The Honorable Alicia Barnes  
The Committee on Government Operations, Consumer Affairs, Energy, Environment and Planning  
Capitol Building  
P.O. Box 1690  
Charlotte Amalie, St. Thomas 00804

Good afternoon Chair Senator Alicia V. Barnes, Vice Chair, Senator Myron D. Jackson, distinguished committee members: Senators Marvin A. Blyden, Allison L. DeGazon, Kenneth L. Gittens, Javan E. James, Athneil “Bobby” Thomas and all other members of the 33rd Legislature who are present, staff of the legislature, and the listening and viewing audience.

I am Donald G. Cole, Executive Director of the Virgin Islands Public Services Commission. Accompanying me today are our Chair, David Hughes, and our counsel, Boyd Sprehn. We thank you for inviting us today to address Bill No. 33-0055, which is intended to achieve a long overdue update to the public utility laws of the United States Virgin Islands. These recommended changes are more than 15 years in the making, and are based on the experience not only of the Virgin Islands, but on our Commissioners and staff working with the Federal Communications Commission, the National Association of Regulatory Utility Commissioners, the Mid-Atlantic Conference of Regulatory Utility Commissioners and, of course, the vast changes in technology, law and regulation affecting the utility industry.

We want to thank Senator Janelle K. Sarauw for bringing Bill No. 33-0055 forward. The majority of this bill reflects the concerns of the Public Services Commission, and the legislative changes that have been requested for more than a decade.

This is not the first time that the Public Services Commission has testified on the current state of the law, and impact to ratepayers and the Territory’s economy of the current status quo. In 2012, the then-Executive Director of the Public Services Commission submitted in part the following statement:

At the outset let us clearly state one of the organizing principles of regulatory practice, and for that matter management generally, is that responsibility and authority must be exercised together. The party with authority must be responsible for its actions; the party with responsibility must have the authority to meet its obligations. The current situation, in which the Public Services Commission has the responsibility to set rates, but in which WAPA has the sole authority to determine all issues that drive those rates, fails this principle.

Although we have discussed this previously, allow me to briefly summarize the situation. The PSC has jurisdiction and authority over all public utilities in the Virgin Islands, to the extent permitted by Virgin Islands and federal statutes. Specifically, Title 30, Section 23(a) provides:
If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this chapter, the Commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, charges, or schedules as shall be just and reasonable. If upon such investigation, it shall be found that any regulation, time schedule, act, or service, complained of is unjust, unreasonable, unsafe, inadequate, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this chapter, or if it be found that reasonable service is not supplied, the Commission shall have power to determine and substitute therefor such other regulations, time schedule, service, or acts and to make such orders respecting any such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. The Commission shall have power to fix, determine and require such extensions, expansions, or increases in facilities or service as the Commission finds are in the furtherance of the public convenience and necessity, and the terms and conditions upon which the same shall be made: provided, that no hearing shall be had and no order shall be made with respect thereto without notice to the public utility affected thereby, as provided in section 22 of this title.

Despite this language, which connects rates, services and facilities, the courts of the Virgin Islands have decided that when the Legislature placed the Water and Power Authority within the jurisdiction of the Public Services Commission for rates, the Legislature did not intend to also include any jurisdiction over facilities and services. The Commission does not believe those are separate issues; rates are not set in a vacuum, but rather are dependent upon the facilities and equipment used, how that equipment is used, and the services provided.

However, in 2003, the Water and Power Authority sued the Public Services Commission as a result of the 2003 rate investigation. In that investigation (Docket 533 – the first after this Legislature mandated rate investigations at least once every five years), the Commission discovered that funds collected as a result of a previous rate increase were not spent for the purpose for which they had been approved, but were instead spent for other purposes. As a result of this diversion of funds, in 2003 WAPA again sought an increase in rates to buy the same generator previously approved. The PSC also instituted a docket which required that WAPA prepare and submit a long-term capital plan, to review its current electrical generation and water production equipment, and plan for future maintenance and replacement. Again, the Authority challenged this process in Superior Court.

In November 2006, Judge María Cabret, then of the Superior Court, issued a decision in which she found that the Commission had power over the rates and services of the Authority, but lacked the power of injunction – that is, the power to mandate particular actions. Judge Cabret acknowledged this resulted in an untenable regulatory
process and noted that only the Legislature could fix this problem. Judge Cabret acknowledged that this decision would cause significant problems and clearly stated:

The consequences of this determination are not lost on the Court. ... This ruling also enables WAPA to disregard PSC orders that seek to enjoin it, severely curtailing any gains that might have been anticipated by the expansion of the PSC's regulatory power over WAPA with the 1973 amendments to section 1. Without amendments to the current law, PSC's power to protect the public interest are significantly curtailed. This, however, is a matter beyond this Court's capacity to address. Rather, it is a matter that must be left to the branch of government with the power to address policy issues and pass laws, the Legislature. [Memorandum Opinion at 26-27.]

Until very recently, the Legislature did not address this problem, despite repeated requests from the Public Services Commission. Instead, the situation has gotten worse. The Commission appealed that decision to the new Virgin Islands Supreme Court, and it not only affirmed that decision (49 V.I. 478, 2008 V.I. Supreme LEXIS 15), but it included language that indicated that the Commission's jurisdiction concerning the Water and Power Authority was strictly limited to setting rates, and did not include services or facilities. Again, the Court directed attention to the Legislature and its knowledge of the laws governing Authority, and pointedly left the matter to the Legislature to correct.

