Good day Honorable Senator Carla J. Joseph, Chairperson of the Committee on Government Operations and Consumer Protection, non-member Senators present, other testifiers, and the listening and viewing audiences. I am Noel Hodge, Interim Executive Director/CEO of the Virgin Islands Water and Power Authority ("WAPA" or the "Authority"). With me to assist in this presentation is the Authority’s Governing Board Chair, Mr. Anthony Thomas, and members of the Executive Management Team. I wish to thank you for allowing the Authority the opportunity today to provide testimony on Bill No. 34-0021, sponsored by the Honorable Janelle K. Sarauw along with the Honorable Javan E. James. Among other things, this Bill seeks to amend Titles 3 and 30 of the Virgin Islands Code, pertaining to WAPA and the Public Services Commission ("PSC").

In the Authority’s reasoned opinion, the proposed Bill seeks to undo five decades of legislative enactments that have withstood the test of time and it increases the operational costs of WAPA without any corresponding benefit. Moreover, various elements of this Bill have previously been proposed in terms of expanded oversight of the Authority, most recently addressed under the vetoed Amendment in the Nature of Substitute Bill 33-0055, heard on November 20, 2020; Bill 33-0346, heard on September 11, 2020; and mandatory shared fiber/cable facilities previously addressed under Bill 32-0204 in July 2018. The Authority reiterates some of the points previously made and specifically notes the following:
- WAPA has highly qualified management and a Governing Board of professionals that are well-equipped to assess its operations and hiring determinations;

- WAPA has developed and implemented, or is in the process of implementing, plans to provide greater system reliability and greater penetration of diverse, renewable energy technologies, which may be affected by this Bill;

- Reasonably prudent investors and bondholders will likely want some comfort as to how the provisions of this Bill will impact their current and future investments with the Authority;

- Vague delineation of the powers and duties retained by WAPA may cause discord in the market and with the federal agencies in terms of their ability to rely on any decisions or direction from the Governing Board or staff of WAPA, as opposed to an expanded regulatory body which, as this Bill proposes, could readily intercede;

- This Bill may violate the USVI covenant to WAPA Bondholders provided in 30 V.I.C. § 119, which could expose the USVI to bondholder litigation, insofar as the Bill may explicitly be perceived as limiting or altering the rights and powers vested in the Authority;

- This Bill could give the federal government a basis to challenge grant funds provided for the improvement of Authority facilities; and

- The failure to include a funding mechanism for all the changes proposed could prove disastrous to the named utilities who may be asked to continue to fund an expanded regulatory behemoth, as well as to the citizens of the Territory who may ultimately bear the substantial costs for the proposed reforms.

SECTION 1:

Section 1 of Bill No. 34-0021 proposes to change the status of the PSC from an agency within the executive branch to a semiautonomous agency of the Government of the Virgin Islands. Such autonomy, without a commensurate new funding mechanism, would enable the PSC Commissioners to prepare their own budget without executive branch review, hire their own employees without executive approval, and establish their own financial arm from which to pay their own bills and employees and hire consultants who will expensively perform the
same work as consultants hired by WAPA, all without any requirement of an annual audit by an auditing firm or approval of its budget by the legislative and executive branches.

SECTION 2:

Section 2 of the Bill further defines WAPA as a public utility whose service is to be regulated the same as a private entity. Somewhat confusing is the intent of subsection (c) under Title 30, Chapter 1, Section 1 of the Virgin Islands Code. The said change results in the following provision:

“If any public utility service supplied by a government owned or created corporation or authority must be regulated the same manner as rates for public utility services furnished by a private entity.” See Bill page 3.

It is unclear whether this body wishes a public utility to be regulated same as a private entity or that the public utility’s rate be administered similar to a private entity. What is clear, however, is that under the proposed Bill, the PSC’s authority over WAPA is to be unfettered. For example, the revisions to Section 25, that concern the expenses of an investigation or litigation undertaken by the PSC, without providing for reasoning or outcome, places all costs wholly upon the utility, even those lacking in any investment whatsoever. See Bill page 3. Presumably should the utility be unable to pay, then those charges are again passed along to the ratepayer as such expenses are not included in the rate making process.

