

IN THE SUPERIOR COURT  
OF GUAM

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OF GUAM

2017 JUL 27 11:36

GUAM WATERWORKS AUTHORITY, )  
 )  
 Petitioner, )  
 vs. )  
 GUAM PUBLIC UTILITIES COMMISSION, )  
 )  
 Respondent. )

Special Proceedings Case no. SP118-11-36

**DECISION AND ORDER**  
re: Petition for Judicial Review  
&  
Declaratory Relief

**INTRODUCTION**

This matter came before the Honorable Judge Michael J. Bordallo on December 7, 2011. The Guam Waterworks Authority ("GWA") was represented by Attorney Terrence M. Brooks. The Guam Public Utilities Commission ("PUC") was represented by Attorney Frederick J. Horecky. After considering the matters presented, the Court now issues the following decision and order granting GWA's petition for judicial review. Even though the PUC has the authority to examine GWA's compliance with all applicable laws, make recommendations to GWA, and even bring a suit against GWA, the Court finds the PUC exceeded its statutory authority when it ordered GWA to pay to pay the Government of Guam \$18,333,333.00.

**BACKGROUND**

On November 3, 2005, Public Law 28-71 ("P.L. 28-71") was enacted. The legislative intent behind P.L. 28-71 was to improve the conditions of Guam's water and wastewater infrastructure. The Guam Legislature determined that the new construction upgrades that will be needed are estimated to cost approximately \$220,000,000.00. The Guam Legislature also determined that additional costs were required for rebuilding, rehabilitating, and modernizing

1 the system which is expected to cost an additional \$230,000,000.00.<sup>1</sup> Based on P.L. 28-71,  
2 GWA issued \$101,175,000.00 in revenue bonds on December 7, 2005.

3 On May 17, 2010, Public Law 30-145 ("P.L. 30-145") was enacted. P.L. 30-145  
4 amended P.L. 28-71 to the extent the principal amount of bond was increased from \$220  
5 million to \$240 million.<sup>2</sup> Furthermore, P.L. 30-145 added the following language: "Twenty  
6 Million Dollars (\$20,000,000.00) principal amount *shall* be used to pay the balance of the  
7 government of Guam Limited Obligation (Section 30) Series 2001A bond and any other  
8 portions of Bonds or Loans paid for by General Fund revenues for which the Guam  
9 Waterworks Authority has received proceeds." Shortly thereafter, GWA issued  
10 \$118,825,000.00 in revenue bonds on November 23, 2010.

11 On January 12, 2011, GWA petitioned the PUC for approval of its proposed projects  
12 funded by GWA's 2010 Series Bond proceeds. On January 31, 2011, the PUC issued an Order  
13 authorizing GWA to utilize the proceeds from the 2010 Series Bond to fund the proposed  
14 projects. On that same day the Commissioners requested a legal opinion on whether P.L. 30-  
15 145 and its mandates should be considered by the PUC prior to approving any future use of  
16 bond funds by GWA, and what impact P.L. 30-145 has upon GWA's future use of bonds.  
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20 On April 11, 2011, the Administrative Law judge of the PUC ("ALJ") issued a Report  
21 outlining his opinion and recommendations on P.L. 30-145. On May 4, 2011, the ALJ filed a  
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26 <sup>1</sup> Thus, according to P.L. 28-71 GWA needed approximately \$450,000,000.00 to improve the conditions of Guam's  
27 water and wastewater infrastructure.

28 <sup>2</sup> P.L. 30-145 also amended the interest rate amount from 6.5% to 7.5%.

1 Supplemental Report. Shortly thereafter, on May 31, 2011, the ALJ filed a Status Report.<sup>3</sup> On  
2 June 2, 2011, the PUC issued an order requiring GWA to pay the Government of Guam  
3 \$18,333,333.00. The PUC based its decision on the ALJ's analyses in the above mentioned  
4 Reports.<sup>4</sup>

5  
6 Shortly thereafter, GWA filed its Petition for Judicial Review requesting the Court  
7 declare that the PUC exceeded its statutory authority in issuing the order and that the order is in  
8 violation of law, vacate the order, and remand the matter back to the PUC. More specifically,  
9 GWA argues (1) P.L. 30-145 unconstitutionally impairs GWA's contracts; (2) the PUC  
10 exceeded its statutory authority; (3) P.L. 30-145 is not ambiguous; and (4) the PUC's June 2,  
11 2011 Order is not in accordance with law and not supported by substantial evidence.

