

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

**VIRGIN ISLANDS WATER & POWER
AUTHORITY,**

Appellant,

v.

**VIRGIN ISLANDS PUBLIC SERVICES
COMMISSION**

Appellee.

CIVIL NO. 798/1998

NOT FOR PUBLICATION

APPEAL

COUNSEL:

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CABRET, MARIA M., Presiding Judge

MEMORANDUM OPINION

(Filed February 3, 2006)

THIS MATTER is before the Court on the challenge of Appellant Virgin Islands Water and Power Authority [hereinafter "WAPA"] to the July 17, 1998 Order of Appellee Public Services Commission [hereinafter "PSC"]. The primary issue on appeal is whether the PSC had subject matter jurisdiction to hear a customer complaint concerning the accuracy of a WAPA bill. Having considered Appellant's Brief, Appellee's Reply Brief and the record herein, the

PSC's July 17, 1998 Order shall be vacated because the PSC lacked subject matter jurisdiction to hear this dispute.

I. FACTS

On November 5, 1994, WAPA installed a 1 inch meter for potable water service at Good Hope Community Town House [hereinafter "Good Hope"]. The 1 inch meter replaced a 5/8 inch meter which WAPA claimed was faulty and did not properly record water usage. Good Hope's water bill increased substantially after installation of the 1 inch meter and on July 31, 1995, Good Hope filed a complaint with the PSC alleging that WAPA's billings were inaccurate, unfair, and unjust due to either a faulty meter or a leak caused by WAPA. After filing the Complaint, Good Hope continued to receive potable water service and monthly bills, but failed to make any payments. On January 18, 1997, WAPA installed a 2 inch meter at Good Hope pursuant to a request from Good Hope. Good Hope stopped using the 1 inch meter after the 2 inch meter was installed. WAPA terminated service on the 1 inch meter for non-payment in May of 1997.

Subsequently, the PSC appointed a Hearing Examiner to consider the Complaint filed by Good Hope. The Hearing Examiner conducted hearings on July 8, August 27, and August 28, 1997. On January 13, 1998 the Hearing Examiner determined that the 1 inch meter was defective and recommended an adjustment of charges for the 1 inch meter over the two-year period from January 1995 to January 1997. On July 17, 1998, the PSC adopted the report of the Hearing Examiner. WAPA then filed a motion for reconsideration on August 14, 1998, which was deemed denied thirty days later by operation of title 30, section 33, of the Virgin Islands

Code, when the PSC failed to act on the application for reconsideration.¹ WAPA filed a Petition for Writ of Review on October 26, 1998. Pursuant to title 30, section 34, the Court granted WAPA an appeal, treating WAPA's Petition as notice of an appeal.

II. STANDARD OF REVIEW

The Virgin Islands Code provides that:

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). The arbitrary and capricious standard considers whether the order being reviewed is supported by a rational factual basis; this does not mean that a court can substitute its judgment for that of an agency, "but that the agency action may be set aside only where it is not supported by any rational basis." *Branch v. Bryan*, 18 V.I. 54, 59 (D.V.I. 1980) (citing *N.L.R.B. v. Jas. H. Mathews & Co.*, 342 F.2d 129, 131 (3d. Cir. 1965)). As for conclusions of law, however, this Court's review is plenary. See *Gov't of the Virgin Islands v. Hatchette*, 182 F. Supp. 2d 468, 470 (D.V.I. App. Div. 2002).

III. DISCUSSION

WAPA advances two arguments on appeal. First, WAPA asserts that the PSC lacked jurisdiction to hear customer complaints regarding challenges of WAPA's billing. Second,

¹ Section 33 provides, in relevant part:

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.

V.I. CODE ANN. tit. 30, § 33 (1998).

WAPA argues that the Hearing Examiner was arbitrary and capricious in finding that the 1 inch meter was unreliable and faulty, and thus, WAPA was required to discount Good Hope's bills.² The PSC replies that it does have subject matter jurisdiction over such disputes and that the Hearing Examiner's order, and the PSC's adoption thereof, was neither arbitrary nor capricious.

WAPA asserts that the PSC's jurisdiction is limited to matters where the customer alleges that WAPA was unjust, unreasonable or discriminatory in the application of its rates, services, or times and conditions of payment. In support of its argument WAPA cites *V.I. Water & Power Authority v. Hodge*, 35 V.I. 40 (Terr. Ct. 1996). In *Hodge*, the plaintiff, Hodge, filed a complaint with the PSC alleging that her utility bills were incorrect and that her water meter was possibly giving false readings. The PSC rendered a final decision against Hodge, which Hodge did not appeal. Hodge was then sued in court by WAPA for failure to pay her water bill. WAPA moved for summary judgment arguing that Hodge was collaterally estopped from contesting the action based on the PSC's prior determination. The court denied WAPA's motion for summary judgment, and remanded the matter to the PSC for dismissal because the PSC had lacked subject matter jurisdiction to hear Hodge's complaint. The court reasoned that Hodge's complaint merely alleged that her bills were inaccurate and not that her rates, services, or times and conditions of payment were unjust, unreasonable or discriminatory.

Hodge relied on a case from the Supreme Court of Iowa, *Iowa Elec. Light and Power Co. v. Ladle*, 430 N.W. 2d. 393 (Iowa 1988), which established seemingly clear jurisdictional lines between cases properly before the Iowa Utilities Board and those properly before the court. The Supreme Court of Iowa indicated that customer complaints about alleged billing overcharges are properly before the courts, while customer complaints about the reasonableness of a utility

² Because of the disposition of the question of subject matter jurisdiction, the Court does not reach this issue.

company's rates or on other rate-setting technical-type grounds³ are properly before the utilities commission. *Id.* at 398. Jurisdiction of a utilities commission over subject matter is predicated on the type of relief sought. *Hodge*, 35 V.I. at 44.

