commonwealth Attorney General's Office, for Defendant-Appellee
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

PER CURIAM:

¶ 1 Stanley M. Torres and Jack A. Angello appeal the trial court's holding that Governor Benigno R. Fitial did not exceed his reorganizational powers under the Commonwealth Constitution by significantly restructuring the administration of the Commonwealth Utilities Corporation ("CUC"). Torres and Angello also argue that the Governor's restructuring caused their utility rates to be illegally increased. Because the Governor did not merely make changes to the allocation of an agency, as is permitted by Article III, Section 15 of the Commonwealth Constitution, but rather created an entirely new government entity, we find that he exceeded the powers granted to him by Article III, Section 15. The increased utility rates imposed as a result of the restructuring were prohibited by law. The legislature, however, later cured the illegality of the rates by passing Public Law 15-35, but it did so only prospectively. As a result, the increased electric rates were invalid from the date the executive director implemented them until the effective date of Public Law 15-35. We therefore REVERSE the decision of the trial court and REMAND this matter directly to CUC for re-calculation of Torres's and Angello's utility bills in a manner consistent with this Opinion.

I

¶ 2 From January 2006 to May 2006, Governor Benigno R. Fitial issued a series of executive orders which prompted Torres and Angello to challenge their monthly utility bill from CUC. The first such order, Executive Order 2006-1 (the "First Executive Order"), was issued in January 2006. In the order, the Governor acted pursuant to his reorganizational powers under Article III, Section 15 of the Commonwealth Constitution and transferred CUC, formerly an independent public corporation, to the Utilities Division of the Department of Public Works ("DPW"). The First Executive Order also abolished CUC's board of directors and established the position of "chief executive officer" to head CUC. The Governor submitted the First Executive Order to the Commonwealth legislature as required by Article III, Section 15. Sixty days elapsed without any legislative action, and the order subsequently became law.

¶ 3 In May 2006, the Governor issued Executive Order 2006-4 (the "Second Executive Order"),[1] which rescinded the First Executive Order and contained Reorganization Plan No. 2 of

[1] The Governor issued two executive orders between the First Executive Order and the Second Executive Order. In Executive Order 2006-2, the Governor declared a Commonwealth-wide state of emergency based on the fact that CUC was unable to purchase enough fuel to sufficiently generate electricity and provide water service. Through Executive Order 2006-2, the Governor assumed full control of CUC after invoking emergency powers under Article III, Section 10 of the Commonwealth Constitution and the Commonwealth Disaster Relief Act, 3 CMC § 5101. In doing so, the Governor suspended all previous regulatory and statutory provisions and reprogrammed additional funds to CUC.

2006. The Second Executive Order converted CUC back to a public corporation, but reorganized CUC's administration in a way that significantly departed from its original form. For example, the order reinstated CUC's board of directors, but only as an advisory body without any actual decision-making authority. The decision-making authority that previously rested with the board of directors was thereafter placed in the hands of a single person – the executive director. This consolidation of power significantly altered a number of Commonwealth statutes, particularly 4 CMC §§ 8131-34 of the enabling legislation. The Second Executive Order further amended Commonwealth law by deleting a provision that restricted utility rates and other service fees to the "actual cost to the corporation to connect customers to corporation facilities." 4 CMC § 8123(m) (repealed 2006). In its place, the order added a new provision granting the executive director the power "to review and establish utility rates and other fees for water, sewer, and electrical power" to the extent he or she "deems lawful and necessary." Reorganization Plan No. 2 of 2006, Exec. Order No. 2006-4, *reprinted in* 4 CMC § 8123(m). The Second Executive Order also abolished the previous version of 4 CMC § 8143, which provided detailed logistical billing instructions to the board of directors, and replaced it with a new provision allowing CUC to immediately increase the existing rate schedules to a level adequate to compensate the corporation for the full cost of production, operation, and maintenance to all customers. Furthermore, it inserted new language into 4 CMC § 8142 that allowed the executive director, on a temporary basis, to immediately adopt a new rate schedule and charge increased rates without first conducting a requisite public hearing.

