PREPARED STATEMENT OF LAWRENCE J. KUPFER,
EXECUTIVE DIRECTOR/CEO, VIRGIN ISLANDS
WATER AND POWER AUTHORITY
TO THE COMMITTEE ON RULES AND JUDICIARY
33rd LEGISLATURE OF THE VIRGIN ISLANDS
Bill 33-0346
SEPTEMBER 15, 2020

Good day Honorable Janelle K. Sarauw, Chairperson of the Committee on Rules and Judiciary, members of the Committee, other Honorable Senators present, other testifiers, and the listening and viewing audiences. I am Lawrence J. Kupfer, Executive Director/CEO of the Virgin Islands Water and Power Authority (hereinafter "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.

We thank you for giving us the opportunity to appear and testify on Bill 33-0346 which seeks to establish a Management and Oversight Review Committee (the "Committee") to bring to the Authority financial solvency, along with greater adherence to appropriate regulatory standards and efficient operations. WAPA is not in support of the proposed legislation to create an oversight committee. Some of our concerns, on which we will elaborate further in the testimony are outlined below:

- The reasons, as stated in the preamble, for the need for this Bill are unsupported and unsubstantiated.
- WAPA has a highly qualified Board of professionals that are familiar with the operations of the Authority.
- 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 the Bill will impact their current and future investments with the Authority.
- Replacement of the Board may cause discourse in the market and with the federal agencies in terms of their ability to rely on any decisions or direction from the Board or staff of WAPA, which, as this Bill demonstrates, could be readily uprooted.
- The Bill may violate the USVI covenant to WAPA Bondholders provided in 30 VIC § 119 of the WAPA Act and 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
- The Bill could give the federal government a basis for challenge with respect to any grant funds provided for the improvement of Authority facilities.
- The possible engagement of a public utility management company experienced in restructuring and returning solvency to failing public utilities could impact the tax deferred status of the bonds.

Note that though we are not supportive of the measure in its current form does not

mean that WAPA is averse to the studies called for in the Bill that would guide its planning to accomplish the results being sought by the Bill. However, these studies cannot be completed by a part time board and cannot be completed for $250,000 per year. If the legislature is serious about having these studies completed, additional funds should be appropriated.

The challenges at the Authority cannot be cured by replacing the current Board with a new team of individuals, regardless of their academic qualifications. The present members of the Governing Board of the Authority are highly- qualified individuals with degrees in accounting, marketing, chemical engineering, applied science - bioengineering, and business management and business administration. These individuals have far greater than the minimum seven years of experience required by the Bill. Additionally, all of the members of the Board were confirmed by the Legislature in a rigorous confirmation process for contemplation of their service on the WAPA Board. As we are now on the cusp of transforming the Authority with the assistance of federal funding, this Bill seeks to take a step back by suspending a highly qualified board and replacing it with a Committee with no unique knowledge of Authority's operations. The market, and indeed our federal partners, could certainly see this as a sign of instability in WAPA operations and may question their investment. I daresay the Bill also disenfranchises from public service a number of highly qualified local residents who, because of previous service on the Board, or employment with the Authority, are not eligible for consideration to become a member of the proposed Committee. We note for the record there is no such prohibition for members of the Public Services

Commission. If the goal of the Bill is to distance individuals who are perceived to have contributed to or impacted the operations of the Authority, then it would appear that PSC Commissioners and their staff, who have played, and continue to play, a key role in regulating the rates of the utility so that it may operate to provide reliable and affordable services to the people of the Territory, should similarly be excluded.

As previously noted, WAPA does not support this Bill in its current form and has a number of serious concerns with the proposed legislation. According to the Bill's preamble, the genesis for this proposed legislation lies with asserted deficiencies regarding: (a) efficient and cost-effective operations; (b) identification of funding sources and proper planning of projects; and (c) efficient operations and mismanagement. These assertions do not capture the realities of the operations of the Authority nor the fiscal and operational challenges WAPA has been managing which are not entirely all of their making. WAPA has worked mightily over the past decade to streamline operations, upgrade its generation and reduce rates to our customers. Some of our noteworthy efforts include the following:

- In 2010 the Authority conducted a public procurement process that resulted in a 30 year contract with Alpine to produce and sell 33 MW of power on St. Thomas and 16 MW of power on St. Croix, the fuel source of which was refuse derived fuel ("RDF") supplemented by pet coke at a price ranging from 14 cents per kwh to 28 cents per kwh. Alpine ultimately removed petroleum coke, and presented a project that would burn RFD, supplemented with woody biomass, scrap tires, rum bottoms and other wastes. The project failed because the then siting legislative body did not approve a land lease for government owned property near the Bovoni Landfill, which was a critical site to the project development. This legislative action not only caused a missed opportunity to reduce fuel and other operational cost for the Authority, but also a missed opportunity to address the bulk of the Territory's solid waste disposal challenges.
- An Energy Action Plan was developed by WAPA's Governing Board in

2012 with a proposed strategy for the reduction of the cost of energy in the Territory as follows:

1. Implement measures to enhance production efficiency at existing power generation facilities.
2. Convert base load power production from fuel oil to liquefied natural gas ("LNG") or liquefied petroleum gas ("LPG").
3. Develop grid interconnection between the Virgin Islands and Puerto Rico.
4. Maximize development of solar and wind resources.
5. Pursue bio-mass energy and ocean thermal energy as potential diversification of baseload energy.

But for the interconnection to Puerto Rico, WAPA has fully satisfied, made attempts to, or is still in the process of achieving these measures. Those measures that were not implemented were not pursued either because the technology was not feasible~~,~~ was cost prohibitive, or because agreements fell through. We wish to note for the record that while LNG continues to be a viable option, the economies have to be affordable, particularly in light of the current investment that has been made in the LPG facilities,

- The year 2016 saw the Authority complete its first ever Integrated Resources Plan, ("IRP"), which provided an assessment of the future electric energy needs of Territory's customers over 20 years, and summarized the preferred plan for meeting those needs in a safe, reliable, cost-effective and environmentally responsible manner. The IRP included energy efficiency program offerings, retirement of all existing thermal capacity units and installation of higher efficiency reciprocating and micro turbine technologies fueled by cleaner-burning liquid propane sized more appropriately to provide greater system reliability and greater penetration of diverse, renewable energy technologies. As a path to achieving the goals of the IRP the Governing Board in 2016 approved a Near Term Generation Action Plan. This plan, as outlined below provided for:

  -Extension of the Unit 25 lease with APR for 1 year on a standby basis (Operated on oil).

  -Entering into an emergency rental agreement for a TM2500+ for a 1-year period with option to extend for 1 year.

  -Overhauling and converting Unit 23 to operate on LPG

  -Installing 3 Rice 7 MW Wartsila Units.

  -Installing 1 SGC 600 24 MW Siemen's Unit (LPG & Oil); and

-Soliciting RFP for Long-Term Generation Options Consistent with the IRP results.

All aspects of this Near-Term Generation Action Plan have been completed except for the conversion of Unit 23. Though all the parts are available the Unit has not been able to be decommissioned for the conversion to take place. Also note the Siemen's Unit was too expensive; however, that option was replaced with the lease of another generating unit from APR.

This year the Authority, with the assistance of Black and Veatch, finalized and updated its 2016 Integrated Resource Plan (IRP). The updated IRP contains several initiatives that are already underway, and which may be realized sooner with the Authority's possible access to substantial federal dollars and technical support. This updated IRP report highlights the obvious need for reliable and cheaper electricity aided by newer, more efficient fossil-fueled generation and a significant expansion of renewables. We are well on the way, with assistance from our federal partners, with addressing the mandates of this plan. As you are aware, we have recently installed new generation facilities at the Harley Plant. Further, we have recently executed a contract for additional new Wartsila generators, and a contract, also with Wartsila, for engine generating sets, together with related auxiliary equipment battery energy storage systems for St. John. All these contracts were secured through competitive bids. We are also pleased to report that the 4MW Donoe solar project, which was destroyed in the recent hurricanes, is soon to be rebuilt by BMR Energy, a company that brings the combined expertise of 10,000 MW of energy infrastructure projects. BMR is backed by Virgin Group Ltd, a British multinational venture capital

conglomerate founded by entrepreneur Sir Richard Branson and Nik Powell, which seeks to develop, acquire, finance, construct and operate energy infrastructure throughout the Caribbean and Central America.

Given the limited allotment of time for this testimony I have attached for your review and the legislative record copies of all the plans and initiatives that I have referenced above.

