



**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Case No. 19 - 0774

JEFFERSON COUNTY VISION, INC.,

Petitioner,

v.

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,**

Respondent.

**On Appeal from the West Virginia
Public Service Commission**

**(Case No.: 19-0059-W-C)
(Related Case Nos.: 18-0657-W-ECN & 19-0060-W-C)**

AMENDED OPENING BRIEF OF THE PETITIONER

Christopher P. Stroech, Esq. (WVSB #9387)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414
304-725-2002
304-725-0282 (Fax)
cstroech@arnoldandbailey.com
Counsel for Petitioner

TABLE OF CONTENTS

I. TABLE OF CONTENTS.....ii

II. TABLE OF AUTHORITIES.....iii

III. ASSIGNMENTS OF ERROR.....1

IV. STATEMENT OF THE CASE.....1

V. SUMMARY OF THE ARGUMENT.....5

VI. ARGUMENT.....6

 A. STANDARD OF REVIEW.....6

 B. THE COMMISSION ERRED IN NOT CONSIDERING THE ARGUMENTS OF PETITIONER BASED UPON ITS DETERMINATION THAT THE COMPLAINTS HEREIN WERE COLLATERAL PROCEEDINGS AND FURTHER FINDING THAT THE APPROPRIATE ACTION TO CHALLENGE THE LEGALITY OF A CERTIFIED PROJECT IS TO FILE A REQUEST TO REOPEN THE CERTIFICATE CASE, NOT THE FILING OF A SEPARATE COMPLAINT ACTION, AS PETITIONER HEREIN WAS NOT A PARTY TO THE CERTIFICATE CASE AND THEREFORE DID NOT HAVE SUCH AVAILABLE RELIEF.....6

 C. THE COMMISSION ERRED IN NOT PERMITTING ANY DISCOVERY OR AN EVIDENTIARY HEARING ON THE ISSUES PRESENTED IN THE COMPLAINTS, SPECIFICALLY WHETHER OR NOT THE SCOPE OF THE SUBJECT PROJECT CHANGED SO AS TO REQUIRE A MODIFICATION OF THE SUBJECT CERTIFICATE.....9

VII. CONCLUSION.....10

VIII. CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

I. STATUTES

W.Va. Code § 24-4-6 (2019).....8, 9

W.Va. Code § 29A-1-2(d) (2019).....8

W.Va. Code § 31-15A-8(b) (2019).....1

II. CASES

Affiliated Construction Trades Foundation v. Public Service Commission, 211 W.Va. 315 (2002).....8, 9

Appalachian Power v. State Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995)....6

Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989).....6, 8

Monongahela Power v. Public Service Commission, 166 W.Va. 4223, 276 S.E.2d 179 (1981).....6

Mountain Communities for Responsible Energy v. Public Service Commission, 222 W.Va. 481, 665 S.E.2d 315 (2008).....6

Smith v. West Virginia Human Rights Comm'n., 216 W.Va. 2, 602 S.E.2d 445 (2004)....8

Wihite v. Public Service Commission, 150 W.Va. 747, 149 S.E.2d 273 (1966).....6

Wooton v. Walker, 237 W.Va. 193, 786 S.E.2d 212 (2016).....8

III. RULES AND REGULATIONS

Procedural Rule of the West Virginia Public Service Commission, §150-19.5. (2019)....7

Procedural Rule of the West Virginia Public Service Commission, §150-6.2.1. (2019)...7

ASSIGNMENTS OF ERROR

- I. The Commission erred in not considering the arguments of Petitioner based upon its determination that the Complaints herein were collateral proceedings and further finding that the appropriate action to challenge the legality of a certified project is to file a request to reopen the certificate case, not the filing of a separate complaint action, as Petitioner herein was not a party to the Certificate Case and therefore did not have such available relief.
- II. The Commission erred in not permitting any discovery or an evidentiary hearing on the issues presented in the Complaints, specifically whether or not the scope of the subject Project changed so as to require a modification of the subject Certificate.