In the case at hand, the PSC strongly objects to WAPA's assertion that its dispute with Good Hope was simply a billing dispute. The PSC distinguishes *Hodge* from the present case by arguing that here, Good Hope was seeking relief from unreasonable charges or services, not from inaccurate billing. The PSC relies on several sections from title 30, which provided at the time and in relevant part that:

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, *charges, 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, the Commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient.

V.I. CODE ANN. tit. 30, § 20 (1998) (emphasis added). The PSC argues that this statute gives it clear authority over Good Hope's complaint, because Good Hope was asserting a claim that WAPA's charges and services were unreasonable due to WAPA's alleged use of a faulty meter to charge for its services. The PSC contends that it has specific authority to review the reasonableness of *all aspects* related to charges provided by title 30, section 2.⁴ The PSC also

³ According to the Iowa Supreme Court, the discriminatory nature of the rates may also be challenged before the commission. *Oliver v. Iowa Power & Light Co.*, 183 N.W.2d 687, 689 (Iowa 1971) (citing *Spintman v. Chesapeake & Potomac Tel. Co.*, 255 A.2d 304 (Md. 1969)).

⁴ Section 2 of title 30 is entitled "Just and reasonable rates and services." It reads as follows:
Every public utility doing business within the United States Virgin Islands is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished, or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby

claims to have the authority to adjust rates and charges, stemming from title 30, section 23.⁵ Finally, the PSC relies on title 30, section 41, which states that the provisions of the statute giving the PSC its authority should be liberally construed to accomplish its purpose. Thus, the PSC concludes that it had subject matter jurisdiction over the dispute.

Contrary to the PSC's contention, title 30, section 20, as it applied at the time, does not give the PSC authority over the present dispute. Good Hope's claim is not that WAPA charges too much per gallon for its water or that its system of measuring water consumption is somehow unreasonable, inequitable or discriminatory. Nor is Good Hope seeking to have WAPA's rates or metering system changed. Good Hope simply alleged that the 1 inch meter was broken and produced an erroneous bill. In sum, Good Hope's claim that the bill was inaccurate does not assert that the service or rates employed were in any way unfair, but rather, that an error was made. Such a claim falls outside of the purpose of title 30, section 20, or any of the PSC's other

declared unlawful. Every public utility is hereby required to obey the lawful orders of the Commission.

V.I. CODE ANN. tit 30, § 2 (1998).

⁵ Subsection 23(a) of title 30, is entitled "Power of Commission to fix rates and services." It provides:

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 power to determine and substitute therefor 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 the 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, as provided in section 22 of this title.

enumerated powers,⁶ and is not within the scope of the PSC's subject matter jurisdiction, even upon liberal construction as required by title 30, section 41.

While title 30, section 20, has since been amended, with the Legislature delegating to the PSC the authority to investigate and issue orders concerning inaccurate or erroneous billing, the amendment occurred in 2001, long after the Hearing Examiner issued the order disputed here.⁷ Thus, the PSC Order must be vacated because at the time of the issuance of the hearing examiner's order, the PSC had no subject matter jurisdiction. Having arrived at this determination, the Court will not address WAPA's secondary argument that the Hearing Examiner's decision, and the PSC adoption thereof, was arbitrary and capricious.

IV. CONCLUSION

During the course of the administrative proceedings in this matter, the PSC lacked the authority to investigate and adjust inaccurate bills for public utility services. Though the Legislature has since delegated this authority to the PSC, this new authority will not be read to

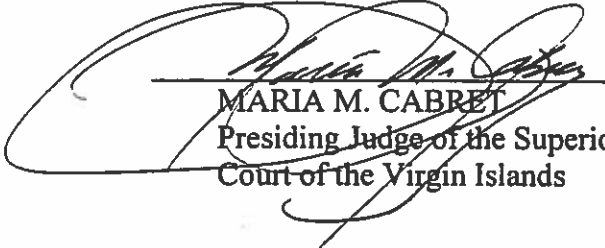
⁶ The PSC's power to fix rates and services under section 23 is limited by its power to investigate. Based on a plain reading of section 23, the PSC may not fix or alter what it may not investigate, as any authority contained in section 23, is subject to the operative language, "[i]f upon such investigation," referring to the PSC's power to investigate in section 20. 30 V.I.C. § 23. Similarly deficient in furnishing grounds for the adjustment of inaccurate bills, section 2 merely contains the obligations of public utilities. 30 V.I.C. § 2.

⁷ In 2001, the statute was amended by Act No. 6402, adding a subsection (b), and designating the former language as subsection (a). Act No. 6481 of the same year also amended the former language of what was now subsection (a). The statute, as amended, extends the PSC's subject matter jurisdiction to cover inaccurate billing and reads as follows.

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 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.

V.I.CODE ANN tit 30, § 20(a) (2005 Supp.) (emphasis added). There is no indication in Act No. 6481 that the Legislature intended the amendment to have a retroactive effect. Thus, the grant of authority to investigate inaccurate billing does not assist the PSC on this appeal.

save actions of the PSC that were previously outside the authority of the PSC to regulate. Thus, the PSC Order adjusting Good Hope's bills will be vacated and the case shall be remanded to the PSC with instructions to dismiss the complaint for lack of subject matter jurisdiction, consistent with the reasoning in this opinion.


MARIA M. CABRET
Presiding Judge of the Superior
Court of the Virgin Islands

ATTEST

Denise Abramsen

Clerk of the Court

By: 
Court Clerk

Dated: 2/3/06