

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFERSON COUNTY VISION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA, AND JEFFERSON
UTILITIES, et al.,

Respondents.



CASE NO. 19-0774

BRIEF OF AMICUS CURIAE ROXUL USA, INC. d/b/a ROCKWOOL IN
SUPPORT OF THE DECISION OF THE PUBLIC SERVICE COMMISSION OF WEST
VIRGINIA TO DISMISS CASE NO. 19-0059-W-C

ON APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA'S AUGUST 2, 2019 FINAL ORDER
IN CASE NO. 19-0059-W-C

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Jefferson Utilities, Inc.,
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Jefferson Utilities, Inc.,
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I. INTRODUCTION

Roxul USA, Inc. d/b/a ROCKWOOL (“ROCKWOOL”) submits this brief in support of the August 2, 2019 Order of the Public Service Commission of West Virginia (the “PSC”) pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure.¹ ROCKWOOL urges this Court to affirm the PSC’s decision dismissing Jefferson County Vision, Inc.’s (“JCV”) and Leigh Smith’s formal complaint filed January 22, 2019 against Jefferson Utilities, Inc. (“JUI”).²

II. STATEMENT OF INTEREST

ROCKWOOL is constructing a \$150 million wool insulation manufacturing facility (the “Facility”) on an approximately 130 acre parcel of real property situated in Ranson, West Virginia (the “Site”). ROCKWOOL is a wholly owned subsidiary of ROCKWOOL International A/S, a Danish company that has been operating for over 80 years and is the world’s largest stone wool manufacturer. ROCKWOOL operates North American manufacturing facilities in Byhalia, Mississippi and Milton, Ontario. Upon full operation, the Facility will provide full-time employment to approximately 140-150 people locally in technical and leadership positions, with generous health and dental benefits, including retirement plans. ROCKWOOL estimates the Facility’s annual operational wages and benefits will exceed \$7,000,000. Construction of the Facility will provide over 500 construction jobs with significant wages and benefits. The Facility will also provide significant state and local tax revenues.

¹Pursuant to Rule 30(e) of the West Virginia Rules of Appellate Procedure, ROCKWOOL represents that no counsel for a party to this action authored this brief in whole or in part. The undersigned, who drafted this amicus curiae brief, is a member of Spilman Thomas & Battle, PLLC, and was retained by ROCKWOOL to provide legal services, and the undersigned prepared this amicus curiae brief in that context. Neither a party in this dispute nor counsel for a party in this dispute made a monetary contribution specifically intended to fund the preparation or submission of this brief.

² JCV, alone, filed the instant appeal of the PSC Order.

The Facility is on schedule to begin production equipment installation during the fourth quarter of 2019 and employee recruiting/training in April 2020. The Facility is slated to begin production in late fall 2020. JCV's complaint relates to JUI's water line extension and water storage tank project, which will provide water service to the Facility in addition to benefitting other current and future JUI customers (the "Project"). The PSC granted JUI a certificate for the Project in Jefferson Utilities, Inc., Case No. 18-0657-W-ECN. The water line portion of the Project is substantially complete³ and water service is available to the Facility. Construction of the water storage tank is ongoing, and it will be completed and operational on or about April 1, 2020. Mountaineer Gas Company has completed its construction of gas distribution lines to serve the Facility. The Potomac Edison Company is currently extending electric service to the Facility. ROCKWOOL and the Charles Town Utility Board have submitted an Alternate Mainline Extension Agreement to the PSC for its approval which provides for the construction of a sewer line extension for the provision of sanitary sewer service to the Facility.

This appeal directly and significantly impacts ROCKWOOL. The immediate availability of water service to the Facility is critical to ROCKWOOL's ability to operate its Facility. ROCKWOOL has relied on the PSC's Orders granting, and later upholding, the certificate to JUI for the Project in Case No. 18-0657-W-ECN, and on the PSC's Orders dismissing JCV's complaint in Case No. 19-0059-W-C. A reversal of the PSC's August 2, 2019 Order will cause irreparable harm to ROCKWOOL, and it would severely threaten ROCKWOOL's ability to place the Facility into operation on schedule necessary for ROCKWOOL to meet its obligations to supply its products.

