IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

VIRGIN ISLANDS WATER AND POWER AUTHORITY, Appellant,	**CIVIL NO. 657/04**
v.	**APPEAL**
VIRGIN ISLANDS PUBLIC SERVICES COMMISSION, Appellee.	**NOT FOR PUBLICATION**

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CABRET, MARIA M., Senior Sitting Judge[1]

MEMORANDUM OPINION
(Filed November 30, 2006)

Before the Court is an appeal filed by the Virgin Islands Water and Power Authority [hereinafter "WAPA"] of the Virgin Islands Public Services Commission's [hereinafter "PSC"], Orders No. 44/2004 [hereinafter "Order 44"] and No. 50/2004 [hereinafter "Order 50"] of Docket 559. WAPA contends that these orders are invalid because they exceed PSC's regulatory authority over WAPA, which it claims is limited by statute to rate-setting. This Court must therefore determine the scope of PSC's statutory authority to regulate WAPA. For the following reasons, the Court finds that while PSC has the implied authority to issue Orders 44 and 50, the orders are nonetheless invalid because PSC's implied power to enjoin cannot prevail

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1 Assumed senior status on July 1, 2006.

over WAPA's statutory protection from injunctions and because PSC violated WAPA's statutory due process rights.

The dispute before the Court arose when WAPA, the primary provider of electric power and water in the Virgin Islands, sought to release Requests for Proposals [hereinafter "RFP"] to independent power producers and PSC, the commission charged with regulating Virgin Islands public utilities, intervened and enjoined the process until WAPA supplied additional information and developed a long-term plan for the acquisition of power capacity. On August 12, 2004, PSC issued Order 44 to "oversee the development of a comprehensive plan to establish a sound, balanced, and reliable power system for the United States Virgin Islands." *In re Long-term Planning for Generation Capacity, Fuel Diversity, and System Reliability of the Virgin Islands Water and Power Authority*, Order No. 44/2004 (Pub. Servs. Comm'n Aug. 12, 2004). In the order, PSC (1) prohibited WAPA from releasing any RFPs for independent power production; (2) authorized the appointment of a hearing examiner to review the RFP process; and (3) required WAPA to submit, in writing, information to PSC regarding proposed protocols and delayed time schedules of pending projects. *Id.* WAPA filed an application for reconsideration on September 1, 2004,[2] which was denied by operation of law on October 1, 2004, when PSC failed to act on the application within thirty days.[3]

On August 27, 2004, PSC issued Order 50, requiring WAPA to pay $15,000 to fund PSC's investigation expenses associated with Order 44. *In re Long-term Planning for Generation Capacity, Fuel Diversity, and System Reliability of the Virgin Islands Water and*

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[2] In WAPA's Petition to PSC for Reconsideration of Order 44, WAPA advanced three central arguments. WAPA contended that Order 44 was invalid because it (1) exceeded PSC's statutory jurisdiction over WAPA; (2) violated WAPA's procedural due process rights; and (3) contained erroneous factual assumptions and findings. In PSC staff's Opposition to Petition for Reconsideration, the staff recommended that PSC deny reconsideration of Order 44 because it (1) was not a final order; (2) did not violate WAPA's procedural due process rights; (3) was not seeking to develop a long-term plan *for* WAPA, but rather, was seeking to obtain a long-term development plan *from* WAPA; and (4) PSC was empowered under its rate-setting authority to issue Order 44.

[3] *See* V.I. CODE ANN. tit. 30, § 33 (1998).

Power Authority, Order No. 50/2004 (Pub. Servs. Comm'n Aug. 27, 2004). WAPA filed an application for reconsideration on September 22, 2004, which was denied by operation of law on October 22, 2004, when PSC failed to act on the application within thirty days.

WAPA then filed the present action pursuant to sections 34 and 36 of title 30 of the Virgin Islands Code, seeking to suspend and invalidate Order 44 and Order 50.[4] Pursuant to section 36, this Court stayed PSC orders, pending oral argument on WAPA's request to have the orders suspended. Following oral arguments, on December 15, 2004, this Court denied WAPA's application for suspension, lifted its stay of the orders, and granted WAPA's request for an expedited appeal. On February 16, 2005, the parties appeared before this Court for oral arguments on the appeal.

On appeal, WAPA reasserts the main grounds from its petition for reconsideration as the bases for its requested relief, among others.[5] First, WAPA claims that PSC exceeded its statutory jurisdiction over WAPA when it issued Order 44. Second, WAPA argues that PSC violated WAPA's due process rights. In response, PSC argues that because Order 44 is not a final appealable order, this Court has no jurisdiction to consider WAPA's appeal.[6] Next, PSC argues that chapter 2 of title 30, the Small Power and Cogeneration Act, grants PSC power to

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[4] In October of 2004, before initiating the present appeal, WAPA filed a complaint and request for a temporary restraining order in the United States District Court for the Virgin Islands, challenging both Order 44 and Order 50 on the ground that PSC had exceeded its authority over WAPA. The District Court dismissed WAPA's complaint for lack of subject matter jurisdiction. *See V.I. Water & Power Auth. v. V.I. Pub. Servs. Comm'n*, Civ. No. 2004-135 (D.V.I. Oct. 18, 2004). WAPA then filed an identical complaint with this Court, on November 10, 2004. On November 17, 2004, this Court denied WAPA's Motion for a Temporary Restraining Order and Motion for Preliminary Injunctive Relief. *See V.I. Water & Power Auth. v. V.I. Pub. Servs. Comm'n*, Civ. No. 629-2004 (Terr. Ct. Nov. 17, 2004).

[5] WAPA also argues that Order 44 violated the Sunshine Act, under section 254 of title 1 of the Virgin Islands Code, but this ground was not raised in its Petition for Reconsideration and thus, cannot be considered by this Court on appeal. *See* V.I. CODE ANN tit. 30, § 33 (1998). Similarly, although WAPA identifies a potential conflict between the requirements of the competitive bidding statute in section 116(a) of title 30 – requiring an advertising process for the solicitation of bids on purchases of services – and the requirement of the calculation of the incremental cost of alternative electric energy contained in 49(c) of title 30 – the touchstone for regulation authority in chapter 2 – the Court cannot resolve this issue as it was not raised in WAPA's petition for reconsideration. *See* 30 V.I.C. §33.

[6] Neither PSC nor WAPA dispute the finality of Order 50.

issue Orders 44 and 50. In the alternative, PSC contends that chapter 1 of title 30 authorizes the issuance of Orders 44 and 50. Finally, PSC asserts that it afforded WAPA due process. To resolve this dispute, the Court must first decide whether the issues are ripe for resolution, a component of this Court's subject matter jurisdiction.

II. SUBJECT MATTER JURISDICTION

As a threshold matter, PSC argues that Order 44 is not a final order and thus, is not ripe for appeal because it does not permanently prohibit the issuance of an RFP; according to PSC, the components of Order 44 each contemplate further investigation of WAPA's proposed actions. WAPA contends that Order 44 is a final order ripe for appeal because it indefinitely enjoins WAPA from performing its statutory duties until PSC has taken unlawful control of the process and seen it to its logical conclusion.

Both parties cite *CEC Energy Co. v. Pub. Servs. Comm'n of the V.I.*, 891 F.2d 1107 (3d Cir. 1989) in support of their respective arguments. *CEC Energy Co.* involved an appeal brought by CEC, a private company who had entered into a long-term contract with WAPA for the construction and maintenance of a co-generation facility on the island of St. Croix. 891 F.2d at 1108. On appeal, CEC challenged a preliminary PSC order indicating that PSC had jurisdiction to review CEC's contract with WAPA and initiating an investigation. *Id.* Notably, the PSC Order in *CEC Energy Co.* did not prohibit either WAPA or CEC from proceeding with the contract. The District Court determined that PSC did not have jurisdiction to review the contract at the time CEC and WAPA reached an agreement, but the Third Circuit Court of Appeals reversed, never reaching the scope of PSC's jurisdiction because it concluded that the Order was not a final Order ripe for review and therefore not appealable. *Id.* The Court reasoned that the Order was not ripe for review because PSC had "not had the opportunity to definitively decide the impact of the contract on consumers, nor ha[d] it concluded that modification of the negotiated contract terms [was] appropriate." *CEC Energy Co.*, 891 F.2d at 1110.

