

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

JEFFREY PROSSER, DAWN PROSSER AND  
JEFFREY MOORHEAD,  
  
Appellants,  
  
v.  
  
PUBLIC SERVICES COMMISSION OF THE UNITED  
STATES VIRGIN ISLANDS,  
  
Appellee.

SX-10-CV-313

APPEAL FROM THE ORDER OF THE  
PUBLIC SERVICES COMMISSION

MEMORANDUM OPINION

**THIS MATTER** came before the Court on Appellants' Appeal from the Public Services Commission's (hereinafter, the "PSC") May 5, 2010 Order Authorizing the Transfer of Control of Virgin Islands Telephone Corp., Innovative Cable STT-STJ, and Innovative Cable STX. On September 7, 2010, a hearing was held on all issues before the Court, including but not limited to jurisdiction issues, proposed-intervenor issues and the merits of the appeal.<sup>1</sup> The Court granted National Rural Utilities Cooperative Finance Corporation (hereinafter, "CFC") and Rural Telephone Finance Cooperative's (hereinafter, "RTFC", and together with CFC, the "Intervenors") Motion to Intervene.<sup>2</sup> Subsequently, the Court heard arguments from Appellants, Appelle, and Intervenors on Appellants' appeal of the PSC's May 5, 2010 Order.

FACTS

On May 5, 2010, the PSC issued an order authorizing the transfer of control of Virgin Islands Telephone Corp., Innovative Cable STT-STJ, and Innovative Cable STX (hereinafter, the "May 5, 2010 Order"). Appellants filed a timely Petition for Reconsideration of the PSC's May 5, 2010 Order. Pursuant to Title 30 of the Virgin Islands Code (hereinafter, "V.I.C."), Section 33, the Petition for Reconsideration was deemed denied. Thereupon, Appellants filed a timely Notice of Appeal with this Court.

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<sup>1</sup> See Title 30 V.I.C. § 35.

<sup>2</sup> See Title 30 V.I.C. § 34.

On August 17, 2010, without the knowledge of this Court granting Appellants' Emergency Motion for Immediate Stay of the PSC's May 5, 2010 Order, the Bankruptcy Court issued its "Final Order: (A) Approving Sale of Group 1 Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests; (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Granting Related Relief. Simultaneously on August 17, 2010, without the knowledge of the Bankruptcy Court's findings/rulings, this Court granted Appellants' Emergency Motion for Immediate Stay of the PSC's May 5, 2010 Order. The matter was then scheduled for a hearing on the merits on September 7, 2010.

### **DISCUSSION**

#### **Public Services Commission**

The Public Services Commission (hereinafter, the "PSC") is a regulatory agency established under Title 3 V.I.C. § 237. According to the PSC's website, the PSC's duty is to set rates that provide regulated utilities an opportunity to earn a return on their investment in order for them to provide adequate and reliable service and that are reasonable for the customer. (*See also* Title 30, Chapter 1 of the Virgin Islands Code.) The PSC also seeks to help consumers better understand its functions and how they can participate in the rate-making process. The PSC has regulatory jurisdiction over the following utilities: Virgin Islands Telephone Company (also known as Innovative Telephone) for local telephone service; Virgin Islands Water and Power Authority for electric and water service; St. Croix Cable TV (also known as Innovative Cable) for cable television service, limited to service issues; St. Thomas/St. John Cable TV (also known as Innovative Cable) for cable television service, limited to service issues; Transportation

Services of St. John for passenger ferryboat service; Varlack Ventures, Inc. for passenger ferryboat service; COCOTS (Customer Owned Coin Operated Telephones), limited to service issues; and Virgin Islands Waste Management Authority for solid waste and waste water management, limited to rate settings. A regulated electric, water, telephone, cable TV or ferryboat company must have the PSC's permission prior to changing its rates. See [www.psc.gov.vi/aboutpsc.html](http://www.psc.gov.vi/aboutpsc.html). Currently, the PSC operates under the provisions of Title 30, Chapter 1 of the Virgin Islands Code.