STATEMENT OF THE CASE

On July 12, 2018, the West Virginia Public Service Commission (the “Commission” or “PSC”) approved the Jefferson Utilities, Inc. (“JUI”) application for an emergency certificate of convenience and necessity to extend water service to a new manufacturing facility subject to the conditions described therein (the “Certificate” in Case No. 18-0657-W-ECN). AAPP 112-117; APP 0437-0442¹. Specifically, the application sought approval to construct certain water system additions and improvements to a site known as Jefferson Orchards, located in Ranson, West Virginia, to serve Roxul USA, Inc. d/b/a Rockwool (“Rockwool”), a manufacturer of stone wool insulation² (the “Project”). AAPP 001-111. The West Virginia Infrastructure and Jobs Development Council (“WVIJDC”) declared the Rockwool project to be an emergency project pursuant to W.Va. Code §31-15A-8(b) (2019). The Commission then approved the application without a public hearing and without appropriate public input. AAPP 115; APP 0440.

The Commission approved the Certificate based upon the following conditions, in part:

¹ The Amended Brief contains parallel cites to both the Amended Appendix (AAPP) and Appendix (APP).

² It should be noted that the construction of the Rockwool facility has caused significant public interest both in the local community and beyond, based upon Rockwool’s expected emissions and other environmental impacts, particularly due to its location directly across the street from North Jefferson Elementary School. Rockwool will be the first heavy industrial site located within Jefferson County, and at the very least, public participation in the permitting process is warranted.

IT IS FURTHER ORDERED that if there are any changes in the Project plans or scope, as well as the terms of any financing other than grants or loan that impact the rates, Jefferson Utilities, Inc., must seek Commission approval of those changes.

IT IS FURTHER 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. AAPP 116; APP 0441.

On January 22, 2019, David Tabb, a ratepayer, filed a Motion to Review July 12, 2018 Commission Order 18-0657-W-ENC and [a] Motion of a Stop Work Order. AAPP 118-119; APP 0434-0435. Mr. Tabb claimed that the Project cost, ownership and financing terms had changed, thus requiring further Commission approval. *Id.*

On January 24, 2019, in Case No. 18-0657-W-ECN, Commission Staff filed both a Petition to Join Roxul USA, Inc. as a necessary party to that proceeding and a separate Petition to Reopen that proceeding based upon “recently discovered significant changes in the financing of the Project and cost of the Project.” AAPP 120-127; APP 0420-0429. Specifically, Staff concluded that “the Project cost ha[s] almost doubled since the Commission granted JUI the certificate of convenience and necessity, and the original funding source for the Project (the West Virginia Infrastructure and Jobs Development Counsel) has withdrawn its offer of funding.” AAPP 120; APP 0420. Staff further concluded that since Rockwool was privately funding the Project, it was a necessary party to the Certificate Case. AAPP 121; APP 0421.

On January 23, 2019, Petitioners herein filed a Formal Complaint and Request for Interim Relief against JUI, and as similarly claimed by Tabb and Commission Staff, asserted that the scope of the Project had changed and that JUI had not filed a petition to reopen as directed by the Commission Order. Instead of complying with the Commission Order, JUI did nothing.

Thus, JUI had violated the Certificate Order and applicable law as the financing, structure and ownership of the Project had changed, as properly recognized by the Commission Staff. AAPP 128-132; APP 0229-0233.

This Complaint was docketed as Case No. 19-0059-W-C, and specifically claimed that (i) the WVIJDC loan had been withdrawn; (ii) the Jefferson County Development Authority would no longer be involved in the Project and would not own the Project infrastructure, (iii) the Project would be financed by ROXUL with an unknown financial commitment by JUI; (iv) the cost of the Project was now \$7,000,000 instead of \$4,850,000 stated in the Application; (v) the construction of the water facilities has commenced with construction expected to be complete by year end, and (vi) contrary to the assertions made in the JUI Application, the new financial arrangement would likely increase rates to other JUI customers. AAPP 130; APP 0231.

