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VIA EMAIL

Graham Botha
General Counsel
Guam Power Authority

Re: Bill 219-35(COR

Dear Mr. Botha:

You have asked for our advice concerning the potential legal effects of proposed legislation, Bill No. 219-35(COR, that would, if passed in its current form, amend Sections 7116 of Chapter 7, Division 2, Title 17, Guam Code Annotated, and Section 5008.2 of Subarticle A, Article 1, Chapter 5, Title 5, Guam Code Annotated relating to net metering arrangements and other related provisions.¹ This letter, although not intended as a comprehensive legal treatise on the issues raised, will describe some of the significant risks that would be created by enactment of the proposed legislation. This letter should not be read as taking any position on the advisability, from a public policy perspective, of encouraging the implementation of renewable energy programs.

Summary of Conclusions

As authorized by Section 8113.3 of the GPA statute, GPA has included in its senior bond indenture (the primary agreement with its senior bondholders) a covenant by the Government of Guam not to limit or alter the rights and powers vested in the Guam Public Utilities Commission (GPUC) in relation to the approval of the rates to be charged by GPA.

Bill 219-35(COR would, among other things, effectively impose further requirements net metering arrangements related to certain educational institutions, without review of any such arrangements by the GPUC. Our view is that the bill, if enacted, would limit or alter the rights or powers of the GPUC in a manner that would be a breach by the Government of its covenant in

¹ Unless otherwise indicated, all section references in this letter are to Title 12 of the Guam Code Annotated.

GPA's bond indenture. Any transaction that would involve net metering arrangements with GPA, the use of GPA's transmission system, the use of GPA's distribution system, or the provision of standby or backup power by GPA must be subject to the approval of the GPUC after consideration of appropriate ratemaking policies, including the appropriate allocation of costs on various ratepayer classes.

A breach of the Government's indenture covenant would be a default under the GPA indenture. Any such default could result in acceleration of the due date of the principal of the GPA's outstanding senior revenue bonds, and could subject the Government itself to contractual remedies, including damages, for breach of its contract with the GPA bondholders.

Background

The GPUC was created in the early 1980's in connection with the Federal Financing Bank refinancings of certain short term GPA notes, all as described in Section 1423a of Title 49 of the United States Code Annotated (Section 11 of the Guam Organic Act). One of the refinancings authorized by the Organic Act was required by the United States Congress to be "conditioned on the establishment of an independent rate-making authority by the Government of Guam."² The purpose of the establishment of the GPUC was to keep ratemaking out of the political arena, and to allow utility rates to be established and approved on a businesslike basis.

The importance of the removal of the ratemaking process from the political arena was further recognized by the Guam Legislature in connection with the authorization of the 1992 public offering of GPA revenue bonds,³ and again in connection with the authorization of the 2005 public offering of GWA revenue bonds.⁴ The utilities have each included in their respective indenture the authorized Government covenant.

Section 6.20 of the GPA Revenue Bond Indenture, dated December 1, 1992, under which all outstanding GPA senior revenue bonds have been issued, provides as follows:

"The Government hereby pledges to the holders of all Bonds that the Government will not repeal, amend or modify Chapter 12, Title 12, Guam Code Annotated, in any way that would substantially impair the powers, duties or effectiveness of the Public Utilities Commission thereunder in relation to the Authority and its rates. The Authority

² USCA, Title 49, Section 1423a. Note the independence requirement.

³ Section 8113.3.

⁴ Section 14229.

includes this pledge of the Government in this Indenture as authorized by Section 8113.3 of the Act.”⁵

Discussion

As a result, the Government has made a contractually binding promise to the GPA bondholders, as authorized by statute, not to limit or alter the rights and powers vested in the Guam Public Utilities Commission (GPUC) in relation to the approval of the rates to be charged by GPA.⁶

The proposed legislation would, among other things, effectively contravene the GPUC statute by imposing further requirements net metering arrangements for certain educational institutions, without review of any such arrangements by the GPUC. The GPUC would no longer be empowered to regulate such matters and certain other matters mandated by the legislation. As a result, the proposed bill, if enacted, would limit the power and independence of the GPUC as a rate-making authority and would be a breach of the Government’s covenant in GPA’s indenture.

The consequences of any such breach are, of course, difficult to predict. In general, under the GPA statute, the Government is not contractually liable for GPA’s bond obligations.⁷ This, however, would be a different case. Here the Government would have breached its own contractual obligation in a manner that could be a default under the GPA indenture. Indenture defaults can result in the acceleration of the bonds, and the Government might find itself liable for significant damages.

In addition, of course, the various other corollary effects of any limitation or alteration of the GPUC rate-making authority in respect of GPA, including such things as a reevaluation of the GPA's bond credit ratings, are beyond the scope of this letter. As you know, any decrease in GPA’s credit rating would increase its borrowing costs the next time that it sells bonds.

⁵ This indenture section quotes the GPA statute verbatim.

⁶ And, by implication, not to limit or alter the rights and powers of the GPUC to approve contracts or other obligations that could affect those rates as provided by Section 12004.

⁷ See, for example, the last paragraph of Section 14203 of the GWA statute: “All indebtedness issued by the Authority pursuant to this 12 GCA § 14203 shall be repayable only from funds of the Authority available therefore or solely from revenues of the system and, therefore, will not be and shall not be deemed to be public indebtedness of Guam as that term is used in said Section 11.”

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Please let me know if I can clarify any matters raised by this letter.

Very truly yours,

/s/ John Wang

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