GOVERNMENT OF THE VIRGIN ISLANDS
PUBLIC SERVICES COMMISSION

IN THE MATTER OF THE VIRGIN ISLANDS WATER AND POWER AUTHORITY'S PETITION FOR APPROVAL OF THE TEMPORARY HURRICANE RECOVERY SURCHARGE AND LEASED GENERATION SURCHARGE	**PSC DOCKET NO. 676** **Order No. 45-2019**

DISSENTING OPINION COMMISSIONER CLENDENIN

On April 25, 2019 the Virgin Islands Public Services Commission ("VIPSC" or "PSC" or "Commission") issued Order 45 – 2019 stating, in part:

> *The requested Leased Generation Surcharge is approved for the payment of generation equipment leases and training for the operation of the new Wartsila units in the amount of $0.030842 per kilowatt/hour, conditioned on the following requirements prior to collection from ratepayers. In advance of filing the rate tariff for the Leased Generation Surcharge and beginning collection from ratepayers of all classes, Executive Director Kupfer must:*
>
> *1. Certify that Aggreko generating units (leased) on St. Croix are in "Full Commercial Operation" (as defined in the contract for the lease of those units);*
>
> *2. Certify that the first three Wartsila generating units on St. Thomas (to be WAPA-owned) are in "Full Commercial Operation" (as defined in the contract for the acquisition of those units);*
>
> *3. Certify that the Authority has submitted a base rate application to the Commission; and further*
>
> *4. The Leased Generation Surcharge is limited to six (6) 30-day billing periods once collection begins.*
>
> *5. The Authority shall file a compliance tariff with the Commission with the required notice period and sunset provision.*

Two broad, fundamental principles justify regulatory oversight to public utilities. First, because the utility provides *essential services* for the well being of society it is an industry "affected with the public interest." [1] WAPA is for all intensive purposes a *natural monopoly* entity in the Territory. They continually use this power to manage output (Generation) and set prices higher than are economically justified. Given these two conditions, economic regulation is the explicit public or governmental intervention into a market that is necessary to achieve public benefits that the market fails to achieve on its own. Effectively regulation constitutes an agreement between a utility and the government (PSC): WAPA accepts an obligation to serve the Territory's energy needs in return for the governments's promise to approve and allow rates that will compensate the utility fully for the costs it incurs to meet that obligation. This implied agreement is sometimes called the regulatory compact. Despite the above

[1] The term "affected with a public interest" originated in England around 1670, in the treatises *De Portibus Maris and De Jure Maris*, by Sir Matthew Hale, Lord Chief Justice of the King's Bench.

phrasing, there is in fact no binding agreement between WAPA and the government (PSC) that protects utility's management and Board from financial accountability. "Just and reasonable" are the hallmarks of regulation.

Though I am sympathetic to the dire situation WAPA faces, the facts remain that WAPA is failing to ensure reliable and resilient energy to the Territory and has proven that they do not always act in good faith to conditions imposed by this commission. The majority's decision treats this applicant's operations as if they had been efficient and not the subject of what appears to be considerable managerial indiscretion and extravagance set out in the record. Given that I am a regulator driven through mandate (Law) to reach reasoned and just decisions based on the demonstrated record presented in our public hearings, the majority decision does not allow me to remain silent.

Traditional regulatory authority in most public utility agencies limits cost approvals to plants and equipment that are "used and useful" i.e., up and running (essentially complete), and, equally important, has the ability to deny capital recovery in rates for expenses that were "imprudent or excessive" i.e., prudency review. The majority's decision fails to address long-standing state and federal law, in some cases going back to 1892, recognizing that the public utility regulatory has the authority to review expenses and to limit expense recovery to only those that are reasonably related to the costs of efficient operation.[2] While WAPA management has considerable discretion in its decision-making process, that discretion is not unlimited. States and Territories have, and do, disallow expenses as imprudent when doing so will compensate management for extravagant or unnecessary costs for public utility service.[3]

I believe the Commission has, and should, review and disqualify many of these alleged expenses precisely because they are not reasonably related to the cost of efficient operation and, in fact, are more the product of managerial discretion than prudence. I dissent from the adopted Order in that it inadequately sets forth the unacceptable lack of transparency and accountability that WAPA continually displays with the negative results and burdens cast on Virgin Islanders with no option other than to endure the results of WAPA imprudence. The Commission continues to be constrained by disputed Legislation that does not permit it to act as other regulatory bodies do in the United States and serves to limit its authority to rate setting. This essentially permits WAPA and its Board to make capital investment, management and operational decisions having significant financial impact to consumers without any accountability of poor decision making to the public. The record is replete with WAPA Board and executive management poor unilateral decision-making resulting in consumer rates that are the highest in the nation for electric service that is at best poor. To name just a few:

- The purchase of Unit 22 in 2001 that has almost never produced electricity after it was installed and was subsequently abandoned.
- The purchase of Unit 23 at a capacity of 39mW over the objections of the Commission that has poorly functioned with poor service often resulting in frequent outages for a significant portion of time, is currently out of service and has been out of service for over two-years.
- The mishandling of getting the Heat Recovery Steam Generators ("HRSG") on both the islands of St Thomas (unit 21) and St Croix (unit 25) into service costing tens of millions of unnecessary dollars to be charged to consumers.
- Allowing the VITOL propane project to escalate from $87 million initially to $160 million without employing proper project management or exercising appropriate due diligence or receiving appropriate rate approval from this Commission. WAPA will surely look to the

[2] Chicago & Grand Trunk Railway v. Wellman, 143 U.S. 339, 345-346 (1892); Reno Power, Light & Water Company v. Nevada Public Service Commission, 298 F. 790 (1923).