In December 2010, Judge Carroll of the Superior Court, reviewing a case involving Granada del Mar on St. Croix that had languished in the Superior Court for more than a decade, issued a decision which clearly stated that the Commission has no jurisdiction in billing disputes between the Water and Power Authority and its customers. In that matter, WAPA was appealing a decision of the Public Services Commission in favor of a ratepayer; the amount in dispute was held in escrow by the Public Services Commission. The PSC was ordered to dismiss the pending complaint, leaving the ratepayer with only WAPA and the courts for a remedy, if any. In March 2010, the Supreme Court denied the appeal, and stated that the Commission's jurisdiction is limited to setting rates, but not considering whether those rates are fairly and properly applied in specific billing disputes.

As a result of these decisions, the Commission has now been told it must regulate WAPA's rates, but it has no authority to order WAPA to do anything. It cannot mandate that WAPA operate reasonably or efficiently. It cannot order that WAPA replace aging and inefficient generation. When the Commission provides revenues to WAPA for specific purposes, if WAPA then decides not to do those actions, the ratepayers are simply out the funds and the Commission has no remedy available. The decisions imply that either the Commission must be a rubber stamp for WAPA, or that rates are set without reference to expenses. Neither view serves the public. In fact, over the course of the past nine years WAPA has become the single most expensive provider of electrical power under the U.S flag.
We must note that this situation does not exist with any other regulated utility. The Commission can mandate the expenditure of funds on an extension of service by the telephone company. The Commission can order increased runs between St. Thomas and St. John by the ferry companies. If the customers of those utilities have complaints, they must first bring them to the Commission before seeking court action. Only WAPA has this irrational exemption.

And it has not worked well for the Territory. In 2004, the Authority told the Court it could not hold back a Request for Proposals for new generation long enough to put a long-term plan together. Eight years later the Territory has limited new generation nor a long-term plan. Instead, WAPA’s sales have declined, but it still consumes the same amount of fuel, now at a much higher cost. WAPA’s rates have increased to the highest in the United States, including Hawaii, Guam, Northern Marianas and even Samoa. All of those jurisdictions, like WAPA, are islands without a backup grid, and primarily dependent on fuel oil. Moreover, those entities have had to purchase fuel oil at higher costs, as they have not had the benefit of discounted fuel prices through HOVENSA and the Third Extension Agreement, yet they still have lower rates. The situation has not improved. Power outages are frequent. Rates are the highest in the United States or the Caribbean, despite low fuel prices. Sales are down. Revenues are down.

While the regulatory limitations imposed on the PSC prohibit it from taking a more proactive approach in the restructuring of WAPA there remains going forward a most critical question facing Virgin Islands’ residences, businesses, government entities and stakeholders — what price is reasonable for electricity? Attached to this testimony are two Appendices. Table 1 shows current prices in the U.S. for electricity. None approach WAPA’s rates. Table 2 shows selected rates around the Globe; none approach WAPA’s rates.

Table 1 shows that the average price currently paid for electricity in the US (May 2020 pricing) was $0.1045/kWh with pricing by states ranging from a low of $0.071/kWh to a high of $0.281/kWh and rates in Guam and the CNMI being $0.181/kWh and $0.191/kWh, respectively. Meanwhile, Table 2 shows the average global price paid for electricity in 2018 was $0.179/kWh and ranged by country from a low of $0.08/kWh to a high of $0.33/kWh. We know that the response will be it costs more here — but we compete with everyone else. And it is simply unacceptable for WAPA to look at these global and US mainland rates and simply throw their hands into the air. If other insular areas are capable of operating at pricing levels below $0.20/kWh then there is no reason WAPA cannot do so as well. The real question for the Virgin Islands is straightforward: in a world where the average price for electricity is $0.179/kWh and the mainland US average price for electricity is $0.1045/kWh what is a reasonable price for electricity in the Virgin Islands and what steps must the government of the Virgin Islands take to bring the price of electricity to that level?

As to the specifics of this bill, we recognize that it begins with recommendations from the Commission. The significant addition to the Commission’s recommendations is the inclusion of language in a revised section 3 and new section 3a, which address concerns that have been raised in consideration of “Dig Once” legislation.
As to the Dig Once proposals, we now note that VITELCO first buried a portion of its system, particularly fiber optics, then viNGN buried some of its fiber optic cables, and WAPA has buried some of its cables. Since 2017 and the restoration efforts, each has complained of the others cutting their lines. Now AT&T is burying more cable, and WAPA has announced major undergrounding plans with FEMA support. The current situation is costly and damaging. An alternative must be put into place.

Again, as noted, WAPA has both new leadership in Mr. Kupfer, and has seen many changes in its management team. At the Commission, we applaud the changed dynamic. However, we also share the concern that WAPA has failed us too many times in the past. The propane conversion, which was to provide a 30% rate relief in 2014, has failed to do so and remains unfinished. While rates are currently marginally lower than in prior years, that has far more to do with fossil fuel prices than local improvements. Despite the absence of new and efficient generation, WAPA has a significant outstanding debt load.

WAPA has the opportunity to significantly change the way it generates and distributes power. But it will require massive changes, and time is short.

We thank you for your time and will be happy to answer your questions.
Appendix
Table 1
US Prices for Electricity by State

US Prices for Electricity by State (May 2020 - $/kWh)
Appendix

Table 2
Global Prices for Electricity

Global Price of Electricity
(2018 - US$/kWh)