This Court has subject matter jurisdiction to hear perfected appeals of final orders issued by PSC pursuant to title 30, sections 33 and 34.[7] The term "final order" is not defined in title 30, but this Court is guided by the Third Circuit Court of Appeals, in *CEC Energy Co.*, which applied the general test for ripeness to determine if an agency decision can be considered on appeal. *Id.* at 1109. "The doctrine of ripeness requires an evaluation of the fitness of the challenged issues for review and the hardship to the parties of withholding judicial consideration." *Id.* (citation omitted). To satisfy the fitness prong, agency decisions must be final and courts should treat the question of finality in a pragmatic way. *Id.* at 1110 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Courts consider a number of factors in assessing finality:

> 1) whether the decision represents the agency's definitive position on the question; 2) whether the decision has the status of law with the expectation of immediate compliance; 3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; 4) whether the decision involves a pure question of law that does not require further factual development; and 5) whether immediate judicial review would speed enforcement of the relevant act.

CEC Energy Co., 891 F.2d at 1109 (citation omitted). A deficiency in the finality of an order may be overcome by a sufficient showing of hardship. *See CEC Energy Co.*, 891 F.2d at 1111. Such a hardship, however, must be "certain and impending to obtain preventive relief." *Id.* (citations omitted).

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[7] No appeal may be taken from a final order, where an application for reconsideration was not previously made and determined. 30 V.I.C. § 33. A determination may occur by operation of law, if PSC fails to act upon an application for reconsideration within thirty days. *Id.* Appeals must be taken within sixty days of any final action by PSC on the petition for reconsideration. 30 V.I.C. § 34. WAPA appealed both Order 44 and Order 50 within the statutorily prescribed time limits.

A. PSC Order No. 44 is a Final Order

Contrary to PSC's position, Order 44 constitutes a final appealable order under the *CEC Energy Co.* standard. First, the Order indicates PSC's definitive position regarding how WAPA should conduct processes for acquiring energy. It conveys PSC's dissatisfaction with WAPA's previous energy expansion efforts, characterizing them as emergency measures without adequate consideration of the long-term effects. The Order also indicates how PSC intends WAPA to manage its RFPs in the future, requiring WAPA to develop a comprehensive plan for promoting system reliability and fuel diversity. This is distinct from the deficiency in finality identified by the Third Circuit Court of Appeals in *CEC Energy Co.* where PSC had not yet determined its position regarding the wisdom of the contract at issue.

Second, in directing WAPA not to release its pending RFP, PSC demands immediate compliance with Order 44. Third, this has the effect of impacting WAPA's day-to-day operations by requiring a rescheduling of WAPA's ongoing efforts to acquire energy. Fourth, the appeal involves a question of law and does not require further factual development – because the sole issue is whether PSC has the authority to issue Order 44 in the first place. The fact that PSC may take additional steps in accordance with Order 44 – PSC asserts that Order 44 merely establishes a docket for further investigation – is irrelevant, as the Order creates a controversy predominantly turning on a pure legal question.

Finally, the fifth factor, whether a pre-enforcement challenge is calculated to speed enforcement of a particular Act, originally derived in *Abbott Labs.*, is inapplicable to these proceedings. WAPA's challenge, unlike the administrative appeal in *Abbott Labs.* by pharmaceutical manufacturers, is not a pre-enforcement challenge to an Act. 387 U.S. at 154. Neither does WAPA's challenge frustrate the purpose of any relevant Act, as asserted by the litigants in *CEC Energy*. *See CEC Energy Co.*, 891 F.2d at 1112. To the contrary, the viability of a legislative act is not contingent upon the outcome of this appeal. Thus, having satisfied the requisite criteria, Order 44 is a final appealable order, and this Court has jurisdiction to hear this matter pursuant to section 34 of title 30.

III. SCOPE AND STANDARD OF REVIEW

Two provisions of the Virgin Islands Code specifically govern the scope and standard of review of appeals from PSC decisions. First, section 33 of title 30 defines the Court's scope of review by limiting the arguments that may be raised before this Court to the specific errors claimed before PSC. Section 33 states that "[n]o public utility, or other person or corporation, shall in any court urge or rely on any ground not so set forth in said application." V.I. CODE ANN. tit. 30, § 33 (1998). Second, section 35 provides the standard of review:

> In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are arbitrary, capricious or procured through fraud.

V.I. CODE ANN. tit. 30, § 35 (1998).

IV. DISCUSSION

This Court must decide whether PSC has the statutory authority to enjoin WAPA from issuing Requests for Proposals [hereinafter "RFP"] to independent power producers until the PSC approves the RFP. To answer this question, the Court must determine the scope of the powers granted to WAPA and PSC by title 30. In reviewing statutory language, this Court is guided by the fundamental principle that when the language of a statute is clear and unambiguous on its face, the Court must read and apply the plain language of the statute as it is the best reflection of the legislative intent. *See Jeffers v. Meridian Eng'g, Inc.*, 27 V.I. 105, 108 (Terr. Ct. 1992); V.I. CODE ANN. tit. 1, § 41 (1995). A statute's plain meaning can only be contravened by a showing of clear, contrary legislative intent. *Charles v. Charles*, 788 F.2d 960, 966 (3d Cir. 1986).

WAPA argues that PSC lacks the statutory authority to issue Orders 44 and 50 and requests the Court to vacate them. WAPA does concede that PSC has the statutory authority under subsection 1(c) of title 30 to set the rates that WAPA charges its customers, but argues it is exempt from PSC's general regulatory authority. Additionally, WAPA claims that its chapter 5 authority and PSC's limited rate-setting authority in chapter 1 are the only relevant statutory provisions specific to WAPA, and thus, these specific provisions must prevail over PSC's general authority to regulate public utilities, as they are inconsistent.

In response, PSC asserts that the plain terms of chapter 2, title 30 grant it the power to (1) certify qualifying facilities, (2) order the interconnection of qualified facilities with WAPA, and (3) determine the terms on which sales and purchases of power may be made between WAPA and qualified facilities. To that end, PSC claims that Order 44 is the permissible, unilateral first step in a process which may lead to interconnection. Alternatively, PSC argues that it has broad regulatory authority over WAPA in chapter 1, and although it does not expressly rely on that broad authority for its power to issue Orders 44 and 50, PSC offers these powers as an indication of its plenary jurisdiction over WAPA.

A. Chapter 2 Does Not Supply PSC with the Authority to Issue Orders 44 and 50

PSC's primary argument is that its enumerated powers from chapter 2 provide authority for the issuance of Order 44. In response, WAPA argues that PSC's scope of authority in chapter 2 – to authorize private-sector driven interconnection orders with qualifying facilities – is too limited to issue Order 44. A brief review indicates that chapter 2 provides a limited grant of authority to PSC over WAPA, too narrow to serve as a basis for Order 44.

First, as PSC references, in sections 46(g) and (j), PSC is entrusted with determining which power producers qualify for certification under chapter 2. Certification under this chapter is possible as a "qualifying cogeneration facility" or a "qualifying small power production facility," as those terms are defined in the chapter. *See* 30 V.I.C. § 46(g), (j). Second, section 47 permits PSC to intervene, when an application for interconnection has been made by a qualifying facility, in certain interconnection disputes between WAPA and qualifying facilities. PSC may also intervene on its own motion, when there is a qualifying facility and PSC has complied with the relevant procedure and requirements in subsections 47(b) and 47(c), and in section 48. Specifically, PSC is empowered to order "such action as may be necessary to make effective any physical connection" and "such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any Order…." 30 V.I.C. §47(a)(2) & (3).

Although PSC asserts that Order 44 falls within the "own motion" language of subsection 47(d), nothing in chapter 2 grants PSC the authority to regulate WAPA's relationships with independent power producers, including those who may not qualify for certification, as Order 44 purports to do. PSC concedes as much in a whereas clause in Order 44 when it acknowledges that "the Virgin Islands does not have any present legislation directly regulating the development of independent power producers." (Order 44 at 2.) Indeed, chapter 2 is a limited grant of jurisdiction and fails to provide PSC with the requisite authority for the subject matters of Orders 44 and 50.

B. Chapter 1 Supplies PSC with the Authority to Issue Orders 44 and 50

Because chapter 2 is inapplicable, the Court now considers whether PSC's alternative basis, PSC's general regulatory authority in chapter 1 of title 30, authorizes the issuance of Orders 44 and 50. Notably, chapter 1 (sections 1-45) contains the powers that PSC may exercise over all public utilities generally, while chapter 5 (sections 101-126) outlines the powers of and protections for WAPA. WAPA contends that it is nevertheless exempt from PSC's general regulatory authority in chapter 1 because such authority must yield to WAPA's specific protections from interference in chapter 5. Accordingly, to resolve this appeal, this Court must determine how chapter 1, captioned "Public Utilities Generally" and chapter 5, captioned "Virgin Islands Water and Power Systems" interact.