¶ 4 After not having been rejected or modified by the legislature within sixty days of its submission, CUC began operating in accordance with the new guidelines set forth in the Second Executive Order in July 2006. On July 21, 2006 the executive director approved a new rate schedule that allowed CUC to potentially recover all electricity delivery costs, pay all debts, and replace broken and antiquated equipment. The following day these rates went into effect. Torres and Angello were billed at these rates and timely filed their initial billing dispute with CUC.

¶ 5 In September 2006, the executive director again amended CUC's rate schedules; Torres and Angello again objected to being billed at CUC's the new rates. In the following weeks, CUC found Torres's and Angello's billing disputes to be without merit. Thereafter, Torres and Angello

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Later, in March 2006, the Governor issued Executive Order 2006-3, which placed the DPW under a state of emergency. In this order, the Governor stated that he would use all necessary powers to resolve the Commonwealth's utility problems. He further stated that the First Executive Order had become law since the Commonwealth legislature neither modified nor rejected it within sixty days.

initiated administrative hearing procedures with CUC in an attempt to have their utility bills adjusted to reflect the rates that were in effect prior to July 22, 2006.

¶ 6 Before the administrative hearing took place, however, the legislature passed Public Law 15-35, which created the Public Utilities Commission ("PUC"). Public law 15-35 established the PUC as an independent executive branch regulatory agency, and became "effect[ive] upon its approval by the Governor" on October 24, 2006. PL 15-35, § 6. In accordance with power conferred by Public Law 15-35, the PUC quickly adopted and ratified CUC's post-July 2006 elevated rate schedules. Approximately two months after Public Law 15-35 became effective, the Commonwealth legislature passed, and the Governor signed into law, Public Law 15-40, which contained certain amendments to Public Law 15-35. Neither law had retroactive application dates, and each became effective after Torres and Angello formally initiated their billing disputes.

¶ 7 In February 2007, which was two months after Public Law 15-40 became effective, Torres and Angello went before a CUC administrative hearing officer for adjudication of their billing disputes. The officer, however, ultimately denied their request for relief. In the denial, the officer found that the Governor did in fact exceed his reorganization authority under Article III, Section 15, thereby making Executive Order 2006-4 constitutionally defective. Nevertheless, he held that "its defects have been cured by legislative action." *In re Billing Disputes of Torres*, B.D. Nos. 06-0001-1, 06-0002-2, 06-0004-5, 12 (Administrative Order: Motion for Summary Adjudication Feb. 26, 2007). The legislative action the hearing officer referred to was the passage of Public Law 15-35 and Public Law 15-40, both of which appeared to incorporate and validate parts of the Second Executive Order. The hearing officer reasoned that the previously unconstitutional executive order had become constitutional due to "the extensive affirmative involvement of the CNMI legislature in the CUC electric rate-making process." *Id.* In denying Torres's and Angello's motion for summary adjudication, the hearing officer's order explicitly provided that Torres and Angello "shall pay withheld electrical charges to CUC within thirty (30) days after the date of this Order, or make arrangements with CUC for a repayment schedule within the time period." *Id.*

¶ 8 In accordance with the hearing officer's directive, Torres and Angello submitted payment proposals to CUC the following month. The two also filed a consolidated petition for judicial review of CUC's administrative decision with the trial court. In April 2007, CUC rejected the proposed payment plans, and Torres and Angello were notified that, unless additional monies were immediately paid and promissory notes executed, their utility service would be discontinued. Torres and Angello thereafter complied with CUC's demands under protest.

¶ 9 Upon review of the administrative decision, the trial court disagreed with the hearing officer's findings, and held that Governor had not in fact exceeded his Article III, Section 15 authority to reorganize executive branch instrumentalities. Referring to the substance of the Second Executive Order, the trial court stated that "[t]hese changes, which restructure the administrative staff of CUC, are well within the boundaries of the Governor's article III reorganization power." *Torres and Angello v. Commonwealth Utilities Corp.*, Civ. No. 07-0098E (NMI Super. Ct. April 17, 2008) (Order Reversing Hearing Officer's Decision In Part at 16). Additionally, because the trial court did not find the Second Executive Order to be constitutionally defective, it declined to address whether Public Law 15-35 and Public Law 15-40 ratified any of the Governor's potentially unconstitutional actions.