³ The certificate of substantial completion was filed with the PSC in Case No. 18-0657-W-ECN on October 3, 2019. This document is publically available on the PSC's website, which lists the docket entries for this case.

Petitioner's PSC complaint and this appeal are clearly attempts to interfere substantially with ROCKWOOL's use and enjoyment of its property by causing delay, harm and injury to ROCKWOOL through legal actions meant to prevent ROCKWOOL from receiving public water utility service. Petitioner has not hidden its opposition to ROCKWOOL's Facility. The newspaper article attached to Petitioner's January 22, 2019 PSC complaint states "Anti-Rockwool protesters formed the nonprofit Jefferson County Vision . . . JCV has filed four lawsuits aimed at fighting the factory." (JCV Formal Complaint and Request for Interim Relief, Case No. 19-0059-W-C, filed on January 22, 2019, Work Underway in Shenandoah Junction on Rockwool Water Line, attached thereto, at 3).

Reversal of the PSC's Orders would further Petitioner's attempt to use the PSC regulatory process improperly to not only harm ROCKWOOL, but also to frustrate and delay the benefits of employment opportunities and tax revenues to the state and local area. Therefore, ROCKWOOL joins Respondents in seeking affirmation of the PSC's August 2, 2019 Order.

III. ARGUMENT

A. The standard of review.

This Court has established the standard of review of final orders of the PSC as follows:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

Syl. pt. 1, Central West Virginia Refuse, Inc. v. Public Service Comm'n of W. Va., 190 W.Va. 416, 438 S.E.2d 596 (1993). Accordingly, this Court has held that:

“The court’s responsibility is not to supplant the Commission’s balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.” Syl. pt. 2, Monongahela Power Co. v. Public Service Comm’n, 166 W. Va. 423, 276 S.E.2d 179 (1981).

Syl. pt. 1, in part, Berkeley County Public Service Sewer District v. Public Service Comm’n of W. Va., 204 W.Va. 279, 512 S.E.2d 201 (1998). Thus, this Court has held that: “[a]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.” Syl. pt. 1, Sexton v. Public Service Comm’n of W. Va., 188 W.Va. 305, 423 S.E.2d 914 (1992) (citations and interior quotation marks omitted). On the basis of the foregoing, the standard of review applicable to the PSC’s decision is clearly a deferential one.

The PSC’s Order in the case below is supported by substantial evidence, and the application of the legal principles by the PSC is correct. Therefore, this Court should affirm the PSC’s well-reasoned decision.

B. The PSC did not err in dismissing Petitioner’s Complaint.

Petitioner’s complaint against JUI, filed with the PSC on January 22, 2019 and designated as Case No. 19-0059-W-C, contained numerous baseless and unsupported allegations. The complaint centered on Petitioner’s belief that JUI was required, pursuant to the PSC’s July 12, 2018 Order issued in Case No. 18-0657-W-ECN, to reopen its certificate case. However, Petitioner’s belief is incorrect. In its July 12, 2018 Order granting JUI’s certificate application, the PSC ordered:

if there are any changes in the plans, scope, or terms of financing of the Project, or changes in rates associated with the Project, Jefferson Utilities, Inc. must petition to reopen for Commission approval of such changes. Changes in project costs or financing do not require separate approval if the changes do not affect rates and Jefferson Utilities, Inc. submits an affidavit from a certified public accountant attesting to the lack of rate impact.

(Case No. 18-0657-W-ECN, Commission Order July 12, 2018, at 5).

JUI, in its answer to Petitioner's complaint, filed January 30, 2019 in Case No. 19-0059-W-C, fully explained why it was not required to reopen the certificate case pursuant to the above-quoted provision. JUI explained that while ROCKWOOL, instead of the Jefferson County Development Authority, would be financing the Project, and the cost of the Project had changed upon receipt of construction bids, the plans and scope of the Project remained exactly the same as those approved by the PSC in the certificate case. JUI further explained that its financial contribution to the Project had not changed, and there would be no change to JUI's customers' rates as a result of the Project. Under these circumstances, the PSC's Order did not require a reopening of the certificate, but only required JUI to submit an affidavit from a certified public accountant attesting to the lack of rate impact. The PSC's Order is consistent with state law, which provides:

A public utility, including a public service district, which has received a certificate of public convenience and necessity after July 8, 2005, from the commission and has been approved by the Infrastructure and Jobs Development Council is not required to, and cannot be compelled to, reopen the proceeding if the cost of the project changes but the change does not affect the rates established for the project.