1. The Definition of "Public Utility" in Section 1 of Title 30 Includes WAPA And Subjects WAPA to PSC's Chapter 1 Regulatory Authority

Section 1, as PSC indicates, defines which services, when provided by qualified persons, are "public utilities," as the term is used in the balance of the chapter. V.I. CODE ANN. tit. 30, § 1 (1998). Persons who provide an enumerated service for compensation in the Virgin Islands are deemed "affected with a public interest" and defined as public utilities under subsection 1(a) for the purposes of subjecting them to regulation.[8] *Id.* The primary services that WAPA, a public corporation,[9] provides to the public for compensation – water supply services and electric power services – are named among the qualified services in subsections 1(a)(4) and 1(a)(5) respectively. By the plain meaning, then, WAPA is a public utility, as defined in subsection 1(a), unless the exception in subsection 1(b) applies.

This exception provides that "[n]one of the foregoing services shall be deemed to be a public utility under this chapter, when supplied by the Federal Government." 30 V.I.C. § 1(b).

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8 Subsection 1(a) provides, in relevant part:

> The following services provided by an individual, firm, co-partnership, association, corporation 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".
>
> . . .
>
> (4) water supply services; except retail deliveries;
> (5) electric power service;
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> . . .

30 V.I.C. § 1(a) (emphasis added).

9 *See generally* V.I. CODE ANN. tit. 30, § 103 (1998) (creating WAPA as "a body corporate and politic constituting a public corporation").

Although subsection 1(b) previously excluded services also supplied by the Government of the Virgin Islands from the definition contained in subsection 1(a), and that exclusion applied to WAPA as a public corporation, the Legislature removed this exemption when it amended subsection 1(b) in 1973. *See* 1973 V.I. Sess. Laws 164 (Act No. 3460; §§ 1-4) [hereinafter "Act No. 3460"].[10] Thus, since there is no longer an exemption for services provided by the Government of the Virgin Islands, WAPA is not exempt from the definition of public utility under subsection 1(a). Accordingly, it is the inclusion of WAPA in the definition of subsection 1(a) and the removal of WAPA's exemption which was previously provided in subsection 1(b) that subjects WAPA to the full breadth of PSC's chapter 1 regulatory powers.

Finally, the Court pauses briefly to address the significance of the amendment to subsection 1(c) in Act No. 3460, as this has been the source of confusion. Both WAPA and PSC argue to some degree that subsection 1(c) is the basis for PSC's rate-setting authority over WAPA. Subsection 1(c) was also amended by Act No. 3460, but the amendment merely restores parity among public utilities for PSC oversight purposes, requiring the rates of government-owned and private-owned utilities to be fixed in the same manner.[11] Previously,

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[10] The pre-1973 version of subsection 1(b) reads:

> None of the foregoing services shall be deemed to be a public utility under this chapter, when supplied by the *Government of the Virgin Islands* or the Federal Government.

1965 V.I. Sess. Laws 182 (Act No. 1435, § 1)(emphasis added).

Section 2 of Act 3460, now codified as subsection 1(b), reads:

> None of the foregoing services shall be deemed to be a public utility under this chapter, when supplied by the Federal Government.

30 V.I.C. § 1.

[11] The pre-1973 version of subsection 1(c) reads:

> The rates for public utility services supplied by the Government shall be fixed, unless fixed by law, by the head of the department having jurisdiction of its operation and administration, subject to the approval of the Governor, or in case of water or electric power service, by the Virgin Islands Water and Power Authority. The Public Utilities Commission shall serve in an advisory capacity in the formulation of such rates.

1965 V.I. Sess. Laws 182 (Act No. 1435, § 1).

Section 3 of Act 3460, now codified as subsection 1(c), now reads:

subsection 1(c) authorized PSC to serve in an advisory capacity for the setting of rates for public utility services provided by the Government. This amendment was necessary to avoid a clear conflict with the simultaneously amended subsection 1(b); otherwise, subsection 1(a) would subject WAPA to PSC's full chapter 1 regulatory authority while an intact subsection 1(c) would still except WAPA from PSC's rate-setting authority. Therefore, WAPA's argument that PSC derives rate-setting authority from subsection 1(c) and that this subsection is the extent of PSC's authority is erroneous. It is the inclusion of WAPA within the definition of public utility in subsection 1(a) that subjects WAPA to PSC's rate-setting and general regulatory authority.

2. The 1977 District Court Ruling Was Inconsistent with Legislative Intent of Act No. 3460 Subjecting WAPA to PSC's Full Regulatory Authority

WAPA disputes the foregoing interpretation of subsection 1(a), arguing that the 1973 amendment gave PSC only the limited, specific authority to regulate WAPA's rates. In support of its position, WAPA relies entirely on *V.I. Pub. Servs. Comm'n v. V.I. Water & Power Auth.*, Civil No. 77/110, (D.V.I. June 17, 1977) [hereinafter "1977 Ruling"], which held that PSC's regulatory authority over WAPA was limited to mere rate-setting. The 1977 Ruling, according to WAPA, forecloses any inquiry into the scope of PSC's authority. Justifying its continued reliance on the 1977 Ruling, WAPA claims that its holding was reaffirmed by the District Court in *CEC Energy Co., Inc. v. Pub. Servs. Comm'n*, Civ. No. 88-232 (D.V.I. May 2, 1989) and this Court in *Chiang v. Turnbull*, 43 V.I. 49 (Terr. Ct. 2000). PSC objects to any continued vitality of the 1977 Ruling, characterizing the decision as a summary, slip opinion that is not precedent and is therefore nonbinding.

> The rates for public utility service supplied by the Government shall be fixed, unless fixed by law, in the same manner as rates for public utility services furnished by a private entity.

30 V.I.C. § 1.

Not only is the 1977 Ruling not precedent, holding no binding or persuasive effect, but it is an unreasoned opinion that fails to cite any legal authority for its conclusions. Assuming, without deciding, that the 1977 Ruling was either binding or persuasive at one time, the law forming the primary basis for that ruling has since been amended, a fact that WAPA consistently ignores. Even without the amendment, however, the 1977 Ruling's logic is flawed. Finally, neither *CEC Energy Co., Inc. v. Pub. Servs. Comm'n*, Civ. No. 88-232 (D.V.I. May 2, 1989), another unpublished District Court decision, nor *Chiang v. Turnbull*, 43 V.I. 49 endorse this faulty rationale, despite WAPA's claims to the contrary.

The 1977 Ruling concerned a declaratory action to determine the scope of PSC's regulatory authority over WAPA. At the time of the 1977 Ruling, section 122 of chapter 5, stated in relevant part:

> Insofar as the provisions of this chapter are inconsistent with the provisions of any other Act of the Legislature of the Virgin Islands, the provisions of this chapter *shall be controlling* and no law heretofore or hereafter governing the administration of the Government of the Virgin Islands or any parts, office, bureaus, departments, *commissions*, municipalities, branches, agents, officers, or employees thereof shall be construed to apply to the Authority unless so specifically provided….

1964 V.I. Sess. Laws 378, 399-400 (Act No. 1248, § 1) (emphasis added). The 1977 Ruling, relying on section 122, held that title 30, subsection 1(c), as amended by Act No. 3460, specifically applied to WAPA, and that WAPA therefore was subject to PSC's rate-setting authority. On the other hand, the 1977 Ruling held that the amendment to subsection 1(b) in the *same* act and its rehabilitative effect on subsection 1(a) did not specifically apply to WAPA, and that therefore WAPA was not subject to PSC's general authority to regulate public utilities.

In 1980, section 122 was amended. It now reads 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 independent instrumentalities of the Government of the United States Virgin Islands, whether such law was enacted before, on, or after February 14, 1980.

30 V.I.C. § 122. Where code provisions are inconsistent, section 122, as amended, no longer contains a preference in favor of the provisions in chapter 5. *See Luis v. Creque*, 803 F.2d 92, 95-96 (3d Cir. 1986) (providing WAPA's provisions are no longer protected from a repeal by implication). Instead, the preference is eliminated as the statute mandates that "[n]othing in [ ] chapter [5] shall be construed as exempting the Virgin Islands Water and Power Authority from any law…." 30 V.I.C. § 122. The amended section 122 now also provides that WAPA shall not be exempt from any law that applies specifically to WAPA or generally to independent government instrumentalities. 30 V.I.C. § 122.

WAPA attempts to diminish the impact of the change in section 122 by characterizing the enactment as a mere legislative response to an adverse judicial opinion involving the application of the Sunshine Act, *V.I. Press Association v. Luis*, 17 V.I. 329 (D.V.I. 1980). Specifically, WAPA argues that in *V.I. Press Association*, the court held that the Sunshine Act, found at section 254 of title 1, would not prevail over various provisions in chapter 5 because of the limiting language then contained in section 122; accordingly, WAPA asserts that the intent of the 1980 amendment was only to extend the application of the Sunshine Act to WAPA and similarly situated independent instrumentalities. Neither the Court nor the parties, however, were able to locate legislative minutes from February 5, 1980, the date the section 122 was amended. Thus, it will be difficult for WAPA to overcome the statute's plain meaning– that the enactment has further reaching consequences – by identifying clear, contrary, legislative intent.