II

¶ 10 Torres and Angello now appeal, arguing that the Governor exceeded his reorganizational authority under Article III, Section 15 of the Commonwealth Constitution, and that the resultant increased rate schedules were illegal. Since this claim originated in an administrative hearing, our review is governed by the Commonwealth Administrative Procedure Act ("APA").[2] 1 CMC § 9112; *Pac. Sec. Alarm, Inc. v. Commonwealth Ports Auth.*, 2006 MP 17 ¶ 12. In reviewing CUC's administrative decision, "we do not give deference to the lower court's findings because our review of agency actions is done with the identical guidelines followed by the lower court under the Administrative Procedure Act." *Commonwealth Ports Auth.* ¶ 12 (citing *In re San Nicholas*, 1 NMI 329, 333-335). In other words, the APA requires this Court to review the agency's decision de novo without regard to the trial court's findings. *Id.* Under the APA, the reviewing court is required to "set aside agency action, findings, and conclusions found to be

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[2] 1 CMC § 9112(f) of the APA directs the reviewing court to:

> (1) Compel agency action unlawfully withheld or unreasonably delayed; and
> (2) Hold unlawful and set aside agency action, finds, and conclusions found to be:
> (i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
> (ii) Contrary to constitutional right, power, privilege, or immunity;
> (iii) In excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;
> (iv) Without observance of procedure required by law;
> (v) Unsupported by substantial evidence in a case subject to 1 CMC § 9108 and 9109 or otherwise reviewed on the record of an agency hearing provided by statute; or
> (vi) Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

1 CMC § 9112(f).

[c]ontrary to constitutional right, power, privilege, or immunity . . . ." 1 CMC § 9112(f)(2)(ii). Accordingly, we review de novo the constitutionality of the executive orders at issue.

¶ 11 Article III, Section 15 of the Commonwealth Constitution is the source of the governor's power to reorganize the executive branch. The relevant part of the provision reads:

> 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.[3] 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.

NMI Const. art. III, § 15. While a governor is given broad powers of reorganization by this section, we must determine the extent of this power, and specifically whether the complete administrative overhaul of CUC surpassed any inherent limitations.

¶ 12 Torres and Angello argue that the Second Executive Order illegally restructured CUC because the Governor's alterations were in excess of the powers granted to him by Article III, Section 15. CUC, on the other hand, claims that the Governor's wholesale restructuring of its administration is exactly the type of action that is constitutionally-sanctioned, as the changes the Governor made were necessary for efficient administration of the agency. It also claims that the Second Executive Order became law and superseded all conflicting statutes after the legislature failed to reject or modify the order within sixty days of its submission.

¶ 13 As noted above, the administrative hearing officer agreed with Torres and Angelo, and found that the Governor acted in excess of his Article III, Section 15 authority to reorganize the executive branch. In so holding, the hearing officer found that the order unconstitutionally invaded the province of the legislature, and went far beyond the Governor's ability to modify existing law under Article III, Section 15. The administrative order relied on Article II of the Commonwealth Constitution, which vests law-making power exclusively in the legislature,[4] and stated "it is clear that the executive order runs counter to the separation of powers doctrine and is not favored as a method of enacting statutory law." *Torres*, B.D. Nos. 06-0001-1, 06-0002-2, 06-0004-5 at 6. In essence, CUC's administrative hearing officer acknowledged that the Governor could reorganize executive branch instrumentalities in such a way that affected existing statutes,

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[3] For purposes of this opinion, we use the terms "office," "agency," "instrumentality," "department," and "entity" interchangeably.

[4] "The legislative power of the Commonwealth shall extend to all rightful subjects of legislation and shall be vested in a Northern Marianas Commonwealth legislature composed of a senate and a house of representatives." NMI Const. art. II, § 1.

but that the Governor did not have the authority to outright legislate in the form of an executive order.