As we stated at the beginning of this testimony, we do not support the Bill insofar as it attempts to create an oversight committee and we are concerned that this form of an attempt to address the issues facing the Authority may hurt more than it will help. Of course, we are always open to any review of the Authority's operations to seek a path to improved efficiency and lowering the rates we charge to the people of the Territory. To better enable this Honorable Body to understand our concerns about the creation and powers granted to the Committee, we have consulted with our bond and disclosure counsels and with our financial advisor, who have all expressed similar apprehension about the creation of a Committee to manage the affairs of WAPA. The chief concern is the negotiation reaction we may expect from existing bondholders, creditors, federal grant providers, and funders, as well as prospective investors (collectively "Investors"). The very existence of and introduction of the Bill has made it difficult to negotiate with Investors because of their concerns relating to being able to rely on decisions or commitments from the current Board and staff. Reasonably prudent investors will likely want some comfort as to how the provisions of the Bill would impact their current and future investments with the Authority. The following concerns warrant attention:

(a) The continuing eligibility of WAPA for federal funding and the potential further delay in the timing of certain projects.
(b) Financings that are currently being negotiated by WAPA and its financing team to refinance and/or reduce WAPA's debt service payments.
(c) The continuing tax-exempt status of WAPA's outstanding debt.
(d) The potential violation of existing covenants of USVI to WAPA bondholders in §119 of the WAPA Act.

Currently the Authority is in talks with Investors to finance the remaining sum of approximately $24 Million that is owed for the Wartsila units currently in operation at the Harley Facility. We are also discussing with other Investors the possibility of a ~~l~~long-term refinancing for the VITOL project, which could later be paid off with federal grant funds. The suspension of the Board and possible changes in management as implied by the Bill could delay, hinder or derail these delicate negotiations.

Additionally, the uncertainties associated with the selection and appointment of the members of the proposed Committee, the coordination of the Committee's relationship with WAPA's existing senior management team and key consultants and/or any new members of the senior management team and key consultants who may be selected by the Management Committee (including the engagement of a public utility management company), could also introduce new challenges and concerns in managing the complex relationships between some of WAPA's vendors, creditors and Investors. The consequential implications of these factors could, at a minimum, increase the interest rates on lending arrangements currently being negotiated with Investors, and lead to more stringent borrowing terms. At worst, the creation of a Management Committee could cause such Investors to terminate negotiations and decline to invest in WAPA.

Consider also that regulation of public utilities is uncommon~~.~~ and is regularly

cited by rating agencies and Investors as a critical criterion of the future success or demise of the Authority. The management and oversight functions outlined in this Bill seem to duplicate the roles of Senior Management and the PSC, which may set up the framework for power struggles, legal challenges and/or confusion as to who has ultimate authority in particular matters.

One of the chief statutory concerns with the Bill is the possibility that it may violate the USVI covenant to WAPA Bondholders provided in 30 VIC § 119 of the WAPA Act and could expose the USVI to bondholder litigation, insofar as the Bill may explicitly be seen as limiting or altering the rights and powers vested in the Authority and its Board. Section 119 of Title 30 states:

> The Government of the Virgin Islands does hereby pledge to, contract and agree with, any person, firm or corporation, or any Federal, Virgin Islands or state agency, subscribing to or acquiring bonds of the Authority or of the Government of the Virgin Islands issued for the purposes of this chapter, that it **obligates itself not to limit or alter the rights or powers hereby vested in the Authority or the Government, as the case may be, until all such bonds at any time issued, together with the interest thereon, are fully met and discharged.**

Suspending the Board and creating an oversight committee could be construed as a violation of the covenants given to bondholders of existing bonds as stated above. For the record, the latest of WAPA'S outstanding bonds does not mature until the year 2035.

Similarly, the Bill could give the federal government a basis for challenge with respect to any grant funds provided for the improvement of Authority facilities for the same reason. 30 VIC § 119 also states as follows:

> The Government of the Virgin Islands does further pledge to, contract and agree with, any Federal agency that in the event any such agency shall construct, extend,

> improve, or enlarge or contribute any funds for the construction, extension, improvement, or enlargement of, any facilities, the Government of the Virgin Islands will not alter or limit the rights or powers of the Authority in any manner which would **be inconsistent with the continued maintenance and operation of such facilities or the extensions, improvement, or enlargement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such Federal agency**; and the Authority shall continue to have and may exercise all rights and powers herein granted so long as the same shall be necessary or desirable for the carrying out of the purposes of this chapter and the purpose of any Federal agency in constructing, extending, improving or enlarging, or contributing funds for the construction, extension, improvement or enlargement of, any facilities.

How our federal partners will see this change remains to be seen. However, divesting the Board of its powers and creating an oversight Committee that will take its charge and directive from two separate but equal branches of the government, that may not always be in alignment, certainly changes the dynamics of the paradigm which Investors and Federal agencies were comforted with, and upon which they may have relied, in purchasing bonds or allocating grant funding.