On or around January 23, 2019, Michael Brittingham filed a similar complaint against JUI, requesting that the Certificate be rescinded pending further approval by the Commission based upon the same changes in the funding, structure and ownership of the Project. This Complaint was docketed as Case No. 19-0060-W-C.

On January 24, 2019, in both Case No. 19-0059-W-C and Case No. 19-0060-W-C, Commission Staff recommended that both Complaint Cases be tracked with and consolidated into the reopened Certificate case (Case No. 18-0657-W-ECN), if the Commission granted Staff's Petition to Reopen. AAPP 133-138; APP 0197-0202.

On January 30, 2019, in Case No. 18-0657-W-ECN, JUI responded to the Commission Staff's Petition to Reopen, contending that the increased Project cost and change of ownership did not constitute changes in the plans, scope, terms of financing or rates associated with the Project. AAPP 139-184; APP 0365-0410. That same day, Rockwool filed a response in

opposition to the Commission Staff's Petition to Join Roxul as a Necessary Party, claiming that Rockwool "has simply stepped into the shoes of the Jefferson County Development Authority ("JCDA") to assume the financing of the water line construction." AAPP 185-186; APP 0412-0413.

By Order dated February 22, 2019, in Case No. 18-0657-W-ECN, the Commission ordered that JUI file an affidavit signed by *its* certified public accountant attesting to the lack of rate impact related to the increased Project cost and change in source of Project financing. AAPP 187-193; APP 0340-0346. Presumably, if JUI complied, the Commission would not take any further action despite the numerous other changes in the scope, financing and ownership of the Project, as set forth in the Complaints identified herein above.

On March 4, 2019, in Case No. 18-0657-W-ECN, Complainants filed a Petition to Intervene and Petition for Reconsideration of the Commission Order of February 22, 2019. AAPP 194-205; APP 0326-0337. Complainants again argued that the Certificate Case should be reopened, Rockwool should be joined as party thereto, certain discovery be permitted and an evidentiary hearing be set, all to ensure that public participation and input is properly considered. *Id.*

On March 14, 2019, in Case No. 18-0657-W-ECN, JUI responded to the Commission's February 22, 2019 Order by filing an Affidavit purporting to claim that notwithstanding all the Project changes, such changes will not affect JUI rates. AAPP 206-214; APP 0289-0297. This self-serving Affidavit, which on its face stated that it was based upon the Project as presented in the ECN Case rather than upon the revised Project, was provided without the opportunity for follow-up discovery, nor the ability to cross-examine the affiants thereto.

By Final Order dated March 26, 2019, in Case No. 18-067-W-ECN, the Commission issued an Order denying Staff's Petition to Reopen, denying Staff's Petition to join Roxul as a necessary party and denying Complainant's Motion to Intervene. AAPP 215-223; APP 0280-0288. The Commission found, based solely on the self-serving Affidavit of JUI, that there had been no change in the scope of plans of the Project; that the increased cost of the Project would not impact JUI rates, and the fact that the WVIJDC is no longer involved is inconsequential. *Id.* The Commission made these determinations without permitting reasonable time for discovery and without holding a public evidentiary hearing. By Order dated May 3, 2019, in Case No. 18-067-W-ECN, the Commission denied a Petition for Reconsideration filed by Petitioner herein. AAPP 224-232; APP 0249-0256.

By Final Order dated August 2, 2019, in Case No. 19-0059-W-C and Case No. 19-0060-W-C, the Commission dismissed the pending Complaints of Jefferson County Vision, Inc, Leigh Smith and Michael Brittingham. AAPP 233-240; APP 0004-0011. The Commission found that the "complaints should be dismissed because the issues raised by JCV and Ms. Smith and by Brittingham are substantially the same issues considered and decided by the Commission in Case No. 18-0657-W-ECN and the complaints constitute collateral proceedings." AAPP 239; APP 0010. The Commission expressly found that "the appropriate action to challenge the legality of a certified project is to file a request to reopen in the certificate case, not the filing of a separate complaint action." *Id.*

It is from this Final Order dated August 2, 2019 that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The Commission procedurally erred in dismissing the Complaint Cases as "collateral proceedings," as Complainants could not petition to have the Certificate Case reopened since

they were not parties thereto. The Commission substantively erred by not permitting reasonable discovery and a public evidentiary hearing on whether or not the admitted changes in the Project structure, financing and ownership required certain modifications of the Project Certificate.

