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Office of The Senate President Shawn-Michael Malone

August 28, 2013

Honorable John P. de Jongh, Jr.
Governor of the US Virgin Islands
Government House
Charlotte Amalie, V.I. 00802

Subject: Recommendations on the "Fourth Amendment Agreement" between the Government of the Virgin Islands and HOVENSA

Dear Governor de Jongh:

I thank you for your willingness to consider the concerns of the Virgin Islands Legislature in regard to the Fourth Amendment Agreement. I have provided herein the following summation of major areas of concern in regard to the Fourth Amendment Agreement between the Government of the Virgin Islands and Hovensa with a view towards ultimately achieving a mutually beneficial compact:

- It is recommended that Section 3(a) be removed, which suspends HOVENSA's obligation under Section 3 of the Third Extension Agreement to bid annually to supply the fuel needs of WAPA to continue.
- Section 3(b) reducing HOVENSA's obligation under Section 7 of the Third Extension Agreement to make payments in lieu of property taxes should be removed - we simply cannot afford the luxury of allowing such a reduction in revenues to the General Fund. In fact, I am sure you will agree that instead, we need an immediate cash infusion. Moreover, HOVENSA should not be allowed to profit from its breach.
- In the event such a reduction in payments in lieu of property taxes from HOVENSA is considered, we would require support from Hess Oil for the proposed \$7 million tax deferral via one of the following options: 1) An Escrow Arrangement, held by a Trustee for the benefit of the USVI; 2) A Bank Letter of Credit from Hess for the benefit of the USVI; or 3) An unconditional Guarantee from Hess for the benefit of the USVI. Further, any of these options selected by Hess Oil must include a provision whereby the \$7 million deferred tax payments at interest rate established pursuant to Title 11 V.I.C. section 951.

- It is also difficult to support the Government forbearance from the collection of import duties and other taxes without knowing the estimated collection. The Senate would need to be provided with information documenting such costs in order for us to make a prudent and fully informed decision.
- Section 4(a)(ii) Making fuels available to the Government and public at the HOVENSA loading rack should be the same as 4(a)(i) available storage for sufficient fuels to meet the local needs of St. Croix, which is August 15, 2019 instead of March 31, 2014;
- Section 4(b)(i) should read equal to or greater – not lesser- of (1) 20% of the gross sales proceeds and (2) \$50 million;
- Section 5 Termination and Discharge Upon Sale certainly requires a legal opinion. This provision must be very carefully drafted as it now exists, it would extinguish the Government's right to enforce against a breach of the Fourth Agreement.
- It is also strongly recommended that the governor aggressively seek to obtain control and ownership of the \$5 million now held in the Escrow Account which resulted from civil penalties paid by HOVENSA.
- There must be a provision in the agreement that expressly reserves the Government's right to take legal action in the event of breach of contract and an expressed covenant stating that any new agreement may not be construed or interpreted as a waiver or discharge of the HOVENSA's obligation to operate the refinery until 2002.

Other concerns include:

- **Health and Environment** – The Administration should ensure, through close collaboration with the EPA, DPNR and others, that HOVENSA remains fully responsible for the cleanup of the St. Croix environment as specified in the EPA's consent decree.
- **Use of the HOVENSA Dock Facilities:** It is recommend that HOVENSA allow the USVI to use the HOVENSA docks for non-oil alternative uses. Such uses would include, but not be limited, to the transshipment of other goods between the U.S. states, the Caribbean and other areas throughout the world. This would enable the USVI to further develop domestic and international trade and to take advantage of our strategic location and deep water ports. Given the recessionary environment described above, our request for access to the HOVENSA docks to stimulate trade and the transshipment of non-petroleum products is both timely and critical.
- **Hold HOVENSA accountable for its share of unpaid Unemployment Insurance:** The USVI Government issued \$80 million in Unemployment Insurance tax breaks to local businesses over a period of ten consecutive years. As the largest private sector employer, HOVENSA, LLC and its' subcontractors benefitted largely from these tax breaks, and contributed to the trust fund's insolvency.

When HOVENSA, LLC closed its doors, the company estimated the cost of unemployment compensation for the affected employees and knew the government would have to borrow money to pay all these claims. Hence with a view toward exacting fairness upon existing employers, HOVENSA must be held accountable for their share of the loan, which is approximately \$32 million.

- **Expand search for a buyer:** Limiting HOVENSA's search for a buyer that will resume oil refinery operations is problematic. The parties should have agreed to make the facility available to a buyer who will put it to its "highest and best" use whatever that may be.
- **Selection of bank in the event of sale:** As it pertains to the possible sale of the refinery to a company that would resume oil refining operations, the Government in the proposed "Agreement" gives carte blanche to HOVENSA to select an investment bank to conduct a "Bonafide Sales Process". This is a critical aspect of the Agreement, and yet there is no provision in the proposed "Agreement" for the Government to review, or give its consent to the investment Bank selected by HOVENSA. Such a critical selection should not be left solely to HOVENSA. There is also a provision in the Agreement that the Government, prior to a sale of the refinery, will give the investment bank, selected solely by HOVENSA, possible areas of modification of the current 3rd Amendment & Concession Agreement, which would then be presented to prospective buyers. This provision is also problematic.

It is important for us to emphasize that the Government's primary contribution to the sales negotiations should be the insistence that the health of the residents is given paramount consideration, and that all environmental laws, rules and regulations are adhered to, and further that a reasonable and fair payment in lieu of taxes be paid to the Government as part of a new concession Agreement with the successful buyer.

- **A requirement for financial statements:** We recommend that any Fourth Amendment Agreement we may enter into with HOVENSA include a requirement for the Company to provide the USVI Government with on-going audited financial statements. Needless to say, the HOVENSA financial statements would be fully protected via a Confidentiality Agreement to be entered into between both parties. Having access to such financial information would be mutually beneficial to both HOVENSA and the USVI Government as we can then enjoy a fully transparent relationship with HOVENSA, while HOVENSA would be assured that the USVI, having such information, would be better able to analyze any request for tax concessions.
- **Quantify the concessions and revenues to be paid to the Government under the Fourth Amendment:** Senators and the public require a bottom line figure in this regard.

Finally, with respect to recent statements by HOVENSA regarding its intent to stop providing fuel to the USVI, specifically, St. Croix, I recommend the Administration prepare its legal team to take the company to court to obtain an injunction that forces HOVENSA to honor its contractual obligation to provide fuel under the Agreement.

Further the scare tactics in regard to fuel shortages and the like are very hurtful to our people and our economy and must cease. Alternative sources for fuel can and will be found and numerous suppliers stand ready to provide St. Croix with all the fuel it needs.

While I can't speak to every concern raised by my colleagues, this letter represents a very comprehensive effort to improve any agreement between the VI Government and HOVENSA and I respectfully submit these concerns and suggestions for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Shawn-Michael Malone", with a long horizontal line extending to the right.

Shawn-Michael Malone
President, 30th Legislature of the Virgin Islands

cc: All Senators