Also please consider 30 VIC § 121, which provides:

> 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.

The Bill proposes to suspend the powers of WAPA's Board of Directors and replace the governance of WAPA with an oversight committee, which "is vested with all the powers and authority granted to the WAPA by [the WAPA Act]." The Bill appears to conflict with §121 of the WAPA Act because the Board per this legislation, continues to exist, which creates a possible challenge via §121.

A further issue for your consideration is the language in the Bill that would

allow the Committee, if it sees fit, to engage a public utility management company experienced in restructuring and returning solvency to failing public utilities. You should be aware that the term “restructuring” has several connotations. In the municipal market it generally means refinancing debt over a longer period of time to lower payments, a mechanism that is widely used and accepted. In the case of the Authority, one of the most critical items on its agenda, as was mentioned previously, is the refinancing or restructuring of the Vitol obligations to spread the payments over a longer period of time. This would provide much needed cash flow relief to the Authority and ratepayers. All of the Authority’s remaining debt obligations (excluding VITOL) have a weighted average interest rate of approximately 4.66%. However, the term restructuring in a broader context would likely involve a negotiation of all the Authority’s creditors and major contracts at a time when the Authority needs to preserve its access to the capital market. Restructurings have used been in recent times for various issuers in Puerto Rico and for the City of Detroit, both of which had much more debt outstanding, and were very costly and time consuming. In October 2019, Debtwire, an active financial industry publisher, reported Puerto Rico had already spent $400 million on lawyers and advisors and professional fees were projected to reach $1.5 billion by 2024. Fees totaled nearly $178 million in Detroit’s bankruptcy proceedings.

It is important to note that if the services of a public utility management company were obtained, as provided for in the Bill, the terms of that engagement would have to be carefully reviewed to determine compliance with the safe harbor regulations that apply to facilities, such as the Authority, that are financed with

the proceeds of tax-exempt bonds. The Authority, as a government instrumentality, qualifies for issuance of tax-exempt bonds that have the benefit of offering to purchasers the advantage of tax-exempt interest. However, in order to retain tax-exempt status of the bonds, the Authority must use the funds, and facilities financed by the funds, in accordance with IRS regulations. One important condition is that any bond financed facility may not be used for more than a minimal "private business use." Whether an arrangement with a private, for-profit company to operate the Authority would have an impact on the tax-exempt status of bonds has to be something that is carefully evaluated when considering that arrangement.

For the record, while Investors and Federal agencies may have solid statutory basis to assert challenges to the proposed Bill, there is no assurance that they actually would, but the vulnerability to litigation is still real.

One final comment to the Bill, not legal in nature, but going to the practicality of the proposed language concerns the Committee meeting requirements. Per the Bill, the Committee may meet as many times as necessary during its first year and thereafter are mandated to hold meetings once, but no more than three times in a quarter. This strict schedule of meeting quarterly will not comport with dynamic needs of the Authority's operations. Currently the Board meets twice a month. Projects or matters requiring approval are presented to either the Finance or Planning Committee for detail review and vetting after which the committee votes, or does not vote as the case may be, to send the matter to the full Board for consideration and approval. In addition to the regular monthly meetings, from time to time, special or emergency meetings are necessary to address issues that require immediate

attention. There is not a month that there are not items on the agenda for consideration and many matters are time sensitive. If in a four-month period the Committee can only meet a maximum of three times, this means there will likely be a period in which it cannot meet if the Authority needs to secure equipment, supplies or services to address an issue to keep the lights on, potable water flowing, or to address other operational issues.

It should also be noted that no plan or initiative to reduce rates could likely come to fruition without the necessary finances to implement these strategies. For the past decade WAPA has been challenged with high government receivables (which as of August 13, 2020 still stands at $9,039,057); the aftermath of 2 catastrophic hurricanes from which we have yet to fully recover; reduction in the customer base and corresponding reduction in operating revenues; rates that are not corresponding to the needs of the Authority; deferred fuel payments that have not been collected; the impact of the Covid-19 pandemic; and a billing system that was destroyed during the hurricanes and that is still being re-built. Contrary to popular belief, federal funds are not the sole solution to the numerous issues plaguing the Authority, and no change in leadership can address these challenges in a short time frame without the funding to bring about a transformation. We ask that the Committee take our comments into due consideration as the ramification from the passage of this Bill could have far reaching effects on the operations of the Authority.

I wish to thank this Honorable Body for allowing the Authority the opportunity to testify on Bill No. 33-0346. My staff and I are available to answer any questions

you may have on these matters.