¶ 14 This Court has previously addressed the limits of a governor's power to alter existing law under Article III, Section 15. In *Sonoda v. Cabrera*, 1997 MP 5, we considered the constitutionality of an executive order transferring a number of government positions out of the civil service system, thereby making the employees in those positions directly accountable to the governor. The executive order in *Sonoda*, like the order here, was in direct conflict with an existing statute. Article XX of the Commonwealth Constitution vested the authority to exempt government employees from the civil service system in the legislature. The legislature thereafter acted on that authority and statutorily established twelve such exempt positions. 1 CMC § 8131. The Governor attempted to expound on these legislatively-created exemptions, and added an additional group of employees to the list. He did so purportedly under his Article III, Section 15 power to reorganize the executive branch. Upon review, we held that the Constitution clearly vested exemption authority in the legislature, and that the Governor had usurped the legislature's role by issuing an executive order modifying the list of exemptions. Also noteworthy was our holding that Governor's actions were still constitutionally defective even though the legislature did not reject the executive order after it was submitted. This court found that "silent acceptance" was insufficient to create a power in the executive branch that the Constitution clearly reserved for the legislature.[5] While *Sonoda* did not set an exact limit on a governor's power to reorganize the executive branch, it made abundantly clear that a governor could not take on functions that were constitutionally delegated to another branch, even if that branch passively acquiesced to the governor's actions.

¶ 15 In addition to *Sonoda*, we also addressed a governor's Article III, Section 15 reorganizational authority in *Commonwealth v. Anglo*, 1999 MP 6. There, we held that the Governor did not exceed his constitutional authority by dissolving an independent government corporation – the Marianas Public Lands Commission – and reestablishing it within the Department of Lands and Natural Resources. It is important to note that the Governor in *Anglo* did not act entirely on his own accord, but rather dissolved the corporation pursuant to a

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[5] *Sonoda* was later reviewed by the United States Court of Appeals for the Ninth Circuit, which affirmed, holding that "even if legislative acquiescence to an executive order enables it to become effective, this is not the equivalent of the 'legislature passing a law.'" *Sonoda v. Cabrera*, 255 F.3d 1035, 1043 (9th Cir. 2001).

constitutional mandate directing him to do so.[6] Since the executive order merely fulfilled a constitutional requirement, there was no potential for overreaching by the Governor. Unlike the executive order at issue in *Anglo*, there is no provision in the Commonwealth Constitution which addresses CUC's placement within the different branches of government. As such, *Anglo's* holding is limited to the proposition that a governor may dissolve a government instrumentality and reestablish it within a different department when required to do so by the Commonwealth Constitution. Similar to *Sonoda*, *Anglo* does not provide sufficient guidance for determining the exact limit of a governor's power under Article III, Section 15.

¶ 16 In support of his assertion that the Second Executive Order was constitutional, the Governor referenced *Marianas Visitors Bureau v. Commonwealth*, Civ. No. 94-0516 (NMI Super. Ct. June 23, 1994), on the face of the order itself.[7] In *Marianas Visitors Bureau*, the executive order at issue placed the Marianas Visitors Bureau under the Department of Commerce while simultaneously abolishing its board of directors. The Commonwealth legislature, unlike the case at hand, thereafter negated the Governor's action by exercising its veto power over the order. Since the legislature in that case rejected the order before it actually became effective, the court did not have an opportunity to address the extent of a governor's authority to reorganize executive branch agencies despite silent acceptance by the legislature, which is the question before us now. While *Marianas Visitors Bureau* is somewhat factually similar to the case at hand, and similarly implicates Article III, Section 15, the ultimate holding did not concern the extent of a governor's authority, but rather focused on whether one chamber of the legislature was able to reverse the other chamber's decision to reject an executive order. Thus, *Marianas Visitors Bureau* does not, as the Governor proposed, validate his decision to significantly restructure CUC.

¶ 17 *Mafnas v. Camacho*, 1 CR 302 (D.N.M.I. App. Div. 1982), which was decided prior to the establishment of this Court, is, however, helpful in defining the extent of a governor's authority to reorganize the executive branch under Article III, Section 15. In *Mafnas*, the Appellate Division of the United States District Court for the Northern Mariana Islands was asked to determine the constitutionality of an executive order transferring the Personnel Office, which

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[6] "After this Constitution has been in effect for at least twelve years, the Corporation shall be dissolved and its functions shall be transferred to the executive branch of government." N.M.I. Const. art. XI, § 4(f).

