PSC’s Comments on Bill No. 33-0055, Amendment in the Nature of a Substitute

Good afternoon Chairman Senator Sarauw, Vice Chairman, Senator Francis, distinguished committee members: Senators Barnes, Gittens, Jackson, James, and Payne, and all other members of the 33rd Legislature who are present, staff of the legislature, and the listening and viewing audience. We want to thank Senator Sarauw for bringing Bill No. 33-0055 forward, and Senator Sarauw and Senator Barnes for today’s proposed amendment.

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 Virgin Islands. We previously testified on this bill in 2019 and submitted testimony on September 10, 2020. The 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 must also note that several other bills have been passed recently, with all but one vetoed by Governor Bryan. The vetoed bills include:

- Bill No. 33-0210--An Act amending sections of the VI Code by establishing minimum criteria for the VI Water and Power Authority Governing Board and changing the number of its members.

- Bill No. 33-0211--An Act amending the VI Code by establishing minimum criteria for Public Services Commission members and changing the number of its members.

Also passed and enacted into law was:

- Bill No. 33-0272--An Act amending the VI Code relating to public utilities adding sections to enact the VI Ratepayers’ Bill of Rights; relating to powers of the Public Services Commission; to authorize the Public Services Commission to...
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resolve ratepayers’ complaints; and relating to powers of the VI Water and
Power Authority to require the Authority to comply with the VI Ratepayers’ Bill of
Rights

This Bill is now Act No 8375, and the Commission is working to implement that Act.

As we have previously testified on Bill No. 33-0055 as it was introduced, these
comments will focus on the Amendment in the Nature of a Substitute, which replaced the entire
bill. For your ease in understanding our comments, the references in **Bold and Underline** are to
the section numbers in the Substitute; the **Bold only are to the sections as codified or proposed to
be codified.

First, we note that the introductory recitals address the reasons for an intention of the
Legislature in moving this proposed amendment. The recitals regarding the Water and Power
Authority and telecommunications are accurate and long overdue. We have some concerns with
the inclusion of the Waste Management Authority, as it is not a self-funded entity but rather
operates as if a component of the government.

**Section 1. Amendment to 3 V.I.C. § 273 – Public Services Commission.**

As originally drafted, Bill No. 33-0055 contained the following additions to 3 VIC §273:

(g) The Commission has the authority to sue and be sued in its own name and
may retain counsel for its representation notwithstanding title 3, section 114 of the
Virgin Islands Code.

(h) Neither the Commissioners nor the Commission’s employees or agents can be
held personally liable for statements made, information delivered, or conduct
performed in good faith while carrying out the Commission’s duties, and are
entitled to an award of attorneys fees and costs if they are the prevailing party in a
civil cause of action for libel, slander or any other relevant tort arising out of their
activities in carrying out their responsibilities or assigned duties.”

Unfortunately, both of these have been omitted in the Substitute. The Commission strongly
urges the restoration of these amendments to the current code.

**Section 2. 30 V.I.C. § 1 - Public utilities subject to regulation; definition; financial interests
of members of Commission**
The changes to Title 30, Chapter 1 of the Virgin Islands Code began in Bill No. 33-0055 with Section 1, and in Subsection(a) included replacing the phrase “telephone service” with “Telephone and telecommunications services to the extent not pre-empted by federal law”; that change has also been omitted. We note that the Substitute includes the creation of a new chapter 9, entitled “Wireless Telecommunications Providers.”

In new proposed language the “Waste Management Authority or any successor agency” is added to the utilities to be regulated. Currently Waste Management Authority is only regulated as to its fees and charges.\(^1\)

**Subsection 1(c).** As originally drafted, Bill No. 33-0055 did not include the following amendment to Subsection 1(c):

> The rates for public utility service supplied by the Government shall be fixed, unless fixed by law, **Any public utility service supplied by a government owned or created corporation or authority must be regulated** in the same manner as rates for public utility services furnished by a private entity.

The Public Services Commission has no objection to that proposed change.

(3) Subsection (f) is added and reads as follows:

> “(f) All utilities, including government owned or created corporations or authorities, regulated by the Public Services Commission are subject to the full regulatory powers and authority of this chapter.”

The Public Services supports this addition, with again the caveat that the Waste Management Authority is not supported by rates and fees, but currently operates as if a government agency and relies on the central government for funding.

