The Virgin Islands Consortium

WAPA Files Suit Against APR Energy in Wrong Court; APR Seeks Dismissal

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An APR Energy generation unit at the Harley Power Plant in St. Thomas. By. APR ENERGY

A $19.1 million lawsuit filed by the V.I. Water and Power Authority against APR Energy, a firm whose relationship with WAPA dates back 2013, was filed in the wrong court according to a contract the parties signed, which mandates that such actions be filed in the United States District Court for the Southern District of New York, or "if such court lacks jurisdiction, in the Supreme Court of the State of New York in New York County," according to paragraph 28 of the agreement.

APR Energy's relationship with WAPA dates back to 2013, when APR acquired General Electric International (GEI), a subsidiary of General Electric which in 2012 had entered into an agreement with WAPA.

WAPA filed its suit in the Superior Court of the Virgin Islands on January 20, 2021.

On March 10, 2020 APR Energy announced it would suspend power generation services to WAPA on March 11 following a default in payments. WAPA at the time was said to owe APR millions of dollars.

"APR Energy has been reliably and successfully providing the citizens of St. Thomas with electricity for over eight years, so it is with regret APR Energy announces the suspension of its operations effective Wednesday, March 11, 2020," the company said in a release provided to the Consortium at the time.

Relative to the latest court action, the 2012 agreement states, "Each of the Parties hereby accepts and consents to, generally and unconditionally, the jurisdiction of the aforesaid courts and . . . irrevocably waives any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Contract brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum."

The 2012 contract between WAPA and GEI, which was acquired by APR Energy, was for "the rental of certain power generation equipment, water treatment systems, and related provision of services, wherein GE agreed to lease power generation equipment to WAPA."

APR Energy and Power Rental OpCo LLC, are asking the District Court of the Virgin Islands to readdress the case to New York, or dismiss the suit altogether, with APR alleging that WAPA's suit — aside from being filed in the wrong court — lacks merit to move forward.

APR contends that the WAPA suit — which sees the authority seeking $19.1 million in relief for APR's alleged "failure to convert Units 26 and 27 to burn [liquid petroleum gas] and the [resulting] unplanned outages due to unreliable service — was filed without WAPA first complying with the conditions set forth in paragraph 28 (a) of the Rental Agreement, which also calls for the parties to settle any controversies, disputes or differences, if not amicably, "by senior management of the Parties for resolution."

Paragraph 28 (a) adds, "In the event the dispute has not been resolved within forty-five days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party may, subject to limitations and exclusions of liability and remedies herein, upon ten days notice to the other Party, pursue their remedies at law."

APR Energy and OpCo contend that though power generation services consisting of electrical power services for the citizens and residents of the USVI were provided since 2013, over time, WAPA failed to make the monthly rental payments as required under the rental agreement.

"As of May 1, 2019, the total amount due and owing by WAPA to OpCo under the Rental Agreement was $14,291,986.00, which included $981,015.00 of accrued but unpaid interest. Under the terms of the Thirteenth Change Order, WAPA agreed to release Defendants from “any and all claim(s) by WAPA in connection with WAPA’s use of diesel fuel instead of propane” and in exchange Defendants agreed to release “WAPA with respect to all amounts owed prior to the effective date of this Thirteenth Change Order pursuant to the Contract other than the Agreed Contract Arrearage,” APR and OpCo contend.

Additionally, defendants APR Energy and OpCo agreed to reduce WAPA’s then outstanding balance to $9,310,971.00, and to release WAPA from its obligations to pay an additional $4,981,015.00 in consideration for WAPA releasing the defendants.

"Because the release contained in the Thirteenth Change Order contradicts the allegations made by Plaintiff... the Thirteenth Change Order is the controlling document and Plaintiff’s allegations should not be taken as true. It is well established that when the terms of an attached contract conflict with the allegations of the complaint, the contract controls to the extent the terms of an attached contract conflict with the allegations of the complaint. Matusovsky v. Merrill Lynch, Pierce & Smith, Inc., 186 F. Supp. 2d 397, 400 (D.C.N.Y. 2002) (emphasis added).

"In such situations, “[t]he court is not bound to accept the pleader’s allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given to the material," argued APR Energy and OpCo.