[7] "WHEREAS, the power of the Governor to reorganize the Executive Branch has been affirmed and upheld by the Superior Court of the Commonwealth of the Northern Mariana Islands in its Decision and Judgment dated June 23, 1994, in the case of *Marianas Visitors Bureau v. Commonwealth*, Civ. No. 94-0516 (Memorandum Decision and Judgment) June 23, 1994;" Executive Order 2006-1; Executive Order 2006-4.

was a legislatively-created independent office, to the Office of Personnel Management, which was under the control of the Governor. Similar to the case at hand, the executive order in *Mafnas* changed existing statutory provisions. The legislature also declined to act on the order and it became law sixty days after it was submitted. The plaintiff in *Mafnas* argued that the order was nevertheless constitutionally defective because "[Article III,] Section 15 does not give the Governor the power to create a new office or entity of the government." *Id.* at 306. The plaintiff claimed that "the Order did not reallocate an existing office but rather created an entirely new one." *Id.* The court found the plaintiff's assertion without merit. It stated, "[f]rom the facts presented before it, the court below concluded that the Order is a reallocation of offices within the executive branch . . . . We are in agreement with the trial court's conclusion." *Id.* at 307.

¶ 18 While not bound by the holding of the *Mafnas* court, we find its analysis persuasive. Article III, Section 15 states that "[t]he governor may make changes in the *allocation of* offices, agencies, and instrumentalities and in their functions and duties that are necessary for efficient administration." NMI Const. art. III, § 15 (emphasis added). *Mafnas* stands for the proposition that a "transfer of functions and duties" from one office to another, which is what occurred in that case, is an "allocation of" an executive branch entity by the governor under Article III, Section 15. We can also take from *Mafnas* that an allocation of offices by a governor is permissible, while the creation of an entirely new government entity is not.

¶ 19 The Commonwealth Constitution itself, in addition to *Mafnas*, clearly suggests that only the legislature may create a new executive branch agency. The first half of Article III, Section 15 addresses the creation of a government entity, while the second half addresses the authority to make changes within those entities that already exist. The first part of Article III, Section 15 states that "[e]xecutive branch offices, agencies and instrumentalities of the Commonwealth government and their respective functions and duties shall be allocated *by law*." NMI Const. art. III, § 15 (emphasis added). Moreover, "[t]he functions and duties of the principal departments and of other agencies of the Commonwealth shall be provided *by law*." *Id.* (emphasis added). Since Article II vests law-making authority in the legislature, and Article III, Section 15 states that agencies are created "by law," the framers of the Constitution likely intended the legislature to be the branch responsible for creating executive branch agencies.

¶ 20 While the term "provided by law" normally refers to legislatively-created statutes, we recognize that law can be created in other ways as well, such as by executive order. When a provision is not entirely clear, we look to the statutory scheme as a whole for guidance in determining legislative intent. *See Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 NMI 212, 224 (1991). In this case, the structure of Article III, Section 15, and the placement of

a governor's authority within the greater framework of the provision suggests that only the legislature may create a new government entity. The second half of Article III, Section 15 gives concurrent authority to both the legislature and the governor to reorganize previously-created agencies. This part of Section 15 states, "[t]he legislature may reallocate offices, agencies and instrumentalities among the principal departments and may change their functions and duties. The governor may make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration." NMI Const. art. III, § 15. The placement of a governor's authority within this part of Section 15, which confers the power to make changes to existing agencies rather than to create new agencies altogether, is further evidence that the framers intended a governor's authority to be so limited.