W. Va. Code §24-2-11(j).

On March 14, 2019, JUI filed an affidavit in Case No. 18-0657-W-ECN attesting that the change in the funding source of the Project and the increased cost of the Project (all to be borne by ROCKWOOL) will not affect JUI's rates, and JUI also filed a projected revenue requirement statement, a projected cash flow analysis and sample journal entries required by the PSC. After the PSC reviewed the record, the PSC issued an Order on March 26, 2019 in which the PSC detailed its review and conclusions. Specifically, the PSC concluded that JUI had complied with the July 12, 2018 Order, and, as a result, there were no grounds to reopen the certificate case.

In its August 2, 2019 Order entered in Case No. 19-0059-W-C dismissing Petitioner's complaint, the PSC provided a thorough discussion of Petitioner's contentions and allegations concerning the certificated Project. The PSC fully explained and identified its extensive review, evaluation and conclusions of all Petitioner's contentions and allegations. The PSC explained that it had "completely considered and decided the Complainants' arguments by its Orders issued in the certificate case, Case No. 18-0657-W-ECN, on February 22, 2019, March 26, 2019, and May 3, 2019." (Case No. 19-0059-W-C, PSC August 2, 2019 Order, at 7). The PSC's detailed explanation of its extensive review and consideration of Petitioner's allegations set forth in its complaint belies Petitioner's claim in its appeal that "the Commission was determined not to give the Complaints any substantive consideration." (Opening Brief of the Petitioner, at 6). Because Petitioner's complaint raised the same issues considered and decided by the PSC in the certificate case, the PSC concluded that it was appropriate to dismiss the Petitioner's complaint case, inasmuch as the PSC previously determined that there was no violation of the PSC's July 12, 2018 Order approving the Project.

In its appeal, Petitioner assigns error to the PSC by claiming that the PSC did not permit discovery or a hearing on the issues in Petitioner's complaint. However, seven days after filing the complaint, Petitioner filed its "First Request for Information and Production of Documents" to JUI. JUI responded to Petitioner's discovery twenty days after service upon it, in accordance with the PSC's Rules of Practice and Procedure. Petitioner is well aware that the PSC's permission is not necessary for a party to a case to file discovery. Petitioner filed one set of discovery, and could have filed additional sets. Petitioner chose not to do so. A person or entity such as Petitioner may file a complaint against a public utility under state law, alleging that the utility is in violation of one or more provisions of state law. However, once the utility has made answer to the allegations, and an investigation by the PSC has demonstrated that no violation exists, it is appropriate to dismiss the complaint.⁴ The PSC has no obligation to schedule a hearing when evidence has been provided to demonstrate that the allegations are unfounded, and thus a hearing is not necessary for the PSC to reach a well-reasoned decision. *Id.* Simply put, Petitioner failed to support the allegations made in its complaint, and the issues alleged in the complaint were fully discussed and considered by the PSC in Case No. 18-0657-W-ECN. Therefore, it was appropriate and reasonable for the PSC to dismiss the complaint based on the record before the PSC.

The subject matter of Petitioner's January 22, 2019 complaint filed with the PSC concerned the construction of the Project that is necessary to allow JUI, the public utility, to provide water service to its customer, ROCKWOOL. This matter is now technically moot because the water line is fully constructed to the Site and is available for service to

⁴ "When issues are joined, the Commission may set a time and place for an evidentiary hearing at the Commission's offices in the City of Charleston or elsewhere in the State at the Commission's discretion. If a formal complaint does not present substantial issues of fact requiring a hearing, the Commission may issue an order on the merits based on the information contained in the file." 150 C.S.R. § 1-6.2.6.

ROCKWOOL, and the water storage tank is under construction with all materials purchased and an in-service date of April 1, 2020. This Court has considered numerous cases where the subject matter was technically moot, and has previously held:

Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public, and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

Syl. pt. 1, Gallery v. West Virginia Secondary Schools Activities Comm'n, 205 W. Va. 364, 518 S.E. 2d 368 (1999) (citing Syl. pt. 1, Israel by Israel v. West Virginia Secondary Schools Activities Comm'n, 182 W. Va. 454, 388 S.E. 2d 480 (1989)).