### Jurisdiction

The Court inquired of the Parties whether it had jurisdiction over this matter despite Title 30 V.I.C. § 34.<sup>3</sup> The Court's main concern was that the pre-emption provisions set forth in the

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<sup>3</sup> Title 30 V.I.C. § 34 provides:

(a) The District Court of the United States Virgin Islands shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility, or any other person or corporation affected by any final order or decision of the Commission, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States Virgin Islands, a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: provided, that the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court shall always be deemed open for the hearings thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Revised Organic Act of 1954, as amended, would prevent this Court from having jurisdiction since this matter is before the Bankruptcy Court. At the hearing, all parties conceded to the Court's jurisdiction to hear this matter. Accordingly, the Court will exercise jurisdiction over this matter.

**Petition for Reconsideration**

At the hearing, Appellants notified the Court that they just filed a Motion to Remand because they realized on Friday, September 3, 2010, that the PSC never issued an order addressing their Petition for Reconsideration. Therefore, Appellants argue that the record before the Court is not complete, and this matter is not "ripe" for review and request the Court to remand this matter to the PSC to issue a final order on their Petition for Reconsideration before the Court rule on the appeal. Appellants cite to 5 U.S.C. § 555, the Administrative Procedure Act, to support their argument that the PSC is required to issue a statement of findings of fact and conclusions in regard to Appellants' Petition for Reconsideration. The Administrative Procedure Act is a federal act that governs the operation of administrative agencies of the federal government of the United States. Throughout the appeal process, Appellants repeatedly argued that this matter deals with a local agency and local statutes, which makes it properly before this Court rather than the federal District Court. The Court continues to find the local statutes applicable in this matter, and not the federal statutes.

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(b) Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Title 30 V.I.C. § 33 clearly provides that the PSC shall either grant or deny the Petition for Reconsideration within thirty days after filing and that failure by the PSC to act within such period will be deemed a denial of the Petition for Reconsideration.<sup>4</sup> Aside from instructing the PSC to decide on the Petition for Reconsideration within thirty days, the statute does not require the PSC to take any action if the PSC chooses to deny the Petition for Reconsideration by allowing the thirty days to lapse. In fact, the statute specifically deals with the situation where the PSC fails to act within the allotted time – “it is deemed a denial thereof.” Accordingly, the Court finds that Appellants’ Petition for Reconsideration is deemed denied by the PSC pursuant to Title 30 V.I.C. § 33 and is appropriate for appeal.

#### **Completeness of Record**

Appellants also contend that the records before the Court is not complete; and, therefore, the Court should remand this matter to the PSC to complete the record. Appellants further contend that in their Petition for Reconsideration to the PSC, they included not only issues previously raised before the PSC but also new issues. Appellants further argued that the PSC’s failure to address and issue a statement explaining its decision of Appellants’ Petition for

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<sup>4</sup> Title 30 V.I.C. § 33 provides:

Any public utility or any other person or corporation affected by any final order or decision of the Commission may, within thirty days after publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility, or other person or corporation, shall in any court urge or rely on any ground not so set forth in said application. The Commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the Commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the Commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: provided, that upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined. *Emphasis added.*

Reconsideration containing the new issues caused the record from the PSC to be incomplete. On September 13, 2010, Appellants filed an Informative Motion, informing the Court that “[n]one of the material contained in the Petition for Reconsideration included new information as previously represented.”

Assuming *arguendo* new issues were contained in Appellants’ Petition for Reconsideration, the PSC did not need to consider any of the new issues raised. The PSC only needed to reconsider its May 5, 2010 Order and may do so by statutory denial. According to Title 30 V.I.C. § 33, “Any public utility or other person or corporation affected by any final order or decision of the Commission may, within thirty days after publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration.”<sup>5</sup> As mentioned above, Appellants’ Petition for Reconsideration was deemed statutorily denied. Accordingly, the Court finds the record in front the Court to be complete.