[3] Southwestern Bell v. PSC of Missouri, 262 U.S. 276, 289 (1923); Acker v. U.S. 298 U.S. 426, 430-431 (1936).

Commission for the additional dollars to be recovered from consumers. WAPA indicated there was an audit recently conducted of the VITOL project, but that $50 million of VITOL expenses were not subject to audit or disclosed!

- Reluctantly recognizing that an Integrated Resource Plan ("IRP") was an industry best practice in determining the optimal mix of generation. The initial plan confirmed staff and Commission positions that the optimal mix for least cost and most reliable generation would be engines of small capacity.
- Delays in undertaking the IRP and implementing its results further shows the lack of concern of WAPA and it's Board in increasing rates unnecessarily and not being held accountable. Each year of delay cost consumers approximately $50 million and there have been several years of delay.
- Accepting tens of millions of dollars in Federal Disaster Relief, Recovery, and Mitigation funds without any substantial difference in providing reliable and resilient service.

The current "emergency" filing by WAPA demonstrates its continued lack of accountability and transparency by WAPA and it's Board and submits a pro forma application to this Commission as a result of significant negligent acts. In once again having the Commission submit to the position that not granting the rate would mean significant reorganization for WAPA and it's Board I believe that the majority erred. I believe that fundamental and sweeping change is exactly what is needed now. By opening this door, significant additional rate increases will be demanded under similar arguments by WAPA in the near future. As I write this WAPA has already petitioned, in addition to the additional approximately 3 cents/kWh granted in the "emergency" proceeding the following:

- A proposed increase in the LEAC on July 1, 2019 of approximately 4 cents/kWh.
- A proposed increase in the base rate of approximately 6 cents/kWh.

Taken together there will be a 7 cents/kWh increase on July 1, 2019 ("emergency" increase of approximately 3 cents/kWh plus an approximately 4 cent/kWh for the LEAC if approved) with a further 3 cents/kWh when the base rate case is concluded (it is my understanding that the "emergency" increase will then be terminated.) At these rates WAPA again approaches a rate of 50 cents/kWh that is beyond punitive for the residents and businesses of the Virgin Islands and crushing for our economy. In the meantime:

- There is no analysis in the record as to why 20 MW is the right amount of temporary generation capacity for the Aggreko units on St Croix. The current LEAC filing shows that they are only effectively used to 11MW average capacity. In my opinion any rate award should only have been considered after a full showing that the decision on the Aggreko units was prudently made, optimal and well supported by the analysis. For me as a Commissioner great weight would be given for any support from independent analysis of experts in the field – there has been none other than WAPA management. I am still very concerned that after leasing 20 MW of Aggreko capacity that WAPA will have to run their large inefficient turbines. I had hoped my fellow Commissioners would have demanded an immediate analysis as to whether additional Aggreko leased capacity would be the least cost scenario for St Croix and if so WAPA should immediately do so or forgo any additional rate considerations by the Commission.
- Unit 23 rehabilitation continues to get delayed, and is now anticipated going into service in September 2019, with significant additional spending that this Commission has indicated is not authorized and will not be compensated through rates. This is another example of the lack of reasonable regulatory authority provided this Commission as the rationale for the repair of Unit 23 has not been explained adequately and WAPA has changed its position on the repair several times.

- Continued court action by WAPA disputing our authority to place conditions on rates.
- Delay of approved "Renewable Projects" with current Qualifying Facilities (QFs) and contracts that are less than current rates and in support of the USVI Renewable Energy policy.
- The VITOL project continues to get invoiced with WAPA very short of cash and Director Kupfer at each PSC Meeting indicates that there are still negotiations to acquire the project. The delay in implementing the acquisition costs millions of dollars to consumers. The commission receives only declaratory statements from Director Kupfer which conform to WAPA's lack of recognized regulatory authority by the Commission.
- WAPA has indicated that it now has liabilities of $1.2 Billion. $ 1.2 Billion! As my fellow Commissioner Kent Bernier eloquently said at the last PSC Meeting – *"How can a utility with a 62 MW peak load support $1.2 Billion in liabilities?"*

WAPA has failed to present a plan to emerge from this morass. I continue to wonder if there can be such a plan. Providing rate increases with no accountability and transparency and without the regulatory authority to require accountability and transparency in my opinion is not the answer. I wish my fellow Commissioners had not affirmatively reconsidered their previous position before casting their vote this time. The discussion in the proceeding led me to believe that they continued to have many of the same concerns that I had. Going forward I trust that all discussions will focus on what the utility requires in the Virgin Islands to provide safe and adequate service at reasonable rates and to make the necessary decisions to get there in a fully transparent manner.

A more reasonable construction of the Commission's jurisdiction in this order would be to limit its reach to substantially completed projects and actions that actually provides the "sufficiently close relationship to the reliable and resilient providing of energy" that I believe is required to invoke Commission jurisdiction.

On a broader level, the jurisdictional puzzle in which the Commission now finds itself only reinforces the fundamental mistake that the Commission made in rushing to dictate a particular outcome in WAPA rates. That outcome, under the most conservative assumptions, creates a regulatory concern over whether these decisions are just, reasonable and based on the record. Speculating on suspect promises is no way to regulate and address our Territory's long-term energy needs.

For these reasons, I respectfully dissent.

Dated:

May 9, 2019

Johann A Clendenin
Commissioner & Chairman Emeritus