ARGUMENT

A. Standard of Review

The Court must reverse and set aside any Commission order based upon “a misapplication of legal principles,” *Monongahela Power v. Public Service Commission*, 166 W.Va. 423, 425, 276 S.E.2d 179, 181 (1981), or any other “mistake of law,” Syl. Pt. 7, *Wilhite v. Public Service Commission*, 150 W.Va. 747, 149 S.E.2d 273 (1966). This includes, notably, a misapplication of its own rules and regulations. See *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 156-58, 386 S.E.2d 650, 654-55 (1989). And in interpreting those rules or regulations, the Court confronts “a purely legal question subject to *de novo* review.” *Mountain Communities for Responsible Energy v. Public Service Commission*, 222 W.Va. 481, 489, 665 S.E.2d 315, 323 (2008) (quoting Syl. Pt. 1, *Appalachian Power v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995)).

B. The Commission erred in not considering the arguments of Petitioner based upon its determination that the Complaints herein are collateral proceedings and further finding that the appropriate action to challenge the legality of a certified project is to file a request to reopen the certificate case, not the filing of a separate complaint action, as Petitioner herein was not a party to the Certificate Case and therefore did not have such available relief.

The Commission procedurally and legally erred by dismissing the Complaints herein as “collateral proceedings” and declaring that Complainants herein should have filed a request to reopen in the Certificate Case. This determination and characterization of the Complaints clearly illustrate that the Commission was determined not to give the Complaints any substantive

consideration. As set forth in the Commission Order dated August 2, 2019, the Commission found:

...Furthermore, the appropriate action to challenge the legality of a certified project is to file a request to reopen in the certificate case, not the filing of a separate complaint action. Here the Complainants seek to invalidate the certificate of convenience and necessity by their complaints. The complaints, therefore, amount to collateral proceedings brought to disturb the Commission resolution of Case No. 18-0657-W-ECN. For these reasons, both of the complaints warrant dismissal. APP 0010.

As such, both Complaints in Case No. 19-0059-W-C and Case No. 19-0060-W-C were dismissed. Complainants were not permitted to conduct meaningful discovery, nor were they able to participate in a public evidentiary hearing, whereat certain evidence proffered by JUI could be appropriately challenged.

Based upon the Procedural Rules of the Commission, however, Complainants could not move to reopen the Certificate Case, as they were not parties to that proceeding at the time of entry of the Commission Order granting the subject Certificate. As set forth at Rule 19.5:

19.5. Application for Reopening

An application for reopening of a proceeding more than ten (10) days after the entry of a Commission order **must be made by petition of a party to the proceeding at the time of entry of the Commission order**, duly verified, accompanied by a certificate showing service upon the attorneys of the other parties. If thereby any Commission order is sought to be vacated, reversed, or modified, by reason of matters which have arisen since the hearing, or by reason of facts not in possession of the petitioner at the time of the hearing, the matter so relied upon by the petitioner must be fully set forth in the petition (emphasis added).

Procedural Rules of the Public Service Commission, §150-19.5. (2019).

Alternatively, as set forth at Rule 6.2:

6.2 Formal complaints.

6.2.1 Any person or entity may complain to the Commission by petition substantially in the form of Form No. 1 attached to these Rules of anything done

or omitted to be done by the public utility in violation of any of the provisions of the Public Service Commission laws of West Virginia...

Procedural Rules of the Public Service Commission, §150-6.2.1. (2019).