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\(^1\) As proposed after amendment (new language in bold):  
Section 1. Public utilities subject to regulation; definition; financial interests of members of Commission  
(a) The following services provided by an individual, firm, co-partnership, **public or private partnership**, association, **public or private** corporation, autonomous governmental instrumentality or agency, or other person for compensation are declared to be affected with a public interest and are defined to be a public utility subject to this chapter, and the person providing such service to be a public utility.  
(1) telephone service;  
(2) water supply services; except retail deliveries;  
(3) electric power service;  
(4) public marine passenger transportation services operating under government grant of exclusive franchise;  
(5) **Waste management service provided by the Virgin Islands Waste Management Authority or any successor agency.**
Sections 3 and 3a – included in original Bill No. 33-0055. All of the provisions regarding Section 3 ("Joint Use of Facilities") and "Dig Once" legislation have been removed from Bill No. 33-0055.

It is our understanding that these items will be considered separately. We note that while "Dig Once" has remained unenacted, yet another company has proceeded with an undergrounding project on a large scale. To date, Viya (VITELCO and the Cable companies), viNGN, and AT&T have all done large scale trenching and undergrounding in the streets of Virgin Islands. The Water and Power Authority has done limited undergrounding to date but has reported federal approval for large scale undergrounding projects.

Damage to the roadways is substantial with each cut, causing early deterioration of the roads and increased vehicular damage. Water intrusion causes additional issues. Finally, the separate trenches increase the overall costs to ratepayers and increases the likelihood that one utility will damage another’s cables. We have seen that played out before this body in prior testimony and accusations of sabotage. [But see Section 7, below.]

Sections 15a, 15b, 15c and 15d. The Substitute Amendment deletes Sections 15a, 15b, 15c and 15d in their entirety. We support this change – all of these provisions were time limited and expired many years ago.

Section 25 – Expenses of Investigation. Both the original bill and the Substitute change Section 25, regarding the expenses of an investigation. The net effect of the proposed changes is shown below (Bold for additions, strikethrough for deletions). The resulting language is identical in both bills.

In connection with any proceeding involving a public utility with a net investment of $1,000,000 or more, the expenses of any investigation or proceeding of any nature by the Commission of or concerning any public utility operating in the Virgin Islands, and all expenses of any litigation, including appeals, arising from any such investigation, valuation, revaluation, or proceeding, or from any order or action of the said Commission, shall be borne by the public utility investigated, or otherwise affected as a special franchise tax in addition to all other taxes imposed by law, and such expenses with interest at 6 per centum per annum may be charged to operating expenses and amortized over such period as the Commission shall deem proper. and If the charged entity is a regulated utility, the expenses must be allowed for in the rates to be charged by such utility except any cost or expenses associated with any investigation or proceedings regarding the certification or interconnection of a Qualifying Cogeneration Facility or,
Qualifying Small Power Production Facility, as defined in 30 V.I.C., 46, is governed solely by 30 V.I.C., 47 and 48. When any such investigation, or other proceeding is begun the said Commission may call upon the utility in question for the deposit of such reasonable sum or sums as in the opinion of said Commission, it may deem necessary from time to time, until the said proceeding or the litigation arising therefrom is completed, the money so paid to be deposited in the Treasury of the Virgin Islands in a special account to be maintained and administered by the Commissioner of Finance and to be designated the Special Public Utility Deposit Account; provided, that the amount so assessed by the Commission to any one company in any one year, in any rate case shall not exceed one half of one percent of the existing net investment of the company investigated, and that the amount so assessed in all other investigations shall not exceed one tenth of one percent of the existing net investment.

Section 39(a) – Penalty for Violation. The fine is changed from $100 per violation to $1,000.

Section 43b – Appointment of receiver for public utilities. This proposed new section is clearly proposed due to concerns with the Water and Power Authority’s financial condition. The authorities granted permit the Commission to appoint a receiver, who will then take control of the affected utility for a period of up to one year. The powers granted, however, do not expressly include a restructuring of existing debt and financial obligations.

After the hurricanes of 2017, WAPA received new leadership and has seen many changes in its management team. However, that leadership has now been in place for three years, and we are concerned both at the pace of change and regarding some of the actions taken. 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 not only failed to do so, but has now resulted in higher rates and in the absence of restructuring, will certainly result in yet higher rates. While rates are currently marginally lower than in the highest years (circa 2008-2009), that has far more to do with significantly lower fossil fuel prices than local improvements. Despite the absence of new and efficient generation, and WAPA not paying for those newly purchased Wartsila units out of its rates, WAPA has a significant outstanding debt load. The recently announced Vitol restructuring has only increased that debt load and is likely to lead to higher rates. Proposed improvements in the generation system, while necessary and overdue, do not appear to be sufficient to offset the outstanding liabilities of the Authority.