#### 12 **DISCUSSION**

13  
14 Guam law governing appeals of PUC's orders can be found in 12 GCA § 12018. That  
15 section provides,

16 From every order made by the Commission under provisions of this Chapter . . .  
17 an appeal shall lie to the Superior Court of Guam within thirty (30) calendar days  
18 form the date of the order . . . The appeal shall be deemed a review of an  
19 administrative proceeding and shall not be a trial de novo.

20 12 GCA § 12018. Here, GWA filed its appeal 3 days after the PUC issued its order. Thus, the  
21 Court has jurisdiction over the appeal.

22 The standard of review to be applied by a trial court, upon judicial review of the  
23 agency's action, is as follows: "If the agency decision is not in accordance with law or not  
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25 <sup>3</sup> The Court notes that GWA filed a request, which was granted, for an opportunity to respond to the ALJ's April 11,  
26 2011 Report. GWA also filed a supplemental filing to the ALJ's April 20, 2011 report and a request for  
27 reconsideration.

28 <sup>4</sup> The findings in the Reports were adopted by the PUC in its June 2, 2011 order.

1 supported by substantial evidence, the court shall order the agency to take action according to  
2 law or the evidence.” 5 GCA § 9240. The court always reviews questions of law de novo.  
3 *Nissan Motor Corp. in Guam v. Sea Star Group Inc.*, 2002 Guam 5 ¶ 10. Further, the court  
4 must weigh the record as a whole, weighing both the evidence that supports and evidence that  
5 detracts from the agency’s decision. *Lopez v. Guerrero*, 882 F.Supp 952 (D. Guam App. Div.  
6 1995) citing *Baxter v. Sullivan*, 923 F.2d 1391 (9th Cir. 1991). Additionally, the court must  
7 uphold the agency's decision where the evidence is susceptible to more than one rational  
8 interpretation. *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984).

9  
10 The court is required to affirm the agency’s findings of fact, and any conclusions  
11 resulting therefrom, if supported by substantial evidence. *Fagan v. Dell'Isola*, 2006 Guam 11 ¶  
12 11. This is because a reviewing body “may not substitute its views for those of the [agency],  
13 but instead must accept the [agency's] findings unless they are contrary to law, irrational, or  
14 unsupported by substantial evidence.” *Id.* Thus, the court must first determine whether the  
15 Commission’s decision was in accordance with law. 5 GCA § 9240. Second, the court must  
16 determine whether the Commission’s decision was supported by substantial evidence. 5 GCA §  
17 9240. “[S]ubstantial evidence is defined as ‘such relevant evidence as a reasonable mind might  
18 accept as adequate to support a conclusion.’” *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6  
19 ¶ 6.

### 20 21 22 **Whether P.L. 30-145 is Constitutional?**

23  
24 Before the Court addresses the constitutionality of P.L. 30-145 it must first address  
25 whether the issue can be considered by the Court. The PUC asserts that the issue cannot be  
26 considered by this Court because GWA never argued that P.L. 30-145 was unconstitutional  
27 during the administrative proceedings.

28 Generally, challenges to the constitutionality of a statute are beyond the power or the

1 jurisdiction of an agency. *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985); *Liu v. Waters*,  
2 55 F.3d 421, 425 (9th Cir. 1995). Because the agency lacks the authority to review such claims,  
3 a petitioner need not exhaust the claims before seeking judicial review. *Howard v. FAA*, 17  
4 F.3d 1213, 1218 (9th Cir. 1994). Thus, in conjunction with a properly appealed order from the  
5 PUC, the Court may consider constitutional claims, regardless of whether GWA presented the  
6 claims during the administrative proceedings.  
7

8 In the instant case, GWA argues that P.L. 30-145 is an unlawful amendment of the  
9 terms of P.L. 28-71 because it modifies the contractual obligations of bondholders without their  
10 consent and imposes an unfunded mandate upon GWA and its ratepayers in violation of law  
11 and the Indenture contracts. GWA asserts that any portion of P.L. 30-145 that is interpreted to  
12 require a payment to the government of Guam from bond proceeds should be held an  
13 unconstitutional impairment of contractual rights of the bondholders.  
14