Notably, while WAPA correctly identifies that the change in its enabling chapter accompanied similar amendments to all the enabling statutes for independent instrumentalities, this Court is not convinced that the new language merely meant to extend the application of the Sunshine Act to WAPA and similarly situated independent instrumentalities. In fact, the Third Circuit Court of Appeals in *Creque* applied the 1980 amendment to extend section 65a of title 3, a different law generally applicable to independent government instrumentalities, to WAPA. 803 F.2d at 95-96. The conclusion drawn from the change in the plain language – that the new section 122 eliminates the preference in favor of chapter 5 provisions and subjects WAPA to all provisions that are generally applicable to independent government instrumentalities – prevails over any purportedly contrary legislative intent.

That said, even if the law had remained the same, this Court disagrees with the 1977 Ruling, and WAPA's reliance thereon, for several reasons. First, the Court disagrees with the District Court in the 1977 Ruling because the District Court determined that section 1 of title 30 was ambiguous and, despite that determination, summarily rejected the importance of the whereas clauses contained in Act No. 3460. *See* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 45.02 at 14 (acknowledging that a statute is ambiguous if it is susceptible to "being understood by reasonably well-informed persons in either of two or more senses."); 47.01 at 209-10 (intrinsic aids of composition and structure may help discern an ambiguous statute's meaning); 48.01 at 409-11 (extrinsic aids, facts comprising the history of a statute, are also probative of a statute's meaning) (6th ed. 2000). The 1977 Ruling should have considered the whereas clauses in Act No. 3460, in light of the court's determination that section 1 was ambiguous.

Although the 1977 Ruling acknowledged that whereas clauses normally evidence the intent of the Legislature – in the 1973 amendment to section 1, to subject WAPA to the regulation of PSC – the court was not persuaded by the intent in that instance because it found the amendment was only specific to WAPA with respect to subsection 1(c). Subsection 1(c), as stated above, provides that "the rates for public utility services supplied by the Government shall be fixed, unless fixed by law, in the same manner as rates for public utility services furnished by a private entity." This Court agrees with the 1977 Ruling's determination that subsection 1(c) applied specifically to WAPA, particularly in light of Act No. 3460's whereas clauses. However, that is the only conclusion of the 1977 Ruling with which this Court concurs.

Second, this Court disagrees with the 1977 Ruling's conclusion that the 1973 amendment to subsection 1(b) did not apply to WAPA. The logical context dictates otherwise. The Amendment to subsection 1(b), by removing WAPA's general exemption, swept WAPA into the definition of public utility in subsection 1(a) and thus subjected WAPA to the full regulatory powers of PSC. Had the Legislature intended to subject WAPA solely to PSC's rate-setting authority and to nothing else, then the Legislature could have simply amended subsection 1(c) alone. The Legislature, however, removed WAPA's general exemption from the application of chapter 1 of title 30 under subsection 1(b) and simultaneously increased PSC's oversight under subsection 1(c). The whereas clauses of Act No. 3460 further bolster this Court's conclusion, as they state that the Legislature passed these amendments because increasing the jurisdiction of PSC would be an effective means of achieving greater efficiency in the supply of services. Act No. 3460.[12] Based on the foregoing, then, this Court finds that the only plausible

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[12] For example, the first whereas clause of Act No. 3460 reads as follows:

> WHEREAS the quality of services rendered by Public Utilities in the Virgin Islands whether governmental or privately owned and operated, has been a matter for considerable complaint and criticism by Virgin Islands residents; and
> . . .

1973 V.I. Sess. Laws 164 (Act No. 3460). The final whereas clause reads as follows:

> WHEREAS it is the sense of the Legislature that appropriate changes in the composition and jurisdiction of the Public Services Commission would be an effective means toward the achievement of greater efficiency and increased responsiveness to public needs by both public and private entities furnishing telephone, electric power, water, transportation and other services to the public;
> . . .

Id.

explanation for removing WAPA's subsection 1(b) exempt status was to subject WAPA to the balance of chapter 1.[13]

Third, the Court also disagrees with the 1977 Ruling because it assumed that *all* of the regulatory powers conferred on PSC in chapter 1 were inconsistent with WAPA's chapter 5 powers.[14] While some sections of chapter 1 may directly conflict with WAPA's chapter 5 powers, this is generally not the case; the dichotomy of powers may coexist. *See* 73B C.J.S. *Public Utilities* § 172 at 419 (2004) (providing that despite a vesting of the power to regulate in a commission, "all the incidents of ownership are retained by a utility over its property and affairs"). In particular, the 1977 Ruling assumed that an inconsistency existed between PSC's general authority to regulate public utilities and WAPA's power to manage its affairs. There is generally no inconsistency between the spheres of power contained within chapters 1 and 5 of title 30, and thus, the 1977 Ruling unnecessarily resorted to the pre-amendment version of

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[13] Although the language of section 1 does not include any specific reference to WAPA by name, it is specifically descriptive of WAPA. WAPA is the only provider of the electric and water services described in subsection 1(a)(4) and (5), and once the exemption for the Government of the Virgin Islands was removed, it is clear from the context and legislative history evidenced in the whereas clauses of Act No. 3460 that the Legislature intended the 1973 amendment to subsection 1(b) to specifically apply to WAPA. Furthermore, subsections 1(a)(4) and (5) state that water supply services and electric power services furnished by public utilities are subject to chapter 1. As WAPA is the only public utility supplying water and electric power, this language is specifically and exclusively descriptive of WAPA, even though it does not reference WAPA by name in the text of section 1.

[14] WAPA construes an inconsistency between WAPA's powers in chapter 5 and PSC's powers in chapter 1. The inconsistency is not as pronounced as WAPA asserts. PSC has none of the powers provided to WAPA in section 105. PSC cannot enter into contracts on behalf of WAPA, acquire property on behalf of WAPA, or control and supervise WAPA's facilities. PSC, rather, only has the power to regulate these activities based on its chapter 1 enumerated powers. *See* V.I. CODE ANN. tit. 30, §§ 1, 19, 20, 23 (1998). PSC's authority to regulate WAPA's acts is extensive. *See* 30 V.I.C. §§ 1, 19, 20, 23. WAPA's interpretation of section 1 ignores the traditional structure of a regulatory state; chapter 5 supplies WAPA the power to manage its affairs while chapter 1 supplies PSC the power to regulate WAPA's acts. PSC regulates WAPA by permitting or prohibiting WAPA's acts, but not by acting on behalf of WAPA. Thus, WAPA's argument that section 105 gives it exclusive authority to manage its affairs misses the point. WAPA does have exclusive authority to act. PSC, however, has the authority to regulate those acts.

As an example title 30, section 6 authorizes PSC to prescribe the manner and form in which WAPA keeps all books, accounts, papers, and records. Title 30, section 6, does not, however, give PSC the power to actually keep WAPA's books, accounts, papers, and records on its own. If WAPA did not have the power to keep its own books, there would be nothing for PSC to regulate. If PSC actually kept all of WAPA's books itself then PSC would cease to be a regulatory body.

section 122, applying only where two otherwise applicable provisions are inconsistent.[15] *See* 73B C.J.S. *Public Utilities* § 172 at 419.

3. PSC's Power to Issue Orders 44 and 50 Lies in Sections 19, 20, 23, 25 and 41 of Title 30

While the Court has determined that PSC has broad regulatory authority over WAPA, it is now necessary to consider what specific statutory authority, if any, supplies PSC with the authority for issuing Orders 44 and 50. WAPA argues that even if PSC possesses regulatory power beyond its rate-setting authority, PSC nevertheless cannot enjoin WAPA from conducting its RFP process because WAPA is protected from injunctions by section 120.[16] PSC responds by recounting in great detail the 1973 amendment to section 1 and its purported effect, as the genesis for its broad regulatory authority over WAPA. PSC identifies the 1973 amendment as a legislative response to *V.I. Hotel Association. v. V.I. Water & Power Authority*, 8 V.I. 620 (D.V.I 1972), *aff'd,* 465 F.2d 1272 (3d Cir. 1972) which highlighted problems in WAPA's rate-setting procedures. PSC then summarizes the scope of its authority including its power, as liberally construed, to investigate and fix rates and services for public utilities generally. Accordingly, PSC argues that it has the power to require the expansion of services for the utilities which it regulates and that it can determine the terms and conditions on which the expansion occurs based on section 23 of title 30, and that it may issue Orders 44 and 50 pursuant to this power irrespective of section 120. A survey of the powers granted to PSC indicates that PSC possesses the implied authority to issue Orders 44 and 50.