In the instant case, there would be no collateral consequences if this Court declined to assess the validity of the PSC's dismissal of Petitioner's complaint. The set of facts presented in Petitioner's complaint are unique to it, and those facts do not present a scenario that is likely to be repeated. Moreover, the PSC already addressed the substance of Petitioner's complaint in the context of its analysis of the certificate case. The complaint, therefore, has already been addressed and decided by the PSC.

As to the second factor, the Petitioner has not substantiated or even identified the public interest or scope thereof that was allegedly unserved due to the two minor changes in the Project. It is not the role of this Court to guess what, if any, public interests are involved. The PSC considered JUI's affidavit that attested to no rate impact from the change in funding source and the increased Project cost. In accordance with West Virginia Code §24-2-11(j) the certificate case was not required to be reopened because there was no change in the plans or scope of the

Project, and there was no rate impact. The West Virginia Legislature has charged the PSC with the responsibility of “appraising and balancing the interests of current and future utility service customers, the general interests of the state's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.” W. Va. Code §24-1-1(b). JUI, as a public utility, has a public service obligation to extend its mains, plant and facilities to serve new customers. In the certificate case, the PSC granted JUI’s request for a certificate to extend its water facilities to serve ROCKWOOL, which is a new customer requesting service. The terms of the service extension, at the time the certificate was granted, and today, allow the extension to be constructed without any impact on JUI’s customer rates. Upon full operation the Facility will employ approximately 140-150 full-time people, will pay over \$7,000,000 annually in wages and benefits, and will pay substantial state and local tax revenues. During the construction phase, the Facility will support a significant number of construction jobs. In reviewing the certificate case, the PSC was required to balance the interests of current and future utility customers, the general interests of the state’s economy, and the interest of the public utilities, in this case, JUI. The granting of the certificate benefits each of those interests. JUI’s water system will receive a new line extension and storage tank that will benefit a large number of current and future customers beyond ROCKWOOL with no rate impact, which satisfies JUI’s obligation to provide service. Furthermore, the Facility will provide significant benefit to the state's economy through additional employment and tax revenue.

As to the third factor, due to the unique set of facts related to the specific complaint, and the fact that no substantial question of law exists, similar matters will not be presented to the Court, requiring a decision here. And, in fact, the PSC decided the issues raised by Petitioner already.

Finally, there is no live controversy to be resolved. As discussed above, Petitioner is wholly incorrect in its belief that the Project plans are different from those approved in the July 12, 2018 certificate case Order and that JUI's customer rates will be impacted by the Project. Furthermore, due to (i) JUI's obligation to provide service to ROCKWOOL, and (ii) the fact that the water facilities are in the ground and operational, or soon to be completed and operational, there is no remedy available and no reason to remand the case to the PSC.

IV. CONCLUSION

Based on the record in the certificate case and in Petitioner's complaint case, it is abundantly clear that JUI did not violate the PSC's July 12, 2018 Order, and the PSC's dismissal of Petitioner's complaint case was justified and appropriate. The water line extension portion of the Project is constructed and available for service to ROCKWOOL at the Site. The water storage tank will be complete and available for service by April 1, 2020. The availability of water service is a critical necessity for the operation of ROCKWOOL's Facility. The PSC has fully and properly balanced the various interests as required by statute. Petitioner has not demonstrated that it is in the public interest to have further inquiry related to the Project. Petitioner's requested relief that the PSC's Order dismissing Petitioner's complaint be set aside and this case be remanded for further review would irreparably harm ROCKWOOL. However, the PSC prefigured the result of any such remand in determining that the issues raised by Petitioner are of no moment. Accordingly, a remand would serve no purpose because the PSC

has already decided the issues raised in the complaint. ROCKWOOL has relied on the PSC's rulings in the certificate case and the complaint case, and operation of its Facility is dependent on the availability of the water service extension. ROCKWOOL strongly urges this Court to dismiss this appeal summarily.

Respectfully submitted this 31st day of October, 2019.

ROXUL USA, INC. d/b/a ROCKWOOL

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