#### Order Granting Stay

On August 17, 2010, this Court issued an Order granting Appellants’ Emergency Motion for Immediate Stay of the PSC’s May 5, 2010 Order. According to Title 30 V.I.C. § 33, “[t]he filing of such an application [for reconsideration] shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application.” Ergo, when Appellants filed their Petition for Reconsideration, the PSC’s May 5, 2010 Order was automatically stayed until the PSC makes a decision on Appellants’ Petition for

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<sup>5</sup> In *Worbetz v. Ward North America, Inc.*, the Third Circuit stated that “[A] motion for reconsideration may not be used as a means to argue new facts or issues that were not presented to the court in the context of the matter previously decided.” 54 Fed.Appx. 526, 533 (2002) (“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.”).

Reconsideration, or the matter is statutorily denied. Once Appellants' Petition for Reconsideration was deemed statutorily denied, the automatic stay is lifted. However, Title 30 V.I.C. § 36 provides that, "if in any petition made to the said Court appealing from an order or decision of the Commission it be alleged that substantial and irreparable financial or property loss would be occasioned to the petitioner by the operation of the said order pending the determination of the said appeal, the Court shall set a time and place for hearing upon the said allegation after not less than three days' notice to the Commission (during which period the execution of the order or decision shall be stayed), and the said Court may then, upon a clear showing of irreparable and substantial financial or property loss as alleged, suspend the effective date of the said order."<sup>6</sup>

In their Notice of Appeal, Appellants alleged that they will suffer substantial and irreparable financial loss by the operation of the PSC's May 5, 2010 Order. Consequently, on August 17, 2010, the Court granted immediate stay of the PSC's May 5, 2010 Order and ordered that no transfer of control should take place until further notice of this Court. The Court found it to be impractical for the transfer of control to consummate while this matter was pending on

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<sup>6</sup> Title 30 V.I.C. § 36 provides

All orders and decisions of the Commission shall remain in full effect, except as provided in Section 33 of this title, unless and until they are suspended or rescinded by the Commission or are vacated by lawful order of the District Court of the United States Virgin Islands: provided, that if in any petition made to the said court appealing from an order or decision of the Commission it be alleged that substantial and irreparable financial or property loss would be occasioned to the petitioner by the operation of the said order pending the determination of the said appeal, the court shall set a time and place for hearing upon the said allegation after not less than three days' notice to the Commission (during which period the execution of the order or decision shall be stayed), and the said court may then, upon a clear showing of irreparable and substantial financial or property loss as alleged, suspend the effective date of the said order. No such suspension shall be for a greater period than sixty days without further order after notice or hearing by the court. In the event of the issuance of an order suspending the operation of any order of the Commission, the court may include therein such provision as it deems advisable for the preservation of records or accounts and the impounding or otherwise securing of moneys necessary to give effect to the order of the Commission in the event the said order is sustained.

appeal. Thereafter, in compliance with Title 30 V.I.C. § 36, the Court scheduled the September 7, 2010 hearing for all the parties to present their arguments. At the September 7, 2010 hearing, the Court found that Appellants failed to provide a clear showing of irreparable and substantial financial or property loss as alleged. Accordingly, this Court's August 17, 2010 Order granting Appellants' Motion for Immediate Stay of the PSC's May 5, 2010 Order will be vacated.

### **Merits of the Appeal**

On July 7, 2010, Appellants filed a timely appeal from the PSC's May 5, 2010 Order. "In the determination of any appeal from an order or decision of the Commission," Title 30 V.I.C. § 35 provides that "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." Hence, the Court cannot disturb the PSC's findings of facts unless it appears to be arbitrary, capricious or procured through fraud, or there are some questions of law. Black's Law Dictionary's definitions of the following key terms: *arbitrary*: (1) Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. (2) (Of a judicial decision) founded on prejudice or preference rather on reason or fact; *capricious*: (1) (Of a person) characterized by or guided by unpredictable or impulsive behavior. (2) (Of a decree) contrary to the evidence or established rules of law; *fraud*: (1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. (2) A misrepresentation made recklessly without belief in its truth to induce another person to act. (3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. (4) unconscionable

dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain. BLACK'S LAW DICTIONARY (8th ed. 2004).