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15 *See e.g., Chiang v. Turnbull*, 43 V.I. 49, 64 (Terr. Ct. 2000) ("Governor's mere studying of WAPA's organizational structure and submitting legislation to alter it, does not ipso facto alter or conflict with WAPA's complete control and supervision over its assets.") In *Chiang*, the court recognized the power of the Legislature, which created WAPA, to enact any recommendation of the Governor and alter any power previously conferred on WAPA. Similarly, the Legislature has complete autonomy to place regulatory power over WAPA in the hands of PSC, and by doing so does not necessarily create an inconsistency between the statutes. Only where such an inconsistency cannot be avoided is a court to apply its rules of statutory construction in selecting which statute governs.

16 30 V.I.C. § 120 provides: "[a]n injunction shall not be granted to prevent the application of [ ] chapter [5] or any part thereof."

a. Section 41 Requires a Liberal Interpretation of PSC's Enumerated Chapter 1 Powers

At the outset, it is important to recognize that section 41[17] of title 30 commands the Court to employ a "liberal interpretation" to the powers of PSC; the powers of PSC are not limited to those specifically enumerated as PSC has all powers deemed necessary and proper to carry out its statutorily-mandated functions. *Atlantic Tele-Network Co. v. Pub. Servs. Comm'n of the V.I.,* 841 F.2d 70 (3d. Cir. 1988) and *Abramson v. Georgetown Consulting Group, Inc.,* 765 F. Supp. 255, 260 (D.V.I. 1997) held that the grant of all necessary and proper powers to PSC, as embodied in section 41, expands the significant and broad express delegation of authority to PSC.

In *Atlantic-Tele Network*, the Third Circuit Court of Appeals held that section 41 gives PSC the authority to regulate the sale of stock of a privately held public utility to fulfill its responsibility of ensuring that a public utility would "maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future." *Atlantic Tele-Network Co.* 841 F.2d at 73. In *Abramson*, the court found that PSC's specific authority to appoint agents found in section 18 of title 30 prevailed over the conflicting statute in title 31, requiring of all agencies a competitive selection process for the hiring of professionals. *Abramson*, 765 F. Supp. at 262-63. Based on a liberal interpretation of section

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17 Section 41 of chapter 1 states:

> The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this chapter the enumeration thereof *shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said Commission.* The Commission hereby created shall have, *in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned and indicated.* A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts and regulations of the Commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

30 V.I.C. § 41 (emphasis added).

41, the deferential treatment of PSC's own interpretation of section 18, and the Legislature's silence in face of that broad interpretation, the court found that PSC had to the authority to appoint the Georgetown Consulting Group, a consultant enlisted by PSC to conduct investigations of WAPA, among others, without being subject to the limitations contained within title 31. *Id.* at 259-263. Accordingly, the same liberal interpretation shall be applied to the enumerated powers which PSC employed to issue Order 44 and 50.

b. PSC's Enumerated Chapter 1 Powers

To begin, section 2 of title 30 pronounces the Legislature's intent that every public utility provide "service and facilities [that are] reasonably safe and adequate and in all respects just and reasonable." 30 V.I.C. § 2. Section 2 also requires every public utility to "obey the lawful orders of the [Public Services] Commission." *Id.* To further this mission, PSC has the power, "after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this chapter." 30 V.I.C. § 4. Title 30 grants PSC the power (1) to inspect records (section 16); (2) to subpoena records and compel the appearance of witnesses (section 17); and (3) to appoint agents to conduct investigations (section 18). *See Abramson*, 765 F. Supp. at 260 (considering PSC's appointment power in section 18 of title 30). In response, every public utility is required, under section 19, to answer all inquiries and comply with all investigations of PSC.

The powers of PSC to investigate rates and services of public utilities operating and providing services in the Virgin Islands are broadly defined in section 20.[18] Construing

[18] Section 20 provides:

> Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, or any billing for service inaccurate or erroneous the Commission may, in its

section 20 narrowly, WAPA cites *V.I. Water & Power Auth. v. Hodge,* 35 V.I. 40 (Terr. Ct 1996) to support its argument that PSC's investigatory powers are limited to rate-setting. While in *Hodge* this Court considered PSC's authority to investigate utility providers, it simply held that a strict reading of section 20 of title 30, "does not enable the PSC to investigate utility companies for inaccurate billing." *Id.* at 42. The review of inaccurate billing was then outside any such PSC authority; *Hodge* did not stand, as WAPA claims, for the proposition that PSC's investigative authority under section 20 was limited to rate-setting.[19] The holding in *Hodge* is also distinguishable because, among other reasons, section 20 has since been amended to include inaccurate billing within PSC's jurisdiction. *See* 2001 V.I. Sess. Laws 350 (Act No. 6481, § 6). Section 20 now confers to PSC the power to investigate rates, conduct reviews and determine the reasonableness and sufficiency of services.

Notably, while WAPA maintains that PSC only has the power to set rates, section 20 is specifically entitled "Investigations of rates *and services.*" *Id.* (emphasis added). The grant to PSC of an investigative authority over services found in the plain language of section 20 belies WAPA's argument that PSC is limited to a rate-setting function. The powers of PSC are not limited to merely accepting or rejecting rate increases as they are requested by public utilities. Rather, the plain language of section grants PSC the authority to review and pass judgment on the manner in which these services are provided.

> discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing.

30 V.I.C. § 20(a) (Supp. 2005).

[19] *Hodge* provided that inaccurate billing is more akin to a breach of contract claim than it is to a complaint about a public utilities rates or services. As enunciated in *Hodge*, if a public utility customer brings a claim for inaccurate billing, it is properly before the courts; but, if the complaint is that the billing services provided by the public utility are unreasonable, then the complaint is properly brought before PSC. *Id.* at 44 (citing *Iowa Elec. Light and Power Co. v. Ladle*, 430 N.W. 2d 393, 398 (Iowa 1988)). The result in *Hodge* was predicated on the relief sought. *See Id.* at 44.

Next, in tandem with PSC's investigative authority, section 23 permits the fixing of rates and services in the furtherance of public convenience and necessity, the most relevant to Order 44 of all PSC's listed powers. In subsection (a), the statute details the power of PSC to fix rates and services:

> (a) 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 the power to determine and substitute therefore 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 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…

30 V.I.C. § 23. (emphasis added). Even without employing section 41's "liberal interpretation" clause, the plain language of section 23 provides a sizable grant of authority to PSC over the public utilities that it regulates.[20] Not only does section 23 grant PSC the power to review and set rates after an investigation, but it also permits the review of the services of utilities. Notably,

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[20] WAPA cannot in good faith assert that PSC may not exercise its section 23 powers over WAPA; there is no legal basis for this negative inference in the Third Circuit's *Atlantic Tele-Network* opinion. Similarly, in *Rosa v. V.I. Water & Power Auth.*, 32 V.I. 89 (Terr. Ct. 1995), the Territorial Court specifically held that PSC has the power to investigate and correct the services provided by WAPA. *Id.* at 93. Under *Rosa*, PSC has authority to review the nature of the services that WAPA provides. *Id* at 93. This is a far cry from the proposition that the "PSC has no jurisdiction to investigate and correct the services provided by WAPA," cited by counsel as being the holding *Rosa*. (Appellant Br. at 18.) There is simply no legal foundation for such a claim.

subsection 23(a) authorizes PSC to order public utilities to make substantial changes to their facilities in order to provide for the public necessity. Within the context of Order 44, this PSC authority to order utilities to make substantial changes is closely tied to the investigatory powers contained within sections 19 and 20, allowing PSC to mandate that such utilities supply information on plans for expansion so that PSC can review the potential impact.

Ultimately, the power to enjoin WAPA from conducting an RFP process until the requested information is supplied is a power similarly inherent to sections 19, 20, and 23 through section 41. Pragmatically, without the authority to enjoin WAPA, PSC's regulatory power over WAPA is severely curtailed, because absent the power to enjoin, PSC would have difficulty discharging its statutory duty to ensure that "service and facilities [are] reasonably safe and adequate and in all respects just and reasonable." 30 V.I.C. § 2. After all, PSC would not be able to effectively determine what is in the furtherance of the public convenience and necessity under section 23, without the power to investigate under section 20 and compel information under section 19. Any investigation pursuant to sections 19, 20, and 23 would be futile unless, when necessary, PSC enjoined WAPA from acting during the pendency of the investigation. Otherwise, if the results of such an investigation yielded the conclusion that WAPA's undertaking was financially or otherwise unwise, such conclusion would be of little or no value to the ratepayers. The only remedy post-action would be to approve a proposed rate increase under section 23 to defray and spread the increased costs among the ratepayers. PSC should not be forced to wait until after financial harm is sustained when an investigation beforehand can establish that such an action is not in the public's interest. The power to enjoin is necessary and properly implied based on the enumerated provisions in chapter 1.