Please be reminded that pursuant to Section 25, WAPA is obligated to pay an annual assessment towards the General Fund to cover the costs of operations of the PSC, and to pay specific assessments to cover the expenses which arise in specified matters which properly come before the PSC. The additional powers proposed through the proposed Bill, without any provision for additional funding, would tremendously increase the costs and expenses of the
Authority, particularly when litigating rate disputes, and those matters reviewed by courts on appeal. For reference, over the past five years, the Authority and its ratepayers have paid the PSC over $8.6 million in docket and annual assessments. Add to that the proposed amendment to Section 35, which inserts a $1,000 per day fine for not adhering to any Order of the PSC, even if disputed. Again, additional charges and expenditures that may ultimately result in yet higher costs to the consumer.

The Bill makes only a vague reference to legislative appropriation while proposing to add yet another section to the Code, expanding the duties and powers of the PSC without the commensurate funding. The PSC would be required to staff up with various costly professionals, experts, and support personnel to carry out the newly expanded assignments, no doubt rivaling the administrative overhead of the very utilities it must now minutely manage. This will again serve to bury the Authority in expenses as the PSC staff is largely comprised of off-island consultants. These higher costs will ultimately be borne by WAPA ratepayer-owners if this Bill is enacted into law. These costs would be in addition to the millions of dollars of already exorbitant PSC regulatory costs WAPA and its ratepayers currently bear, and have borne for decades, for the PSC’s consultants.

SECTION 3:
Not applicable to the Authority. Therefore, WAPA takes no position on this Section, except if otherwise noted elsewhere herein.
SECTION 4:

WAPA believes that the revisions to Section 104, in terms of clarifying the role of the Executive Director and Chief Financial Officer, do not need to be codified and, in application, the language appears to statutorily restrict the functions of both officers and to dictate hiring capabilities. See Bill pages 5 - 7. These requirements are not normally found within a governing statute.

SECTION 5:

WAPA has no objection to the proposed revised Section 116 and Section 118. Section 118 (1) seeks to ensure timely audited fiscal reporting which WAPA applauds. However, due to the devastating storms of the recent past, and belated changes to the requirements for entries, the duration of the audits have increased. Accordingly, the Authority is currently undergoing an audit of Fiscal Year 2019. Upon its conclusion, a minimum of nine months will then be needed to complete the audit of Fiscal Year 2020. The audits cannot be fast tracked. Accordingly, WAPA anticipates a further cycle before the ability to comply with the desired timeframe which will realistically comprise approximately 270 days and not the 180 days as contemplated by the proposed Bill.

The Authority strenuously objects to the changes proposed that expand the PSC’s jurisdiction. As modified, it seeks to upset the long-established balance of responsibility between the PSC Commissioners and the WAPA Governing Board by granting broad regulatory authority over WAPA to the PSC. Indeed, it virtually eliminates the need for a WAPA Governing Board consisting of members nominated by the Governor and confirmed by the Legislature. In its current form, Section 121 has provided the blueprint to avoid the
encroachment by third parties, such as PSC, on the statutory powers vested in the Authority’s Governing Board.

In a 2012 decision, the Supreme Court of the Virgin Islands\(^1\) re-affirmed WAPA’s long-standing operational ability and rejected the PSC’s continuing attempt to exceed its rate-setting jurisdiction. The Supreme Court accepted the Authority's arguments on appeal recognizing, significantly, that when the Legislature created WAPA, it expressly provided WAPA with its own Governing Board for the management of its affairs. See 30 V.I. C. §§103, 104. There can be no doubt that WAPA’s Governing Board is more familiar with the technical, environmental, safety, and other operational facts and issues relating to the operations of WAPA.