¶ 21 Our textual-based analysis is supported by the Committee on Governmental Institutions' Report to the 1976 Constitutional Convention, which explained the drafters' reasons for including certain provisions, as well as the intended effect of those provisions. It was at this Convention that the present version of Article III, Section 15 was adopted. In the Report, the Committee stated, "[i]t is the legislature's responsibility to establish departments, define their functions, powers and duties and make changes as appropriate. This section also provides, however, that the governor can take the initiative in administrative reorganization." Northern Mariana Islands Constitutional Convention, Report to the Convention by the Committee on Governmental Institutions, Committee Recommendation No. 4 (1976). While certainly not binding, the Report provides a deeper insight into the framers' intent in adopting Article III, Section 15, and lends credence to this Court's finding that the legislature alone may create an executive branch agency.[8]

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[8] We note that the full text of the version of Article III, Section 15 proposed in the Committee Report reads:

> All executive and administrative offices, agencies and instrumentalities of the Commonwealth government, and their respective functions, powers and duties shall be allocated by law among and within not more than fifteen principal departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies need not be allocated within a principal department. The legislature shall by law prescribe the functions, powers and duties of the principal departments and of all other agencies of the Commonwealth and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, and may change their functions, powers and duties. *The governor may make such changes in the allocation of offices, agencies and instrumentalities and in the allocation of their functions, powers and duties as he considers necessary for efficient administration.* If such 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.

Northern Mariana Islands Constitutional Convention, Committee Recommendation No. 4 (emphasis added). This is very similar to the provision which was actually adopted as Article III, Section 15, with the

¶ 22 Having determined that the legislature alone may create an executive branch entity, we now turn to whether the First and Second Executive Orders infringed on that authority. Until this point in litigation, only the Second Executive Order has been challenged, as it is the document that purportedly gave CUC the authority to increase the rates that are the subject matter of this appeal. However, for the reasons discussed below, it was the interplay between the First and Second Executive Orders that caused Torres' and Angello's rates to be illegally increased for a period of time. As a result, we cannot conduct a comprehensive analysis of the legality of the increased rates without reviewing both orders.

¶ 23 The First Executive Order, wherein the Governor transferred the functions and duties of CUC to the DPW, appears at first glance to be a mere "allocation" of a government entity. Like *Mafnas*, the Governor placed one government agency under the control of another. However, unlike *Mafnas*, the Governor took further steps in the First Executive Order which considerably altered the nature of CUC's administration, and in some cases completely nullified existing statutory schemes. For example, the order abolished CUC's board of directors, thereby making 4 CMC § 8131-32, as well as parts of 4 CMC § 8133-34 essentially void. In place of the board of directors, the order directed a chief executive officer to unilaterally administer the day-to-day functions of CUC. The former 4 CMC § 8131 provided detailed criteria for the makeup of the board of directors. For example, it required the board to have at least two female members, one member from outside the Commonwealth with utility management experience, and at least one member from Tinian and one from Rota. Five of the members had to have a minimum of three years of experience in the private business sector. Through these requirements, the legislature provided a methodical plan that assured the board of directors would be comprised of people with certain qualifications, experiences, and geographical and personal viewpoints. Under the Governor's first plan, there was no minimum education or experience requirement for the lone executive officer, and no regional or gender criteria. Furthermore, under the original enabling legislation, all members of the board were required to be confirmed by the senate. Under the new

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notable absence of a governor's ability to "allocate functions, powers and duties as he considers necessary . . . ." The version that was actually adopted only allows the governor to "make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration." NMI Const. art III, § 15. While the proposed constitutional text in the Committee Report likely would not have allowed a governor to create a completely new department either, the lack of the language that the governor may "transfer functions, powers and duties" in the adopted version of Article III, Section 15 further indicates that framers intended to limit a governor's power to mere reorganization of agencies already in existence.

guidelines established by the Governor, no senate confirmation was required for the executive officer.[9]

¶ 24 The overreaching changes implemented by the First Executive Order were further amended in the Second Executive Order when the Governor reestablished CUC's board of directors as a mere advisory body. Additionally, the Second Executive Order allowed the ultimate decision- and policy-making authority to remain with one individual. The order also allowed the executive director to temporarily change rates without a public hearing and without input from any other advisory body. It further abolished the statutory rate schedule previously set forth at 8 CMC § 8143, and gave the executive director the power to permanently and unilaterally set new rates after simply holding a public hearing.