Finally, as a corollary to PSC's implied power to enjoin, section 25[21] provides PSC with a means of recovering the costs associated with the exercise of its section 20 investigative and section 23 rate-setting powers. As a direct extension of PSC's investigative power, PSC has the authority to issue an order for the payment of compensable expenses. *See Abramson*, 765 F. Supp. at 257 (recognizing this section 25 authority). Order 50 is an exercise of this very power.

In review, PSC's ability to regulate all public utilities described in subsection 1(a) subjects WAPA to the balance of powers contained in chapter 1. The grant of authority in sections 19, 20 and 23, coupled with PSC's power to do what is necessary and proper to carry out its mandate under section 41, supplies PSC with the power to enjoin WAPA's RFP process by issuing an order until the requested information is supplied. The allocation of expenses PSC incurred during the pendency of such a proceeding is similarly permissible.

2. PSC's Power to Enjoin Yields to WAPA's Chapter 5 Protection from Injunction

Having determined that PSC has the implied power to enjoin WAPA, the Court must now resolve the apparent conflict identified by WAPA between this power to enjoin and WAPA's protection from injunctions. Namely, PSC's implied power to enjoin (§§ 1, 19, 20, 23, and 41) and WAPA's protection from PSC's assertion of jurisdiction and the implementation of an injunction (§§ 120 and 121)[22] cannot be harmonized since the provisions concern the ability

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[21] It pertinent part section 25 provides,

> 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 United States 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…

30 V.I.C. § 25.

[22] Section 120 provides that "[a]n injunction shall not be granted to prevent the application of this chapter or any part thereof." 30 V.I.C. § 120. Section 121 reads:

to enjoin WAPA. WAPA argued previously, citing *Creque*, that even if PSC is given extensive powers, sections 120 and 121 prevent PSC from enjoining WAPA's RFP process since they conflict. WAPA's argument is that sections 120 and 121 must prevail over PSC's otherwise existing powers in chapter 1, since they are provisions of specific application and PSC's powers, outside of its limited rate-setting authority in subsection 1(c), are set forth in statutes of general application. PSC does not expressly address WAPA's contentions. Sections 120 and 121, though forceful, are not the ironclad statutes WAPA asserts them to be.[23]

As correctly identified by WAPA, the Third Circuit has provided the analysis that courts should employ when faced with reconciling inconsistent provisions in chapter 5 of title 30 and those in the balance of the Virgin Islands Code. *See Creque*, 803 F. 2d at 92. In *Creque*, the Third Circuit dealt with a conflict between statutes in title 3 and title 30 of the Virgin Islands Code. The first, an enactment concerning the holdover of appointments which applied generally to government instrumentalities, limited the continued service of board members on boards to sixty days past the expiration of a term. *See* V.I. CODE. ANN. tit. 3, § 65a (1995). The second, a chapter 5 provision specific to WAPA, allowed for the continued service by a member of the WAPA board until the appointment and confirmation of a successor. 30 V.I.C. § 103(a). Since

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> *No* officer, board, *commission*, department or other agency or political subdivision *of the United States 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.

30 V.I.C. § 121 (emphasis added).

23 *See Virgin Islands Hotel Ass'n v. V.I. Water & Power Auth.*, 8 V.I. 620 (D.V.I 1972), *aff'd*, 465 F.2d 1272 (3d Cir. 1972) (allowing for an injunction of WAPA's proposed rate increase until such a time due process could be given). Implicitly, the Third Circuit Court of Appeals' decision in *Virgin Islands Hotel Association* erodes some of WAPA's protection from injunctive relief found under section 120. In addition, even WAPA concedes, as it did at oral arguments, that at least the portion of section 121 that precludes any commission from exercising jurisdiction over the fixing of its rates does not prevent PSC from actually fixing rates. That said, sections 120 and 121 are not completely devoid of all meaning. WAPA still enjoys insulation from involvement in its affairs by other government entities, including the office of the Governor. *See e.g., Chiang v. Turnbull*, 43 V.I. 49 (Terr. Ct. 2000).

the duration of the appointment and confirmation process could conceivably exceed sixty days, the Third Circuit Court of Appeals determined that the two statutes could not be reconciled as they addressed the same subject matter. *Creque v. Luis*, 803 F.2d at 95. Thus, the Court of Appeals resorted to the well-accepted rule of statutory construction for resolving statutes in conflict. Relying on *Busic v. United States*, the Third Circuit concluded that the "more specific [provision] will take precedence over the more general." *Creque*, 803 F.2d at 95 (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)). In *Creque*, the court held section 103(a) was more specific than section 65a and thus, the WAPA specific provision, section 103(a) took precedence over the more general provision, section 65a.

Admittedly, sections 120 and 121, as chapter 5 provisions, apply to WAPA only. Yet, as discussed, so do subsections 1(a)(4) and (a)(5) because they are specifically and exclusively descriptive of WAPA; these subsections include WAPA within the definition of public utility[24] as it is used in the balance of chapter 1. This inclusion makes all the enumerated powers of chapter 1 specifically applicable to WAPA. PSC's power to enjoin, however, is not specifically enumerated in chapter 1. Although the power to enjoin exists as a necessarily implied power incidental to PSC's power to investigate in sections 19 and 20, and power to fix rates and services in section 23, such an implied power is of mere general application. Implied powers can never prevail over a specific statutory protection. *See Creque* 803 F.2d at 95. Thus, under *Creque*, WAPA's statutorily mandated protection from injunctions must prevail.

The consequences of this determination are not lost on the Court. With Order 44 invalid, the assessment in Order 50 for the unlawful Order 44 proceeding is similarly invalid. 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 PSC's regulatory power over WAPA

24 All of chapter 1 was made specifically applicable to WAPA by the 1973 amendment to subsection 1(b).

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.

D. WAPA's Statutory Due Process Rights

In addition, the Court must vacate PSC's Order on statutory due process grounds. In its brief, WAPA argues that PSC violated its statutory due process rights by failing to observe the provisions of the Virgin Islands Sunshine Act[25] or to provide it adequate notice and a meaningful hearing. WAPA contends that it received no prior notice that the RFP process would be discussed or considered at the August 9, 2004 PSC meeting. WAPA also insists that the August 9, 2004 meeting did not constitute a formal hearing, which is required under title 30 and that PSC conducted private discussions in violation of the Sunshine Act. Consequently, WAPA asserts that PSC's actions in adopting Orders 44 and 50 violated WAPA's statutory due process rights. A review of the record reveals that PSC did violate WAPA's statutory due process rights by failing to give it adequate advance notice and failing to provide a formal hearing prior to issuing Orders 44 and 50.[26]

1. Formal Procedural Requirements of PSC

While title 30 grants extensive authority to PSC to oversee the operations of WAPA and other public utilities, this authority is far from unfettered. Section 20 states that PSC may conduct investigations and inquiries into utility services either upon the filing of a reasonable complaint or upon its own initiative. 30 V.I.C. § 20. PSC's authority to act on such

[25] Since WAPA did not assert the Sunshine Act basis in petition for reconsideration, the Court cannot consider it now. Arguments articulated for the first time on appeal are outside the scope of this Court's review and should not be considered. 30 V.I.C. §33.

[26] Order 44 was an exercise of authority, while Order 50 was an assessment for that exercise. It follows that if the exercise of authority fails, that the assessment for that exercise shall fail as well. The outcome for the due process inquiry on both Orders, then, is inextricably intertwined.

a. Section 41 Requires a Liberal Interpretation of PSC's Enumerated Chapter 1 Powers

At the outset, it is important to recognize that section 41[17] of title 30 commands the Court to employ a "liberal interpretation" to the powers of PSC; the powers of PSC are not limited to those specifically enumerated as PSC has all powers deemed necessary and proper to carry out its statutorily-mandated functions. *Atlantic Tele-Network Co. v. Pub. Servs. Comm'n of the V.I.,* 841 F.2d 70 (3d. Cir. 1988) and *Abramson v. Georgetown Consulting Group, Inc.*, 765 F. Supp. 255, 260 (D.V.I. 1997) held that the grant of all necessary and proper powers to PSC, as embodied in section 41, expands the significant and broad express delegation of authority to PSC.

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[19] *Hodge* provided that inaccurate billing is more akin to a breach of contract claim than it is to a complaint about a public utilities rates or services. As enunciated in *Hodge*, if a public utility customer brings a claim for inaccurate billing, it is properly before the courts; but, if the complaint is that the billing services provided by the public utility are unreasonable, then the complaint is properly brought before PSC. *Id.* at 44 (citing *Iowa Elec. Light and Power Co. v. Ladle*, 430 N.W. 2d 393, 398 (Iowa 1988)). The result in *Hodge* was predicated on the relief sought. *See Id.* at 44.

