

**Marianas Public Land Trust
BOARD RESOLUTION
08-03**

**A RESOLUTION OF TERMS AND CONDITIONS IN MAKING AN
INVESTMENT IN THE COMMONWEALTH UTILITIES CORPORATION UNDER
THE MPLT ECONOMICALLY TARGETED INVESTMENT PROGRAM**

WHEREAS, on June 28, 2008, the Board of Trustees approved a Resolution authorizing a \$4.5 million investment in the Commonwealth Utilities Corporation at 7% interest on a 3 year note secured by CUC's Revenues and Receivables. The source of the investment is the net lease proceeds from the Department of Public Lands to be remitted to MPLT; and

WHEREAS, on Thursday, July 10, 2008 at a Special Meeting, the Board of Trustees rescinded the approval of the \$4.5 million CUC ETI Investment and rejected that investment proposal due to various legal flaws and concerns including the lack of authority from the Legislature as required under 4 CMC § 8123(e) because CUC was unable to secure the authorization from the Legislature for such a loan from MPLT and because the Legislature was concerned regarding the constitutional prohibition against incurring a public debt for operations; and

WHEREAS, as its July 21, 2008 Regular Meeting, the Board of Trustees received a copy of Public Law 16-7 and have considered the law as enacted. The Trustees considered and read the plain language of PL 16-7 as merely earmarking the future interest income for FY 2009 and 2010 or CUC's needs to be committed to CUC when MPLT makes those distributions at the end of each fiscal year without any further request or obligation upon MPLT except to distribute the interest revenue after those fiscal years, all of which have no impact upon MPLT following such distribution to the General Fund at the end of each fiscal year; and

WHEREAS, informal discussions with the leadership of the House of Representatives and the Executive Branch have provided the Board of Trustees with the impression that the Commonwealth Government wishes that the Board of Trustees assist with resolving the power crisis in the CNMI. The contemplated assistance is either an advance of interest income distribution from the Trust corpus, or a form of investment which is permissible under MPLT's constitutional mandate and the Trustee's fiduciary duties; and

WHEREAS, Article XII § 6 of the NMI Constitution establishes the Marianas Public Land Trust (MPLT) with five Trustees responsible for the reasonable, prudent, and careful investment of the Trust Funds; and

WHEREAS, 7 CMC § 3401 provides statutory authority for the applicability of the common law in the CNMI as to trust administration through the Restatement of Trusts as approved by the American Law Institute as the rules of decision in the courts of the Commonwealth; and

WHEREAS, consistent with the principles set forth in Section 227 of the Restatement Third, Trusts (Third), MPLT's fiduciary responsibilities requires the Trustees to make reasonable, careful and prudent investments and to preserve and enhance net revenues received from the lease of public lands for the benefit of all CNMI descendants and their future generations; and

WHEREAS, consistent with this standard of care, the MPLT Trustees have adopted a Statement of Investment Policy and Guidelines (IPS) to govern and set forth MPLT's investment strategies and plans in their management of the fund corpus; and

WHEREAS, the IPS recognizes that certain Economically Targeted Investments (ETI) produce corollary benefits to Trust beneficiaries in addition to a competitive risk-adjusted rate of return; and

WHEREAS, MPLT's trust corpus is comprised, in part, of the money it receives from DPL and which DPL receives from public land leases, less funds necessary to meet DPL's reasonable expenses and for Homestead Development. *See NMI Const. art. XI, § 5(g)*. The MPLT Trust is obligated by the NMI Constitution to invest the money transferred (*art. XI at § 6(b)*) and then to transfer to the Commonwealth General Fund any interest income accrued less reasonable expenses of administration. *Id. at § 6(d)*.

WHEREAS, the plain, clear, and unequivocal language of the Constitution provides for no discretion permitting MPLT to do anything with the public land lease, net lease revenues other than making reasonable, careful, and prudent investments that preserve and enhance the revenues received from the lease of public lands for the benefit of all CNMI descendants and their future generations. *See NMI Const., art. XI; see also Statement of Investment Policy & Guidelines for the Marianas Public Land Trust (MPLT)*; and

WHEREAS, while MPLT is free to transfer interest revenue accrued on trust proceeds to the General Fund after each fiscal year, MPLT has no discretion to do anything with DPL revenues except invest them. In the CNMI, as in the Ninth Circuit generally, it is a basic principle of statutory construction that language in a statute must be given its plain meaning. *Commonwealth Ports Authority v. Hakubotan Saipan Enters., Inc.*, 2 N. Mar. I. 212, 221 (1991) (*citations omitted*); *Dyack v. CNMI*, 317 F.3d 1030 (9th Cir. 2003).