Specific concerns with the Receivership option:
The section does not specifically address restructuring WAPA’s outstanding liabilities or its existing agreements. Such restructuring may be necessary to return WAPA to financial viability and to restore its credit rating.
Control of the utility may remain with the receivership for only twelve months. Financial restructuring may take more than that period of time.

**Section 3. New Section 45.** The Substitute introduces a completely new Section 45. Currently, Section 45 creates the position of Director of the Public Services Commission, assigns particular responsibilities, and creates the position of Assistant Executive Director on St. Croix. Current full text is below:

The administrative management of the duties and responsibilities of the Public Services Commission under this chapter shall be vested in a Director who shall be appointed by the Governor, upon recommendation of this Commission, by and with the advice and consent of the Legislature. The Commission is authorized, subject to the provisions of chapter 25 of Title 3 of this Code, to select, employ and recommend for appointment such officers, employees, and agents as the Commission shall deem necessary to carry out the provisions of this chapter. However, the Commission shall, in accordance with the provisions of this section, recommend for employment an Assistant Executive Director for the St. Croix District.

The proposed changes would eliminate the implied requirement that the Executive Director operate on St. Thomas, and the requirement that the Assistant Executive Director be from St. Croix, and replace with the requirement that the two position be filled with persons from each district.

Most of the listed duties simply codify the existing duties, although "(4) Ensure compliance with and enforcement of statutes and regulations pertaining to utilities which are regulated by the Public Services Commission:" appears to be a significant expansion of authority.

Proposed Subsection (e) limits the appointment of hearing examiners to a period three months. It has not been our experience that significant rate cases or transfer of control proceedings are accomplished within such a short period, particularly if there are disputed issues or significant concerns with financial issues or levels of customer service.

**Proposed Section 45b. Certificate of Public Convenience and Necessity; Application. Requirements, Suspension, Revocation.** Aside from some formatting, remains unchanged. The Commission continues to support this necessary reform.

**Section 4. Proposed Amendment of Section 104 re WAPA Executive Director.** A change is proposed to Section 104 of Chapter 5, Title 30, redefining the requirements for and the duties of
Section 5. 30 V.I.C. Chapter 5 [WAPA], Subchapter V is amended:

Subsection 116(a) is amended to increase the competitive bidding requirement from $2,500 to $10,000. We have no comment on this proposed change.

Section 118 is amended to require financial statements be completed by a time certain, January 31. This permits WAPA seven (7) months to complete its financial statements. That time should be more than adequate. We must note that WAPA has not provided such information on a timely basis for several years.

Section 121 is amended in two ways. First, the existing section is amended as follows:

No officer, board, commission, department or other agency or political subdivision of the Virgin Islands shall have jurisdiction over the Authority in the management and control of its properties and facilities, or any power over the regulation of rates, fees, rentals and other charges to be fixed, revised and collected by the Authority, or any power to require a certificate of convenience or necessity, license, consent, or other authorization in order that the Authority may acquire, lease, own and operate, construct, maintain, improve, extend or enlarge any facility.

This existing section is to be redesignated as subsection (a), and a new subsection (b) added:

“(b) Nothing contained in subsection (a) may be construed to preclude the Virgin Islands Public Services Commission from exercising jurisdiction to regulate the Authority as a public utility subject to its broad regulatory authority pursuant to chapter 1 of this title.

This language is retained from the original Bill No. 33-0055 and has been requested by the Commission for many years. The current section 121 has been cited by the Virgin Islands Supreme Court in its opinions that the Water and Power Authority is not accountable to the Public Services Commission and is not subject to the normal regulation of a public utility. The results to date have been disastrous.

Section 122 is amended as follows:

Nothing in this chapter shall be construed as exempting the Virgin Islands Water and Power Authority from any law made specifically applicable thereto or generally
applicable to public utilities, or independent instrumentalities of the Government of the Virgin Islands, whether such law was enacted before, on, or after February 14, 1980.

[Bold language to be added.]

The Public Services Commission supports this change, for the same reason as above.

Section 125 is amended as follows:

(a) The electric power service meters shall be read at least once every month by duly trained personnel of the Authority.

(b) At the time of reading the meter, the Authority employee making the actual reading shall leave a written notice informing the subscriber of the results of the reading affixed to the meter or in a convenient place likely to be found by the subscriber as evidence of the reading. The Authority shall make the actual reading and date of the reading available not later than 30 days after the date of the reading to the customer on the customer’s bill.

The Public Services Commission supports both of these changes. These changes reflect the technology that is available, and a service for which WAPA’s customers have been paying for several years.

Section 128 is proposed to be added as follows:

§128. Monthly LEAC Filings
The Authority shall submit monthly Levelized Energy Adjustment Clause filings to the V.I. Public Services Commission for rate adjustments. Filings are due by the 15th day of each month for the month immediately preceding the filing.”