Next, in tandem with PSC's investigative authority, section 23 permits the fixing of rates and services in the furtherance of public convenience and necessity, the most relevant to Order 44 of all PSC's listed powers. In subsection (a), the statute details the power of PSC to fix rates and services:

> (a) 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 the power to determine and substitute therefore 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 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…

30 V.I.C. § 23. (emphasis added). Even without employing section 41's "liberal interpretation" clause, the plain language of section 23 provides a sizable grant of authority to PSC over the public utilities that it regulates.[20] Not only does section 23 grant PSC the power to review and set rates after an investigation, but it also permits the review of the services of utilities. Notably,

[20] WAPA cannot in good faith assert that PSC may not exercise its section 23 powers over WAPA; there is no legal basis for this negative inference in the Third Circuit's *Atlantic Tele-Network* opinion. Similarly, in *Rosa v. V.I. Water & Power Auth.*, 32 V.I. 89 (Terr. Ct. 1995), the Territorial Court specifically held that PSC has the power to investigate and correct the services provided by WAPA. *Id.* at 93. Under *Rosa*, PSC has authority to review the nature of the services that WAPA provides. *Id* at 93. This is a far cry from the proposition that the "PSC has no jurisdiction to investigate and correct the services provided by WAPA," cited by counsel as being the holding *Rosa.* (Appellant Br. at 18.) There is simply no legal foundation for such a claim.

subsection 23(a) authorizes PSC to order public utilities to make substantial changes to their facilities in order to provide for the public necessity. Within the context of Order 44, this PSC authority to order utilities to make substantial changes is closely tied to the investigatory powers contained within sections 19 and 20, allowing PSC to mandate that such utilities supply information on plans for expansion so that PSC can review the potential impact.

Ultimately, the power to enjoin WAPA from conducting an RFP process until the requested information is supplied is a power similarly inherent to sections 19, 20, and 23 through section 41. Pragmatically, without the authority to enjoin WAPA, PSC's regulatory power over WAPA is severely curtailed, because absent the power to enjoin, PSC would have difficulty discharging its statutory duty to ensure that "service and facilities [are] reasonably safe and adequate and in all respects just and reasonable." 30 V.I.C. § 2. After all, PSC would not be able to effectively determine what is in the furtherance of the public convenience and necessity under section 23, without the power to investigate under section 20 and compel information under section 19. Any investigation pursuant to sections 19, 20, and 23 would be futile unless, when necessary, PSC enjoined WAPA from acting during the pendency of the investigation. Otherwise, if the results of such an investigation yielded the conclusion that WAPA's undertaking was financially or otherwise unwise, such conclusion would be of little or no value to the ratepayers. The only remedy post-action would be to approve a proposed rate increase under section 23 to defray and spread the increased costs among the ratepayers. PSC should not be forced to wait until after financial harm is sustained when an investigation beforehand can establish that such an action is not in the public's interest. The power to enjoin is necessary and properly implied based on the enumerated provisions in chapter 1.

Finally, as a corollary to PSC's implied power to enjoin, section 25[21] provides PSC with a means of recovering the costs associated with the exercise of its section 20 investigative and section 23 rate-setting powers. As a direct extension of PSC's investigative power, PSC has the authority to issue an order for the payment of compensable expenses. *See Abramson*, 765 F. Supp. at 257 (recognizing this section 25 authority). Order 50 is an exercise of this very power.

In review, PSC's ability to regulate all public utilities described in subsection 1(a) subjects WAPA to the balance of powers contained in chapter 1. The grant of authority in sections 19, 20 and 23, coupled with PSC's power to do what is necessary and proper to carry out its mandate under section 41, supplies PSC with the power to enjoin WAPA's RFP process by issuing an order until the requested information is supplied. The allocation of expenses PSC incurred during the pendency of such a proceeding is similarly permissible.

2. PSC's Power to Enjoin Yields to WAPA's Chapter 5 Protection from Injunction

Having determined that PSC has the implied power to enjoin WAPA, the Court must now resolve the apparent conflict identified by WAPA between this power to enjoin and WAPA's protection from injunctions. Namely, PSC's implied power to enjoin (§§ 1, 19, 20, 23, and 41) and WAPA's protection from PSC's assertion of jurisdiction and the implementation of an injunction (§§ 120 and 121)[22] cannot be harmonized since the provisions concern the ability

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[21] It pertinent part section 25 provides,

> 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 United States 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...

30 V.I.C. § 25.

[22] Section 120 provides that "[a]n injunction shall not be granted to prevent the application of this chapter or any part thereof." 30 V.I.C. § 120. Section 121 reads:

to enjoin WAPA. WAPA argued previously, citing *Creque*, that even if PSC is given extensive powers, sections 120 and 121 prevent PSC from enjoining WAPA's RFP process since they conflict. WAPA's argument is that sections 120 and 121 must prevail over PSC's otherwise existing powers in chapter 1, since they are provisions of specific application and PSC's powers, outside of its limited rate-setting authority in subsection 1(c), are set forth in statutes of general application. PSC does not expressly address WAPA's contentions. Sections 120 and 121, though forceful, are not the ironclad statutes WAPA asserts them to be.[23]

As correctly identified by WAPA, the Third Circuit has provided the analysis that courts should employ when faced with reconciling inconsistent provisions in chapter 5 of title 30 and those in the balance of the Virgin Islands Code. *See Creque*, 803 F. 2d at 92. In *Creque*, the Third Circuit dealt with a conflict between statutes in title 3 and title 30 of the Virgin Islands Code. The first, an enactment concerning the holdover of appointments which applied generally to government instrumentalities, limited the continued service of board members on boards to sixty days past the expiration of a term. *See* V.I. CODE. ANN. tit. 3, § 65a (1995). The second, a chapter 5 provision specific to WAPA, allowed for the continued service by a member of the WAPA board until the appointment and confirmation of a successor. 30 V.I.C. § 103(a). Since

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> *No* officer, board, *commission*, department or other agency or political subdivision *of the United States 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.

30 V.I.C. § 121 (emphasis added).

[23] *See Virgin Islands Hotel Ass'n v. V.I. Water & Power Auth.*, 8 V.I. 620 (D.V.I 1972), *aff'd*, 465 F.2d 1272 (3d Cir. 1972) (allowing for an injunction of WAPA's proposed rate increase until such a time due process could be given). Implicitly, the Third Circuit Court of Appeals' decision in *Virgin Islands Hotel Association* erodes some of WAPA's protection from injunctive relief found under section 120. In addition, even WAPA concedes, as it did at oral arguments, that at least the portion of section 121 that precludes any commission from exercising jurisdiction over the fixing of its rates does not prevent PSC from actually fixing rates. That said, sections 120 and 121 are not completely devoid of all meaning. WAPA still enjoys insulation from involvement in its affairs by other government entities, including the office of the Governor. *See e.g., Chiang v. Turnbull*, 43 V.I. 49 (Terr. Ct. 2000).

the duration of the appointment and confirmation process could conceivably exceed sixty days, the Third Circuit Court of Appeals determined that the two statutes could not be reconciled as they addressed the same subject matter. *Creque v. Luis*, 803 F.2d at 95. Thus, the Court of Appeals resorted to the well-accepted rule of statutory construction for resolving statutes in conflict. Relying on *Busic v. United States*, the Third Circuit concluded that the "more specific [provision] will take precedence over the more general." *Creque*, 803 F.2d at 95 (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)). In *Creque*, the court held section 103(a) was more specific than section 65a and thus, the WAPA specific provision, section 103(a) took precedence over the more general provision, section 65a.

Admittedly, sections 120 and 121, as chapter 5 provisions, apply to WAPA only. Yet, as discussed, so do subsections 1(a)(4) and (a)(5) because they are specifically and exclusively descriptive of WAPA; these subsections include WAPA within the definition of public utility[24] as it is used in the balance of chapter 1. This inclusion makes all the enumerated powers of chapter 1 specifically applicable to WAPA. PSC's power to enjoin, however, is not specifically enumerated in chapter 1. Although the power to enjoin exists as a necessarily implied power incidental to PSC's power to investigate in sections 19 and 20, and power to fix rates and services in section 23, such an implied power is of mere general application. Implied powers can never prevail over a specific statutory protection. *See Creque* 803 F.2d at 95. Thus, under *Creque*, WAPA's statutorily mandated protection from injunctions must prevail.

The consequences of this determination are not lost on the Court. With Order 44 invalid, the assessment in Order 50 for the unlawful Order 44 proceeding is similarly invalid. 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 PSC's regulatory power over WAPA

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24 All of chapter 1 was made specifically applicable to WAPA by the 1973 amendment to subsection 1(b).

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.