¶ 25 There is no doubt that these changes significantly modified the legislation that established CUC. However, the executive orders altered the law to such an extent that they were clearly legislative in nature. Article II of the Commonwealth Constitution vests law-making authority exclusively in the legislature. As we held in *Sonoda*, a governor does not have the authority to take on functions which are delegated to the legislature by the constitution, even if the legislature declines to act. It is true that Article III, Section 15 allows a governor to reorganize the executive branch in ways that "affect existing law," but the Constitution does not sanction a governor's complete abolition and overhaul of existing statutes that are the foundation of executive branch entities. As the CUC hearing officer stated, "[t]here is a world of difference between . . . administrative reorganization and the wholesale restructuring of CUC and its electrical rate-making authority that occurred pursuant to Executive Order 2006-4." *Torres*, B.D. Nos. 06-0001-1, 06-0002-2, 06-0004-5 at 7. While Torres and Angello only appeal the Second Executive Order, and we accordingly limit our holding thereto, we point out the constitutional shortcomings of executive orders, including the First Executive Order, that essentially legislate and create new entities by virtue of their substantial alterations to existing law.

¶ 26 Turning to the Second Executive Order, which purportedly allowed CUC to increase its rates, we find it constitutionally defective despite the substantial changes made to its administrative framework. When the First Executive Order brought CUC under the control of the

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[9] While the issue is not before the Court, it appears that no executive order or public law to date has inserted a requirement that the executive director of CUC be confirmed by the senate. Article III, Section 14 states that "[t]he governor shall appoint heads of executive departments with the advise and consent of the senate." NMI Const. art. III, § 14. The PUC, according to Public Law 15-35, is a regulatory agency, which is viewed differently in some circumstances under Article III, yet it retains a significant amount of control over CUC. We refrain from placing precise labels on agencies or unraveling the legal relationship between the PUC and CUC, as the parties have not presented the issue. However, we note the possibility that the executive director of CUC may be illegally serving as the head of that agency.

DPW, it simultaneously abolished CUC's board of directors as well as CUC's status as an independent government agency. In effect, there was one less government agency upon consolidation of the two entities; CUC did not legally exist apart from the DPW. As stated above, only the legislature may create a new agency. Therefore, when the Governor issued the Second Executive Order reestablishing CUC as an independent public corporation, he created a new executive branch agency, which only the legislature has the authority to do. Even if the Second Executive Order had reestablished CUC as an independent entity with its previous administrative structure in tact, it still would have been constitutionally invalid due to the procedure by which it was created.

Public Law 15-35 and Public Law 15-40

¶ 27 Having determined that the Second Executive Order unconstitutionally created a new agency, we now turn to the effect, if any, that Public Laws 15-35 and 15-40 had on the legitimacy of the executive order, and specifically, whether the laws cured the illegality of the increased utility rates. The legislature passed Public Law 15-35 on October 24, 2006, approximately three months after the Second Executive Order became effective. The law created the PUC, which is an independent executive branch regulatory agency, and authorized it to have a role in determining CUC's utility rates. Two months later, this legislation was followed by Public Law 15-40, which amended certain provisions of Public Law 15-35. The CUC administrative hearing officer ruled that these statutes amounted to positive affirmation of the Second Executive Order by the legislature, and that, accordingly, the statutes cured any illegality in the new rate schedules. The hearing officer also found that the public laws cured the rates retroactively. The trial court did not address this issue, as it considered the matter moot.

¶ 28 For the same reasons provided in the administrative order, we find that the legislature, through Public Law 15-35 and Public Law 15-40, intended to adopt many of the provisions set forth in the Second Executive Order. For example, Section 3(b)(4) of Public Law 15-35 states, "[n]otwithstanding section (1) of this section or any law to the contrary, 4 CMC § 8122, as amended by Executive Order No. 2006-4 is further amended as follows . . . ." PL 15-35, § 3(b)(4). It is evident from the law's affirmative mention of the Second Executive Order that the legislature intended for the Governor's changes that did not conflict with its own new provisions to become effective. For purposes of the dispute before us however, we must specifically examine the public laws' effect on the rate schedules set by the Second Executive Order. The increased rate schedules that are the basis for this lawsuit were enacted by the executive director pursuant to authority granted to him by the amended 4 § CMC 8123(m). This amendment remained unchanged by both public laws, thus we conclude that the legislature intended to ratify

