

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0774

JEFFERSON COUNTY VISION, INC.,
Petitioner

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and
JEFFERSON UTILITIES, INC.,
Respondents



Appeal from the Public Service
Commission
Case No. 19-0059-W-C
August 2, 2019 Commission Order

BRIEF OF RESPONDENT
JEFFERSON UTILITIES, INC.

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I. STATEMENT OF THE CASE

A. GOVERNING LAW.

The Public Service Commission of West Virginia (the “Commission”) generally regulates the provision of public utility service throughout the State of West Virginia.¹ Absent certain limited exceptions, public utilities generally must apply for and receive a certificate of convenience and necessity from the Commission prior to commencing construction of any plant, equipment, property, or other facility relating to its provision of public utility service.²

Upon submission of an application for a certificate of convenience and necessity, the Commission will order the public utility to provide public notice of its application in the form of a Class I legal advertisement in the public utility’s proposed area of operation.³ The Commission may waive a formal hearing on the public utility’s application if there is no “substantial protest” after 30 days from the date which the Class I legal advertisement was initially published.⁴ If the Commission waives a hearing on the matter, the Commission may issue, refuse to issue, or issue in part and refuse in part, the public utility’s certificate of convenience and necessity on the written materials provided in the Commission’s case docket on the matter.⁵

The West Virginia Infrastructure and Jobs Development Council (the “WVIJDC”) is a public economic development authority that provides, among other things, funding for public utility expansion and renovation projects throughout the State of West Virginia.⁶ Notably, the

¹ See W. VA. CODE §§ 24-2-1(a) *et seq.*

² See *id.* § 24-2-11(a).

³ *Id.* § 24-2-11(b).

⁴ *Id.*

⁵ *Id.*

⁶ See W. VA. CODE §§ 31-15A-5 *et seq.*

WVIJDC may designate a proposed project as an “emergency project” if the WVIJDC concludes that the project: (i) is essential to the immediate economic development of an area of the state; and (ii) will not likely be developed in that area if construction of the project is not commenced immediately.⁷ If the WVIJDC deems that a proposal falls within the parameters of an “emergency project,” then the Commission is required to render its final decision on the public utility’s application for a certificate of convenience and necessity within 120 days of the public utility’s submission of its application to the Commission.⁸

Relevant to this proceeding, a public utility may be required to petition to reopen a certificate proceeding in certain limited situations. Rule 10.3.8 of the Commission’s Rules of Practice and Procedure (the “*Procedural Rules*”) states:

A public utility whose project has received a certificate of public convenience and necessity from the Commission must notify the Commission in writing and receive approval of any change in the scope, cost, or funding of the project or any change in project-related revenue requirement and/or rates prior to beginning or continuing construction on such project.

Provided, however, a public utility whose project has received a certificate of public convenience and necessity from the Commission and has been approved by the West Virginia 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. In such instance the utility shall notify the Commission that there has been a change in project costs that does not affect rates or the scope of the project, with such notification to be in the form of either an affidavit signed by the utility’s certified public accountant for the original certificate filing, or verification from the utility’s bond counsel.⁹

Thus, pursuant to Rule 10.3.8 of the *Procedural Rules*, a project approved by the WVIJDC and that receives a certificate of convenience and necessity from the Commission cannot have the certificate proceeding reopened if: (i) any change in project cost does not affect the public

⁷ *Id.* § 31-15A-2(h).

⁸ *Id.* § 31-15A-8(b).

⁹ W. VA. CODE R. § 150-1-10.3.8.

utility's rates and charges; and (ii) the public utility's certified public accountant provides an affidavit attesting to the same.

B. PROCEDURAL HISTORY.

Jefferson Utilities, Inc. (the "Company") is a privately-owned enterprise that provides water treatment and potable water delivery service throughout its service territory in Jefferson County, West Virginia.¹⁰ Accordingly, the Commission regulates the Company's provision of water service as a regulated public utility.¹¹

On December 6, 2017, the WVIJDC, with a recommendation from the West Virginia Development Office, approved financing for an "emergency project" that would involve the construction of certain additions and improvements to the Company's existing waterworks system to a site commonly known as Jefferson Orchards (the "Jefferson Orchards Site") for the provision of water service to a manufacturing facility to be owned and operated by ROXUL USA, INC., dba Rockwool ("ROXUL") (collectively, the "Water Line Extension").¹² Specifically, the Water Line Extension would include two distinct expansion projects: (i) Contract No. 1 ("Contract No. 1"): the installation of approximately 18,050 linear feet of 16-inch water line, a 1,200 gallon per minute triplex pressure booster station, an altitude valve vault, and all other necessary appurtenances; and (ii) Contract No. 2 ("Contract No. 2"): the installation of a 795,000 gallon water storage tank.¹³

On May 9, 2018, the WVIJDC designated the Water Line Extension as an "emergency project" under W. VA. CODE § 31-15A-2(h).

¹⁰ App. 1386.

¹¹ *Id.*

¹² *See id.* 1412-13.

¹³ *See id.* 1386-87.