Accordingly, Complainants herein did indeed follow the proper procedure through the filing of the Complaints against JUI. The Commission must be bound by its own Rules. “A statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152. More to the point herein, “any person or entity having a good faith reason to file a complaint against a public utility under West Virginia Code § 24-4-6 (2019) has standing to so, notwithstanding the fact that such person or entity was not a party to prior proceedings for a certificate of convenience and necessity or other proceedings to which the complaint relates.” Syl. Pt. 8, *Affiliated Construction Trades Foundation v. Public Service Commission*, 211 W.Va. 315 (2002). Finally, “a regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W.Va. Code § 29A-1-2(d) (1982), and such a legislative rule has the force and effect of law.” Syl. Pt. 5, *Smith v. West Virginia Human Rights Comm’n.*, 216 W.Va. 2, 602 S.E.2d 445 (2004). Accordingly, we reject any suggestion that [the W.Va. Code of State Rules] are mere ‘guides,’ a term with no legal significance, or are otherwise of no consequence.” See *Wooton v. Walker*, 237 W.Va. 193, 197, 786 S.E.2d 212, 216 (2016).

The Commission erred by dismissing the Complaints herein as “collateral proceedings.” As clearly set forth in the applicable Rules and defining law, the complaint process is the only method available to the Complainants herein to protest an unlawful action of a public utility. For this reason, the Court should remand this matter back to the Commission for further proceedings in the Certificate Cases.

C. The Commission erred in not permitting any discovery or an evidentiary hearing on the issues presented in the Complaints, specifically whether or not the scope of the subject Project changed so as to require a modification of the subject Certificate.

The Commission's initial action in these collective matters was to enter an Order only in the ECN Case that gave JUI express direction as to what action it could take in order to avoid the reopening of the ECN Case – i.e., file an accountant affidavit. After the self-serving Affidavit was filed, the Commission took no further action on the Complaints, other than dismissing them.

As confirmed in the *Affiliated Trades* case, “any person or entity having a good faith reason to file a complaint against a public utility under West Virginia Code §24-4-6 (2019) has standing to do so, notwithstanding the fact that such person or entity was not a party to prior proceedings for a certificate of convenience and necessity or other proceedings to which the complaint relates.” Syl. Pt. 8, *Affiliated Construction Trades Foundation v. Public Service Commission*, 211 W.Va. 315 (2002). More to the point, “[t]he Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public.” *Id* at Syl. Pt. 9.

The Complainants asserted that the “scope of the Project” had changed without JUI complying with the Commission Order that directed it to file a petition to reopen if such changes occurred. This provision in the Commission Order was not a mere formality. The purpose of this provision in the ECN Order, and virtually all other certificate orders, is to provide a procedural vehicle for the meaningful review of any post-order revisions to a project to ensure that the revised project does indeed and continues to serve the interests of the public and JUI customers.

Whether or not the “scope of the Project” has changed is inherently a factual inquiry – facts that are in the possession of JUI and its consulting engineers – not known to the Complainants or the general public. As illustrated in its initial Order, the Commission focused solely on the financing of the Project and its impact on rates, although the Complaints alleged that there were other changes in the “scope of the Project.” Once JUI filed the self-serving Affidavit, the action directed by the Commission, there was no further inquiry or even opportunity to inquire as permitted by the Commission.

Even more striking is the fact that the Commission found no issue with Rockwool “simply stepping into the shoes of the JCDA” following the issuance of the Certificate – the act of a private corporation assuming the approved role of public entity. This inaction certainly does not merit the lawful utility regulation that the Commission is obligated to provide.

The Commission inaction inappropriately restricted the inquiry into whether the “scope of the Project” had changed and whether the revised Project scope served the public interests and JUI customers. Consequently, Petitioners were denied the opportunity to discover information about the Project revisions and provide their position as whether or not those revisions served the public interest – a clear denial of due process.

CONCLUSION

For the reasons above, Petitioner respectfully requests that this Court set aside the Commission’s decision below and remand for further review under the applicable legal principles.

Dated: September 11, 2019

Respectfully submitted,



Christopher P. Stroech, Esq. (WVSB #9387)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414
304-725-2002
304-725-0282 (Fax)
cstroech@arnoldandbailey.com
Counsel for Petitioner