15 The United States Supreme Court has consistently held that state laws authorizing the  
16 impairment of municipal bond contracts are unconstitutional. *United States Trust Co. of New*  
17 *York, Trustee, v. New Jersey et. al.*, 431 U.S. 1 (1977). Furthermore, “[A] contract is impaired  
18 by legislation which alters its terms, imposes new conditions, or lessens its value.” *Pierce*  
19 *County v. State*, 148 P.3d 1002, 1009 (Wash. 2006). Here, P.L. 30-145 increased the principal  
20 amount of bond from \$220 million to \$240 million, and it requires GWA to pay the  
21 government of Guam \$20 million from the proceeds of such bonds. Nothing in the record  
22 indicates that the 2005 Bond Series was impaired. Thus, the Court finds that P.L. 30-145  
23 neither alters the terms of GWA’s bond indentures, imposes new conditions, nor lessens the  
24 value of GWA’s bonds.  
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26  
27 Additionally, the Court notes that P.L. 30-145 was enacted on May 17, 2010, which is  
28 approximately six months prior to GWA’s issuance of the 2010 Series Bond. This is significant

1 because GWA knew about its \$20,000,000.00 obligation well before the issuance of the 2010  
2 Series Bond. Thus, the Court finds that P.L. 30-145 could not have impaired the 2010 Series  
3 Bond because it came after P.L. 30-145 was passed. Because there is no evidence that P.L. 30-  
4 145 impaired any contract of GWA, the Court finds P.L. 30-145 to be constitutional.  
5

6 **Whether the PUC Exceeded its Statutory Authority?**

7 The third count of the petition states that the PUC exceeded its authority by ordering  
8 GWA to pay the Government of Guam \$18,333,333.00. Before the Court addresses this issue it  
9 must first address whether the issue can be considered by the Court. The PUC asserts that the  
10 issue cannot be considered because GWA never argued that the PUC exceeded its authority  
11 during the administrative proceedings.  
12

13 Because agency action for which there is no statutory authority is void, it is subject to  
14 attack at any time in any court, either directly or collaterally. *Daniels v. Industrial Commission*  
15 *et al.*, 201 Ill.2d 160, 166 (Ill. 2002). Even if the parties themselves do not raise the question,  
16 courts have an independent duty to vacate and expunge void orders and thus may *sua sponte*  
17 declare an order void. *Id.* Thus, in conjunction with a properly appealed order from the PUC,  
18 the Court may consider statutory authority claims, regardless of whether GWA presented the  
19 claims during the administrative proceedings.  
20

21 In the instant case, GWA argues that the PUC does not have the ability to make  
22 enforcement orders, such as the June 2<sup>nd</sup> order, after an investigation.<sup>5</sup> On the other hand, the  
23 PUC asserts that the statutory and regulatory framework creating the PUC does not limit the  
24 role of the PUC to investigations or recommendations. The PUC argues that the enabling  
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27 <sup>5</sup> The Court recognizes this issue was briefly touched upon by the ALJ in his Reports to the PUC. As mentioned  
28 above, those same reports were adopted by the PUC in its June 2, 2011 order.

1 statutes provide it with the authority to make enforcement orders, such as the June 2, 2011  
2 order. More specifically, the PUC argues that it is under an obligation to ensure that any public  
3 utility agency is not in violation of, or neglecting to comply with, any territorial or federal law  
4 that impacts the PUC's regulation of rates.  
5

6 Administrative agencies may only act within its powers as specifically granted by the  
7 legislature. *See, e.g., Carlson v. Guam Telephone Authority*, 2002 Guam 15 ¶ 9 (citing *Ada v.*  
8 *Guam Telephone Authority*, 1999 Guam 10, ¶ 11). "They are dependent upon statutes, so that  
9 they must find within the statute warrant for the exercise of any authority which they claim.  
10 They have no general or common law powers but only such as have been conferred upon them  
11 by law expressly or by implication." *Id.* Therefore, the PUC may act only if such authority is  
12 within its powers as granted by the Guam Legislature. The PUC's powers, duties, and  
13 obligations are set forth in 12 GCA § 12000 *et seq.*  
14

15 After reviewing the PUC's enabling statutes, the Court finds that the PUC exceeded its  
16 authority by ordering GWA to pay the Government of Guam \$18,333,333.00. The PUC's  
17 powers and duties revolve around the regulatory oversight of rates set by each public utility.  
18 This is important to the Court's analyses because the June 2, 2011 order issued by the PUC  
19 goes beyond such regulatory oversight. The June 2, 2011 order implies that the PUC has broad  
20 authority to issue orders related to the use of bond funds. The Court notes however that  
21 nowhere in the enabling statutes does it explicitly or implicitly state that the PUC has the  
22 authority to make such an order.  
23  
24