WHEREAS, the Commonwealth Utilities Corporation (CUC) was previously an autonomous public corporation established pursuant to Public Law 4-47, as

amended, and while CUC has previously been subject to an Emergency Declaration, Executive Order 06-04 substantially modified CUC's enabling act subjecting the agency to the substantial control of the Executive Branch through the Office of the Governor. For example, the Governor appoints the CUC Executive Director; and

WHEREAS, CUC previously tendered a proposal to the Board of Trustees requesting that the Trustees engage in an investment of the Trust Funds in CUC. The source of MPLT's investment were those funds derived and remitted from the Department of Public Lands from public land leases remitted in the amount of \$3.5 million; and

WHEREAS, in considering CUC's proposal as an ETI under MPLT Resolution 08-02, the Trustees previously found that a) the rate of return of 7% was higher than that offered by other investments in MPLT's portfolio; b) that the investment stood on its own merits and was not attractive simply because MPLT has funds; c) the investment would be subject to close and public scrutiny by the Legislature; and d) the investment would assist the community with the devastating power crisis; and

WHEREAS, MPLT Trustees did also find a considerable risk to the ETI exists because of the rapidly escalating and unstable fuel and oil costs in the market challenging CUC's ability to pay for its fuel and operations, but that risk was countered and tempered by CUC's ability to apply for and implement a new tariff or rate reflecting such increases) or decreases) which its customers must pay as CUC is the only public utility agency in the CNMI; and

WHEREAS, the MPLT Trustees have considered the recent informal proposal from the Executive Branch as to the advancement of future interest revenue, whether or not PL 16-7 authorized or directed such a request for an advance. Unfortunately, the Trustees decline that request as impermissible and prohibited by the Constitution. The Trustees make clear in this Resolution that the Constitution delineates the Trustees' authority and provides no authority to invade the Trust corpus must less advance against the future interest income. Fiduciary prudence compels against such a strained reading of the Constitution; and

WHEREAS, in light of the enactment of PL 16-7 and the Executive Branch's informal request for an advance of future interest income distribution for FY 2009 and 2010, which MPLT has declined herein, the MPLT Trustees through this Resolution desire to set forth terms and conditions which MPLT may consider in an investment in the Commonwealth Utilities Condition under the ETI Program which would accomplish the following objectives:

- A. The proposed transaction must be 'an investment'. In MPLT's view, that means that the transaction must be undertaken to produce revenue for the Trust and its beneficiaries;
- B. The proposed transaction must be a 'reasonable, careful and prudent investment'; and
- C. The proposed acquisition must be examined by the Trustee by exercising strict standards of fiduciary care under the ETI program; and
- D. The proposed ETI investment would produce the corollary and social investing benefits of helping the community and the Trust beneficiaries as to the power situation at CUC on many levels including the livelihood of the community; the economy; essential government services; public safety; public health; and education.

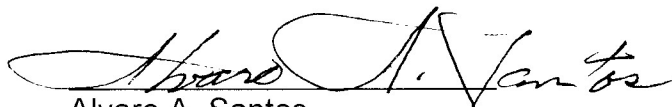
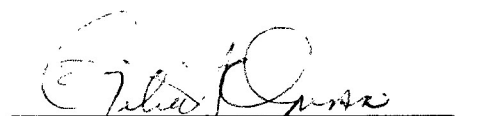
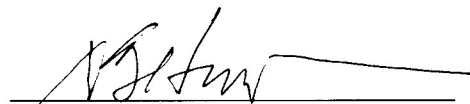
BE IT RESOLVED, THEREFORE, in consideration of the foregoing, the MPLT Board of Trustees hereby set forth the following terms and conditions which the Trustees would consider and invite as to an ETI proposal in the Commonwealth Utilities Corporation. In adopting this Resolution, the Trustees would invite the Executive Branch and Legislature to engage the Trustees in measured dialogue to comport with constitutional requirements while seeking to achieve the aim of an investment in CUC which meets fiscal prudence. Therefore, the Trustees consider the following to be conditions precedent in any ETI investment in CUC as follows:

- 1. In investment in the sum of \$3.5 million to the Commonwealth Utilities Corporation through its Executive Director Antonio S. Muna who shall have expenditure authority;
- 2. The investment shall be secured by a Secured Promissory Note;
- 3. Interest shall be at the rate of 7% per annum which CUC shall pay interest payments only in equal monthly installments of MPLT;
- 4. As to the principal investment of \$3.5 million, CUC shall pay that amount in full on or before the 60th month of execution of the Secured Promissory Note or on or before August 1, 2013;
- 5. The investment is conditioned upon an agreement that should any government agency of the Legislature impose any rate or tariff restriction upon CUC during the term of its investment, that such an action shall constitute an event of default at which time MPLT shall declare the entire unpaid balance together with all accrued interest due and payable immediately;

BE IT FURTHER RESOLVED, that the Commonwealth Utilities Corporation shall use MPLT's investment subject to any constitutional or statutory restrictions or restraints against using funds from a public debt incurred for operations so that CUC may, at its discretion and without any limitation by MPLT, use MPLT's investment for its capital expenditures for power generation; and

BE IT FURTHER RESOLVED, that the Office of the Attorney General shall deliver to MPLT its written legal opinion and analysis confirming CUC's authority to engage in the loan from and investment made by MPLT and the legal sufficiency of the foregoing conditions between MPLT, CUC and the Commonwealth Government.

SO ADOPTED, this 4th day of August, 2008 by the MPLT Board of Trustees at a Special Meeting on Saipan.


Alvaro A. Santos
Chairman, Board of Trustees
John E. Untalan
Vice Chairman, Board of Trustees
Norman T. Tenorio
Treasurer, Board of Trustees
Gregoria Fitial-Omar
Carolinian/Women Representative
Vianney B. Hocog
Rota Representative