The Virgin Islands Supreme Court has stated:

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\ldots \text{[T]he Legislature clearly intended that it be the responsibility of WAPA’s Board, not PSC, to establish and implement WAPA’s managerial decisions whilst subjecting WAPA’s rates to PSC's jurisdiction.}
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Accordingly, in its 2012 decision, the Supreme Court recognized, as did the Territorial Court, the District Court of the Virgin Islands and the Superior Court of the Virgin Islands before it, that although in 1973 the Legislature of the Virgin Islands amended the PSC's jurisdiction to allow it to fix WAPA’s rates, that created a very narrow exception to WAPA’s enabling powers. The Supreme Court also concluded that “PSC’s chapter 1 powers apply only to public utilities generally and not to WAPA specifically.”\(^2\)

In a further 2008 decision of the Virgin Islands Supreme Court, the Court held that Section 105 (13) of Title 30 plainly states that WAPA has “complete control and supervision of facilities and properties construed or acquired by it, including the power to determine the

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\(^2\) V.I. Public Services Commission v. V.I. Water and Power Authority, 49 V.I. 478, (V.I. 2008).
character of and necessity for all its expenditures and the manner in which they shall be incurred ... and such determinations shall be final and conclusive for all purposes.”³ Bill No. 34-0021 proposal to amend Section 121 of Chapter 5, to include language purporting to subject WAPA to the PSC’s broad regulatory authority pursuant to Chapter 1 of Title 30 and would therefore create an unproductive and costly clash between the PSC Commissioners and the WAPA Board.

The Authority respectfully argues against passage of Bill No. 34-0021 so as to avoid the ensuing paradigm shift in the jurisdictional balance between the Authority and the PSC no doubt leading to prolonged legal clashes in the courts. Attempts by the PSC to leverage their new purported powers in areas historically delegated to WAPA’s Board would result in increased costs and expenses to the Authority, confusion on the part of vendors, higher costs for WAPA’s customer/owners, confusion among its bondholders and federal partners, and conflicting policy directives from WAPA Governing Board where there is disagreement with the PSC. Instead, the PSC should be legislatively directed to follow the suggestion of the Virgin Islands Supreme Court that it make recommendations to the WAPA Governing Board. As the Supreme Court noted, since the PSC sets its rates, those recommendations are entitled to great weight and will be given important significance by the WAPA Governing Board.⁴

Further, WAPA strenuously objects to the proposed quarterly LEAC filings under added Section 128. The proposed changes conflict with that demanded by the PSC and by the Legislature itself through its own recently passed Bill 33-0272 (Act 8375) enacting a Ratepayer Bill of Rights. With the given constraints, WAPA must provide the PSC with LEAC filings ninety (90) days ahead of time. In addition, the Bill of Rights mandates that the Ratepayer be

⁴ Id.
provided with the filing sixty (60) days prior thereto (with no delineation as to whether the actual complete filing must be mailed to the ratepayer). However, given the exorbitant cost to provide same to every ratepayer along with the environmental waste, WAPA will err on the side of caution and infer that the statute provides that a summary of the filing be provided along with a link to the website containing the complete version. Given the breadth of time required for each filing and the unavailability of current data, a filing every three (3) months is impractical. Moreover, an increase in filings necessarily means an increase in costs. Every time a petition is filed, the PSC charges a fee. An increase in filings necessarily results in an increase in fees again to be borne by the ratepayer. And far from a drop in the bucket, WAPA has paid the PSC to the tune of $84,000 per filing.

SECTION 6:
Not applicable to the Authority. Therefore, WAPA takes no position on this Section, except if otherwise noted elsewhere herein.

SECTION 7:
In subsection (c), under Title 12, Section §698(b), the Bill seeks to codify the sharing of equipment and facilities irrespective of federal agreements and laws. As we have previously placed on the record before this body, the Authority understands the proposed changes are brought in a good faith effort to encourage deployment of communication facilities and services by facilitating “dig once” efforts in installing, relocating, and improving infrastructure installed by a government agency but a mandate to build conduits for communication providers is not something the Authority can afford given its financial constraints. The Authority, to some
extent, already makes provisions for third parties to use its spare conduits that are installed for various projects. For example, there may be projects where an expansion is foreseeable and is cost-effective. In such an instance, the Authority would make provisions for a separate build-out of a duct bank that can be leased for future use.