When reviewing the record in this matter, the Court looks for any indication that the PSC's findings of facts and conclusions were arbitrary, capricious, or procured through fraud.<sup>7</sup> The Court finds that the PSC made its findings and authorized the transfer of control based upon the testimony, exhibits, and cross-examinations by the parties to this proceeding, the Report and Recommendations of the Hearing Examiner, and the complete record of the proceeding. There is nothing in the record that suggests that the PSC's findings of facts and conclusions were arbitrary, capricious, or procured through fraud. Even though the issues presented by Appellants raise the eyebrows of the Court, the Court, pursuant to Title 30 V.I.C. § 35<sup>8</sup> and § 41, is handcuffed from pursuing such issues.

Title 30 V.I.C. § 41 provides that "[T]he provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific

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<sup>7</sup> In the PSC's May 5, 2010 Order, the PSC found that (1) the proposed transfer of control of Virgin Islands Telephone Corp., doing business as Innovative Telephone (hereinafter, "VITELCO"), from Stanford Springel, as Chapter 11 Trustee for the Bankruptcy Estate of Innovative Communication Corporation to CFC meets the public interest pursuant to Title 30 V.I.C. § 43(a); (2) the proposed transfer of control agreement submitted by the parties on February 26, 2010 addresses the needs of the Virgin Islands telecommunications today and should replace the 1989 Settlement Agreement; (3) the proposed transfer of control will not adversely affect VITELCO's operations or rates; (4) the approval of transfers of control of Caribbean Communications Corp., doing business as Innovative Cable TV St. Thomas-St. John (hereinafter, "Innovative Cable STT-STJ"), and St. Croix Cable TV, Inc., doing business as Innovative Cable St. Croix (hereinafter, "Innovative Cable STX" and collectively with Innovative Cable STT-STJ, the "Cable Companies") from Stanford Springel, as Chapter 11 Trustee for the Bankruptcy Estate of Innovative Communication Corporation to CFC pursuant to Title 30 V.I.C. § 313 will benefit the U.S. Virgin Islands as compared to other available alternatives; and (5) after the transfer of control, CFC must seek the PSC's approval for any change in rates, rate base and the accounting treatment of the assets and liabilities of VITELCO and the Cable Companies in accordance with the proposed transfer of control agreement submitted on February 26, 2010.

<sup>8</sup> As mentioned previously, Title 30 V.I.C. § 35 provides that "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."

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.”<sup>9</sup> At the hearing, Appellants contested Mr. Steven Lilly’s authority to sign the Transfer of Control Agreement. Again, the Court will refer to Title 30 V.I.C. § 41, which also provides that “[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.” For the foregoing reason, the Court deems the PSC’s findings of facts to be conclusive and finds the PSC to be in substantial compliance with the requirements of Title 30. Appellants did not raise any other questions of law in their appeal. If the Court is to review additional questions of law, the Court will continue to follow the guidance of Title 30 V.I.C. § 41.

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<sup>9</sup> Title 30 V.I.C. § 41 provides:

“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.”

CONCLUSION

The Court finds the PSC's findings of facts and conclusions in its May 5, 2010 Order were not arbitrary, capricious, or procured through fraud. Accordingly, the Court will dismiss Appellants appeal and affirm the PSC's May 5, 2010 Order and vacate this Court's August 17, 2010 Order granting Appellants' Motion for Immediate Stay of the PSC's May 5, 2010 Order.

DONE and so ORDERED this 14<sup>th</sup> day of September, 2010.

ATTEST:

Venetia Harvey-Velazquez  
Clerk of the Court

By: *Venetia Harvey-Velazquez*  
~~Deputy Clerk~~  
Dated: 9/14/10

*Harold W. L. Willocks*  
HAROLD W. L. WILLOCKS  
Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY  
This 14<sup>th</sup> day of Sept 20 10  
VENETIA H. VELAZQUEZ, ESQ.  
CLERK OF THE COURT

By *[Signature]* Court Clerk II