25 12 GCA §§ 12005, 12014 sets forth PUC's options when it discovered that GWA was  
26 not in compliance with P.L. 30-145. Those sections provide,

27 **12 GCA § 12005. Powers.**

28 The Commission shall have the following powers which it may exercise in  
carrying out its mandate to regulate rates: to examine the financial records of each

1 public utility including all bank records; the terms and conditions of any contracts  
2 with the United States Government; terms and conditions of any refinancing  
3 provisions by the Federal Finance Bank and the Department of the Interior; its  
4 costs of operations and costs charged to it by the United States Government;  
5 schedules of rates and classifications; the value and condition of the utility's  
6 physical property, including that of the United States Government where  
7 appropriate; the issuance on behalf of the utility of bonds and the disposition of  
8 the proceeds thereof; the volume of unit sales; the amount and disposition of its  
9 income; all its financial transactions; its compliance with contracts, covenants,  
10 promissory notes and other terms of indebtedness; its compliance with all  
11 applicable territorial and federal laws and with the provisions of its franchise,  
12 articles of incorporation and enabling legislation. The Commission shall have the  
13 power at any time to examine the financial condition of the utility.

14 **12 GCA § 12014. May Make Recommendations and Bring Suits.**

15 If the Commission is of the opinion that any public utility is violating or  
16 neglecting to comply with the terms of its loans and contracts, or with any  
17 territorial or federal law, or any provisions of its franchise, charter, enabling  
18 legislation or articles of incorporation, if any, or any rule, or order of the  
19 Commission; or that any rates, assessment costs, or, charges are unreasonable or  
20 unreasonably discriminatory; it shall in writing inform the public utility of its  
21 conclusions and recommendations, shall include the same in its annual report, and  
22 may also publish the same in such manner as it may deem wise. The Commission  
23 may examine into any of the matter referred to in § 12005, notwithstanding that  
24 the same may be within the jurisdiction of any court or other body, and when after  
25 the examination the Commission is of the opinion that the circumstances warrant,  
26 it shall effect the necessary relief or remedy by the institution and prosecution of  
27 appropriate proceedings or otherwise before such court or other body, in its own  
28 name or in the name or names of any complainant or complainants, as it may  
deem best.

A closer look at 12 GCA §12014 reveals that “[i]f the Commission is of the opinion that any  
public utility is violating or neglecting to comply with . . . any territorial or federal law . . . it  
shall in writing inform the public utility of its conclusions and recommendations.” The statute  
goes on to say that if “the circumstances warrant, it [PUC] shall effect the necessary relief or  
remedy by the institution and prosecution of appropriate proceedings or otherwise before such  
court or other body, in its own name or in the name or names of any complainant or  
complainants, as it may deem best.” 12 GCA §12014. Based on the above sections and the  
PUC’s enabling statutes as a whole, the Court finds that the PUC has the power to examine



1 GWA's compliance with all applicable laws, make recommendations to GWA, and even bring  
2 a suit against GWA, when it feels that GWA is not in compliance with Guam law. Nowhere in  
3 the statutes is there any indication of anything that would give the PUC broad authority to issue  
4 orders, such as the June 2, 2011 order, to GWA when it is of the opinion that GWA was not  
5 complying with the law. For this reason, the Court finds that the PUC exceeded its statutory  
6 authority when it ordered GWA to pay the Government of Guam \$18,333,333.00.

8 **CONCLUSION**

9 Based on the foregoing, the Court finds that although P.L. 30-145 is constitutional, the  
10 PUC exceeded its statutory authority in its June 2, 2011 order when it ordered GWA to pay the  
11 Government of Guam because nowhere in the statutes is there any indication of anything that  
12 would give the PUC broad authority to issue such an order. Therefore, PUC erred when it  
13 ordered GWA to pay the Government of Guam \$18,333,333.00. Thus, the Court finds that the  
14 PUC's decision was not in "accordance with the law" and orders the PUC to vacate its June 2,  
15 2011 order.

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19 SO ORDERED, this 7 day of June 2012.

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22 Original Signed By:  
23 HON. MICHAEL J. BORDALLO  
24 HONORABLE MICHAEL J. BORDALLO  
25 Judge, Superior Court of Guam

26  
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28  
is a full true and correct copy of  
original on file in the office of the  
clerk of the Superior Court of Guam.  
Dated at Hagåtña, Guam

JUN 07 2012  
James R. Borja  
Deputy Clerk, Superior Court of Guam