It is important to note that the Authority’s underground projects are largely funded by federal dollars. And, as you know, federal dollars are designated for specific purposes and the Federal Government will not approve projects that are specified for use by privately named entities or are for their benefit. Also, it must be understood that once a particular federally-funded project design is approved, the Authority cannot allow a private entity to enter and install their own conduits even if the cost is borne by the private entity. As noted, while the Authority can make certain provisions for spare conduits within a particular project scope and cost, it cannot abide by a blanket requirement for every project or every installation because of the consequences of each funding source to include the possibility the Authority could be declared ineligible for the funds. Further, if the requirements are promulgated as proposed, the Authority would, in the alternative, have to attempt funding through its own cash-strapped resources. The Authority’s finances would make it almost impossible to find the financial footing to support additional conduits and infrastructure with every project. This mandate would adversely affect the Authority’s projects and its ability to fund projects with the additional conduits.

Moreover, joint fiber use may conflict with prior legislation and federal mandates. Under Act 7240, the Legislature authorized the creation of viNGN to implement and operate a territory wide high-speed fiber network for the wholesale delivery of broadband service. Pursuant to that legislation, on September 30, 2011, the Authority entered in a Memorandum
of Understanding with viNGN to develop, maintain and operate the desired network. The agreement is to span twenty-five (25) years with two (2) consecutive automatic twenty-five (25) year renewal periods. The agreement provides that viNGN shall have exclusive use of the Authority’s existing optical fiber strands and infrastructure as well as the non-exclusive use of its existing conduits and utility pole space. The Authority’s fiber strands and infrastructure in use by third parties pursuant to a lease, license, or other agreement, likewise transfer to viNGN’s exclusive control upon termination. viNGN is solely responsible for all new fiber installations, maintenance and control for the Broadband Project.

Section 8:

The Authority reiterates its objections to expanded PSC powers as voiced under the previous Sections throughout this statement.

Section 9:

The proposed Bill would enable PSC Commissioners to hire legal counsel, at increased cost to WAPA and its customer/owners. Currently, the PSC is provided with counsel free of charge through the office of the Attorney General at no cost to the utility or its customer/owners. In matters of legal import to the Commission, the Office of the Attorney General is empowered to appear and represent executive branch agencies, boards, and commissions. At a time when every agency and instrumentality of Government is focused on sustainable approaches to the fulfillment of their individual and collective mandates, and where the attainment of the established goals of the agencies and instrumentalities require a keen

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5 3 V.I.C. §114(a)(6) – (8). See also Daily News v. PSC, 45 V.I. 49 (Terr. Ct. 2002), in which the court held that the PSC must be represented by the office of the Attorney General.
focus on limited financial resources, it is counter-intuitive that Bill No. 34-0021 proposes to allow the Commission to retain counsel to represent it, where existing law, i.e. 3 V.I.C. §114, already provides for the legal representation and expertise for the benefit of the Commission at no cost to WAPA and its customer/owners. It is sure to exacerbate the costs of the Authority, which is legally required to pay all ratemaking costs of the PSC, which in turn must be passed on to its customer-owners.

Finally, it appears the intent of this newly added Section is to grant the PSC immunity for certain acts attributable to the Commissioners and their agents. For the record, no such immunity is granted generally to WAPA or to its Governing Board, or to the boards of other semi-autonomous instrumentalities.

**Conclusion:**

The fundamental false premise of the proposed Bill is that giving the PSC broad regulatory power over WAPA will increase the likelihood that WAPA will operate more efficiently and at a lower cost. In fact, just the opposite will occur as the PSC Commissioners and WAPA’s Governing Board fight over the limits of their power. It bears noting that most of the difficulties that plague WAPA are unrelated to the scope of the PSC’s authority. Changing the PSC’s scope will not cause improvement. With the assistance of FEMA, the Authority is now on the cusp of modernizing its entire generating facilities with new generating units and its electric transmission and distribution system through hardened poles and underground systems. Millions of federal dollars have been made available and will be more available to the Authority and any change in legislation of the kind proposed has the potential to complicate, confuse, and impede the efforts of WAPA to take advantage of this singular opportunity. I
therefore urge the Legislature to reject the proposed Bill as written and instead encourage the PSC to work collaboratively with WAPA.

Madame Chair, this concludes my prepared testimony and we stand ready for any questions the Committee may have.