it. Moreover, Section 3(h) of Public Law 15-40 affirmatively sanctioned the rate schedules that were in effect at the time the law was passed. The provision states, "[f]or the purposes of a deliberate and uninterrupted transition to regulation under the Public Utilities Commission, and notwithstanding Sections 8425, 8429 and any other provision of law, the Commonwealth Utilities Corporation's power and authority to set rates, fees, charges and rents shall continue until such time as the Public Utilities Commission shall issue an order setting rates, fees, charges or rents for a utility service." PL 15-40, § 3(h).

¶ 29 While it appears that the legislature intended to adopt many of the changes made by the Second Executive Order, neither public law denotes that statutory ratification should apply retroactively.[10] We have previously held that "[t]he presumption is that a constitutional amendment is to be given only prospective application unless the intention to make it retrospective in operation clearly appears from its terms." *Camacho v. Northern Marianas Retirement Fund*, 1 NMI at 362, 368-69 (1990) (citations omitted). This presumption of prospective application applies to statutes as well. *Wabol v. Muna*, 2 CR 963, 980 (D.N.M.I. App. Div. 1987) ("Generally speaking, . . . changes in statutory laws and constitutional provisions apply prospectively, unless there is a clear manifestation of intent that they should be applied retroactively."). In this case, there is no evidence of retroactive intent in Public Law 15-35 or Public Law 15-40. As such, we find that Public Law 15-35 and Public Law 15-40 apply only prospectively.

¶ 30 In sum, because the Governor lacked the authority to create a new CUC, the rate increases that were implemented pursuant to new CUC policy were illegal. This illegality was cured by the legislature when it passed Public Laws 15-35 and 15-40, as there was apparent intent to adopt many of the provisions set forth by the order, including the provisions relating to rate formulation. The public laws, however, only applied prospectively. Therefore, Torres and Angello were billed at an illegal rate from July 22, 2006 – the date the new rate schedule was implemented by the executive director – to October 24, 2006, which was the date Public Law 15-35 took effect.[11]

IV

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[10] Public Law 15-35 also appears to indicate a prospective intent. It states that "[e]xcept as provided therein, the regulations, standards, procedures, and all other such aspects related to the regulation of the functions and operations of the regulated entities that may be in force when this Act becomes effective, shall continue to apply until amended or repealed by the Commission, pursuant hereto." PL 15-35, § 2.

[11] While both Public Law 15-35 and Public Law 15-40 constitute legislative validation of the Second Executive Order, Public Law 15-35 was the first formal validation by the Commonwealth legislature. For this reason, we hold that October 24, 2006 is the date the new CUC became a legal entity.

¶ 31 While the Commonwealth Constitution grants a governor wide discretion to reorganize the executive branch, it does not allow him or her to create a new entity, agency or department. This constitutional power is vested solely in the legislature. By attempting to reestablish CUC after it had been consolidated within the DPW, the Governor created a new executive branch entity, thereby usurping the authority of the legislative branch. Because the executive order establishing the new entity was constitutionally defective, the resultant increased utility fee schedules were also defective. Moreover, by radically altering the CUC enabling statutes in both executive orders, the Governor essentially engaged in the legislative process. Since only the legislature may make such substantial changes to existing law, both orders infringed upon that authority. Although the legislature prospectively cured the defects by adopting the relevant provisions of the orders in Public Laws 15-35 and 15-40, CUC was still operating as an illegitimate entity in the interim. Accordingly, Torres and Angello were billed at an illegal rate from July 22, 2006 to October 24, 2006. We therefore REVERSE the decision of the trial court and REMAND the case to CUC for calculation of Torres's and Angello's bills consistent with this opinion.[12]

SO ORDERED this 28th day of SEPTEMBER 2009.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice

[12] The bills are to be calculated using the rates in effect immediately prior to the first rate increase.