The current LEAC process is a six-month process, in which WAPA must submit information on the forecast six-month period, including but not limited to:

- The Generators to be used and in what amount;
- The anticipated efficiency of the generation (fuel economy);
- The type of fuel to be utilized;
- The amount of purchased power (to date WAPA does not own any alternative power: it is all purchased);
- The anticipated cost of the fuel to be purchased (both on specific types of fuel and overall costs).
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- WAPA must also submit the information looking back, to see how WAPA performed in comparison to its forecast on efficiency, fuel economy, prices paid, etc., as needed to reconcile if WAPA has spent more than it was authorized to recover from ratepayers or if ratepayers have overpaid, and if WAPA spent more, whether that excess cost was reasonable or beyond WAPA’s control.

It is not immediately obvious to the PSC Staff what is meant by the monthly filing.

Section 6 creates a new Chapter 9 within Title 30, entitled Wireless Telecommunications Providers.

Chapter 9. Wireless Telecommunications Providers

§ 401. Limited Oversight by the Public Services Commission
Oversight of wireless telecommunications providers is limited to service issues only.

§ 402. No Regulation as a common carrier
Neither the Virgin Islands Public Services Commission nor any other government authority within the Virgin Islands may impose on wireless telecommunications providers regulation as a common carrier or a utility.

§ 403. Complaint; procedure
(a) The Commission shall accept, compile, and attempt to resolve consumer complaints regarding wireless telecommunications providers informally. When the Commission reasonably suspects a pattern of customer abuses, the Commission may, on its own motion, initiate investigations into the activities of wireless telecommunications providers offering cellular service.
(b) The Commission's authority in these complaint proceedings is limited to adjudication of complaints regarding wireless telecommunication service provided by wireless telecommunication carriers and may not be expanded to include either an award of any other damages or regulation of the rates and charges of the wireless telecommunication provider. However, a person that takes a complaint to the Commission may pursue an appeal of the decision through the courts as provided for in law.
(c) In connection with customer complaints or Commission investigations into consumer abuses, wireless telecommunication providers shall provide the Commission access to their accounts, books, papers, and documents related to Virgin Islands’ transactions, if the information is relevant to the complaint or investigation.
(d) No wireless telecommunication provider may discontinue service to a customer for a disputed amount if that customer has filed a complaint that is pending with the Commission, and that customer has paid the disputed amount into an escrow account.
(e) The Commission may adopt additional consumer protection standards that are in the public interest.

This proposed chapter addresses a significant hole in the current statutory structure. To date the only Commission authority in Virgin Islands law regarding cellular communications has been in regard to Eligible Telecommunications Carrier Designations (Section 45a, enacted in 2007). The FCC has not pre-empted local regulation in these areas, rather it has expressly encouraged state and territorial authorities to address consumer complaints, particularly in the area of quality of service.

The proposed chapter does not appear to conflict with the current federal pre-emption of any laws limiting entry into the market or setting rates for cellular service.

Section 7 amends 12 V.I.C., Chapter 16A regarding the undergrounding of utilities. This section is intended as an alternative to “Dig Once”. It places the responsibility for regulating the undergrounding of utilities in the Department of Public Works. We note that Section 3 of Title 30 provides the Commission with the authority to require regulated utilities to jointly use facilities, including:

“tracks, conduits, poles, wires, switchboards, exchanges, works, or other equipment shall, for a reasonable compensation, permit the use of the same by any other public utility whenever public convenience and necessity requires such use, and such use will not result in irreparable injury to the owners or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users.”

As noted earlier, there has been substantial activity, which continues, in undergrounding and much more is anticipated. It is critical that this be done in a manner which is safe not only during the construction activity, but in the long run, and in a manner that is cost effective.

SECTION 8. Title 29 Virgin Islands Code, chapter 8, subchapter I, section 500m. is amended by designating the existing language as subsection (a) and adding a subsection (b) that reads as follows:
(b) Nothing contained in subsection (a) may be construed to preclude the Virgin Islands Public Services Commission from exercising jurisdiction to regulate the Authority as a public utility subject to the Commission's regulatory authority pursuant to title 30, Chapter 1 of the Virgin Islands Code.”

As noted earlier, the Waste Management Authority does not derive even the majority of its income from rates, fees and tariffs; rather, it is primarily funded by the Virgin Islands Government and for practical purposes acts as a governmental agency. Consequently, it does not operate as an ordinary public utility. The Commission concerned about its ability to regulate the Waste Management Authority as such.

We thank you for your time and will be happy to answer your questions.