D. WAPA's Statutory Due Process Rights

In addition, the Court must vacate PSC's Order on statutory due process grounds. In its brief, WAPA argues that PSC violated its statutory due process rights by failing to observe the provisions of the Virgin Islands Sunshine Act[25] or to provide it adequate notice and a meaningful hearing. WAPA contends that it received no prior notice that the RFP process would be discussed or considered at the August 9, 2004 PSC meeting. WAPA also insists that the August 9, 2004 meeting did not constitute a formal hearing, which is required under title 30 and that PSC conducted private discussions in violation of the Sunshine Act. Consequently, WAPA asserts that PSC's actions in adopting Orders 44 and 50 violated WAPA's statutory due process rights. A review of the record reveals that PSC did violate WAPA's statutory due process rights by failing to give it adequate advance notice and failing to provide a formal hearing prior to issuing Orders 44 and 50.[26]

1. Formal Procedural Requirements of PSC

While title 30 grants extensive authority to PSC to oversee the operations of WAPA and other public utilities, this authority is far from unfettered. Section 20 states that PSC may conduct investigations and inquiries into utility services either upon the filing of a reasonable complaint or upon its own initiative. 30 V.I.C. § 20. PSC's authority to act on such

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25 Since WAPA did not assert the Sunshine Act basis in petition for reconsideration, the Court cannot consider it now. Arguments articulated for the first time on appeal are outside the scope of this Court's review and should not be considered. 30 V.I.C. §33.

26 Order 44 was an exercise of authority, while Order 50 was an assessment for that exercise. It follows that if the exercise of authority fails, that the assessment for that exercise shall fail as well. The outcome for the due process inquiry on both Orders, then, is inextricably intertwined.

investigations is limited by the requirement that it must act only after conducting formal proceedings. *Id.*

The statute provides that "no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing." 30 V.I.C. § 20. Since the record indicates that PSC, in exploring the issues which culminated in the issuance of Orders 44 and 50, was acting on its own initiative, rather than upon a complaint filed by a third-party, PSC was not required to give notice to WAPA *prior to setting* a hearing date. 30 V.I.C. § 21. PSC, however, was nonetheless required to give WAPA "notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined." 30 V.I.C. § 22. This notice must be given at least 10 days in advance of the hearing so that the public utility "shall be entitled to be heard and shall have process to enforce the attendance of witnesses." 30 V.I.C. §§ 22, 23. Consequently, the Court must now focus on what PSC procedures exist for providing notice to utilities of hearings, whether PSC followed those procedures, and whether sufficient notice was actually provided to WAPA prior to the adoption of Orders No. 44 and 50.

a. PSC Regulations

On August 12, 2004, PSC issued Order 44.[27] The Order was approved by a vote of PSC that took place on Monday, August 9, 2004 at the Department of Education Video-Conferencing Center on St. Thomas. The record includes a transcript of the proceedings, including the roster of Commission members who were present. Since PSC adopted an order, the Court must determine whether this proceeding constituted a formal hearing within the meaning of title 30. The Court begins by examining the administrative regulations promulgated by PSC.

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27 Order 50 was issued on August 27, 2004. There is little information in record concerning any procedure afforded prior to the issuance of Order 50.

PSC's regulations can be found in volume 3, at chapters 1, 2 and 5. 3 *Code of U.S. Virgin Islands Rules,* 30 001 001-1, *et seq.* (1999). A review of these regulations indicates that they fail to provide explicit procedures for conducting administrative hearings. Since PSC's regulations themselves fail to detail what procedures the Commission must follow, there is no way for the Court to determine whether or not the proper procedures were actually followed in adopting Orders 44 and 50. If PSC is operating under written procedures and guidelines, such guidelines appear nowhere in either the *Code of U.S. Virgin Islands Rules* or in the record that is before the Court.

b. Notice of Hearing Requirement

The only procedural rule that PSC appears to have formally adopted for itself is that ten days notice be given to a public utility in advance of a formal hearing. *Id.* at § 11-42. This is the same ten-day notice requirement that appears in title 30 at section 22 of the Virgin Islands Code. Therefore, at minimum, PSC is required to give 10 days notice to a public utility prior to holding a formal hearing pertaining to that public utility.

c. Formal Hearing Requirement

As discussed above, title 30 mandates that PSC must give WAPA and other public utilities formal hearings when it acts upon investigations. A formal hearing is an elusive concept. Title 30 does not define what procedures must be followed so that a formal hearing conforms to due process requirements. The Third Circuit Court of Appeals, in assessing the adequacy of WAPA's adherence to its title 30 requirements to provide formal hearings in setting rates, reasoned that:

> The rate fixing procedure created by 30 V.I.C. § 105(a)(12) contemplates a *meaningful* hearing at which interested persons can present their views and present *evidence in support thereof.* Concomitant with such a hearing are the essential requirements of adequate notice, dissemination to the public of the facts and

> figures on which the Authority relies, and an opportunity afforded to those attending the hearing to rebut such facts and figures.

Virgin Islands Hotel Ass'n v. V. I. Water and Power Auth., 465 F. 2d 1272, 1276 (3d Cir. 1972) (emphasis in original). In *Virgin Islands Hotel Ass'n,* the Court of Appeals remanded a case to the trial court when WAPA failed to provide formal hearings to interested ratepayers prior to raising rates. *Id.* After the hearing following remand, the case was again considered by the Court of Appeals, which explicitly reaffirmed this definition of WAPA's formal hearing requirements. *Virgin Islands Hotel Ass'n v. V.I. Water and Power Auth.,* 476 F. 2d 1263, 1265 (3d. Cir. 1973). The Court recognized that it could not scrutinize WAPA's administrative procedures as stringently as federal courts review other administrative bodies given the absence of "specific statutory procedures such as the Administrative Procedure Act." Thus, the Court was compelled to provide WAPA with "greater leeway." *Id.* at 1269.

Likewise, title 30 does not provide specific statutory procedures for PSC when it conducts formal hearings, and this Court will accordingly grant PSC some leeway. However, this Court is persuaded by the Third Circuit's analysis, and holds that title 30 contemplates that PSC provide WAPA and other public utilities with a *meaningful* hearing. At a minimum, a meaningful hearing is one in which a utility is provided adequate notice in accordance with the statute, and is afforded the opportunity to be heard and introduce evidence to support its position.

2. PSC Violated WAPA's Statutory Due Process Rights

The record supports WAPA's contention that PSC's Orders 44 and 50 were not the result of a meaningful hearing and thus violated WAPA's statutory due process rights. Exhibit e of Part 1 of the record is an Agenda, on official PSC letterhead, for PSC's August 9, 2004 special meeting. This document is dated August 4, 2004 and signifies that PSC failed to supply WAPA

10 days advance notice of the meeting agenda as provided under title 30. Furthermore, the Agenda itself bears no mention of Docket 559, Order 44 or Order 50. The only referenced agenda item pertaining to WAPA is Docket 289, which concerned the Levelized Energy Adjustment Charge.

A review of the transcript from the August 9, 2004 meeting shows that while WAPA officials were questioned about the RFP process, these questions were an extension of the ongoing conversations pertaining to Docket 289. At no point in the entire transcript did any member of PSC mention or reference Docket 559, Order 44, or Order 50 by name. There is no evidence whatsoever that would suggest that PSC held a formal hearing on Orders 44 or 50. This constitutes a clear violation of WAPA's statutory due process rights.

Since PSC failed to provide WAPA with adequate notice – notice that Docket 559 would be on the agenda ten days in advance of the August 9, 2004 meeting– any formal action taken with respect to Docket 559 violated WAPA's statutory due process rights. WAPA's rights were further violated when PSC approved Order 44 and Order 50 without first providing WAPA with a formal, meaningful hearing and an opportunity to be heard and introduce evidence. Consequently, both Order 44 and Order 50 are invalid as PSC failed to observe the proper statutory procedures for exercise of its authority.

V. CONCLUSION

PSC has the authority to issue orders and to regulate WAPA as a public utility operating in the United States Virgin Islands. While PSC has the implied power to enjoin WAPA, this power cannot prevail over WAPA's statutorily mandated protection from injunctions. Thus, Order 44 to the extent that it seeks to enjoin WAPA, is invalid. Similarly, as the assessment for Order 44, Order 50 is necessarily invalid as an outgrowth of an unlawful proceeding. Even if WAPA were not protected from injunctions, Orders 44 and 50 would be invalid because PSC is required to observe and provide to WAPA formal notice and due process prior to discharging its authority. The lack of notice to WAPA prior to the issuance of the Orders 44 and 50 renders them similarly invalid.

ATTEST:
Denise Abramsen
Clerk of the Court
By: Delois A. Copeman
Deputy Clerk
Dated: 11/30/06

MARIA M. CABRET
Senior Sitting Judge of the Superior
Court of the Virgin Islands