On May 10, 2018, the Company filed with the Commission its application for an emergency certificate of convenience and necessity regarding the Water Line Extension (the “Certificate Case”).¹⁴

As provided in the Company’s May 10, 2018 filing, the Water Line Extension was estimated to cost approximately \$4,850,000 and was to be funded by a \$4,520,000 loan from the WVIJDC for a term of 40 years at no more than 1.0% interest to be taken out by the Jefferson County Development Authority (“JCDA”).¹⁵ The Company would provide up to an aggregate maximum cost of \$330,000 for all engineering, design, permits, and rights-of-way and easements for the Water Line Extension, including all required meters and telemetry.¹⁶

While the JCDA would initially own the Water Line Extension, the Company and the JCDA would enter into a long-term Lease and Purchase Agreement (the “Lease and Purchase Agreement”), whereby the Company would be granted the exclusive right to use the Water Line Extension for a period of 40 years, at the end of which the JCDA would convey the Water Line Extension to the Company for \$1.00.¹⁷ As provided in the Lease and Purchase Agreement: (i) the JCDA would pay all taxes and assessments on the property covered by the Lease and Purchase Agreement during the lease term; (ii) the Company would operate and maintain the Water Line Extension at its cost; (iii) the Company would pay a monthly use fee to the JCDA of \$2.88 per 1,000 gallons of water sold to all customers served by the Company at the Jefferson Orchards Site through the Water Line Extension; (iv) the JCDA would then pay all debt service costs and other expenses associated with the WVIJDC loan from the \$2.88 per 1,000 gallons

¹⁴ *Id.* 1383.

¹⁵ *Id.* 1388.

¹⁶ *Id.*

¹⁷ *Id.*

monthly use fee; and (v) the Company's obligation to pay the JCDA the monthly use fee would terminate on the earlier of (a) the expiration of the 40-year lease term, or (b) upon JCDA's full repayment of the WVIJDC loan.¹⁸ As provided in the Company's May 10, 2018 filing, the Company's participation in funding the Water Line Extension would not impact the current rates and charges of the Company's ratepayers.¹⁹

Pursuant to W. VA. CODE § 24-2-11(b), the Commission ordered the Company to provide public notice in the form of a Class I legal advertisement on May 10, 2018 (the "May 10, 2018 Procedural Order").²⁰ As provided in the May 10, 2018 Procedural Order, the Commission stated:

IT IS FURTHER ORDERED that in the absence of substantial protest received within the stated thirty (30) day period, the Commission may waive formal hearing and grant the application based on the evidence submitted with the application and the Commission's review thereof.²¹

In accordance with the May 10, 2018 Procedural Order, the Company published its Notice of Filing on May 16, 2018 (the "Notice of Filing").²² The Company's Notice of Filing stated, in part, the following:

Anyone desiring to protest or intervene should file a written protest or request to intervene within thirty (30) days following the date of this publication unless otherwise modified by Commission order. **Failure to timely protest or request to intervene can affect your right to protest aspects of this certificate case, including any associated rate increases, or to participate in future proceedings.** All protests or requests to intervene should briefly state the reason for the protest or request to intervene. Requests to intervene must comply with the rules on intervention set forth in the Commission's Rules of Practice and

¹⁸ *Id.*

¹⁹ *Id.* 1388-89.

²⁰ *Id.* 0428.

²¹ *See Id.*

²² *Id.* 1426-29.

Procedure. All protests and requests to intervene should be addressed to Ingrid Ferrell, Executive Secretary, P.O. Box 812, Charleston, West Virginia 25323.

In the absence of substantial protests within said thirty (30) day period, the Commission may waive formal hearing and render its decision on the application based on the evidence submitted with said application and its review thereof.²³

Accordingly, the Commission could waive public hearing on the Company's certificate application unless substantial protests were received by June 15, 2018.

On July 12, 2018, the Commission issued an order granting the Company's application for an emergency certificate of convenience and necessity for the Water Line Extension (the "July 12, 2018 Commission Order").²⁴ Pursuant to the July 12, 2018 Commission Order, the Commission: (i) concluded that no substantial protests were filed by June 15, 2018; (ii) approved the proposed funding for the Water Line Extension; and (iii) found that the proposed funding for the Water Line Extension would not result in an increase to the Company's current rates and charges.²⁵ The Commission's approval, however, was contingent upon certain conditions as provided in Rule 10.3.8 of the Commission's Rules of Practice and Procedure (the "*Procedural Rules*"), which were reflected in the July 12, 2018 Commission Order's ordering paragraphs:

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.²⁶

²³ *Id.* (emp. added).

²⁴ *Id.* 0437.

²⁵ *Id.* 0440-41.

²⁶ *Id.* 0441.

On January 22, 2019, David Tabb, a ratepayer, filed a motion in the closed Certificate Case docket (the “January 22, 2019 Tabb Filing”).²⁷ As provided in the January 22, 2019 Tabb Filing, Mr. Tabb claimed that the cost of the Water Line Extension, financing, and ownership terms had changed from the terms previously approved by the Commission.²⁸ Mr. Tabb asserted that the Company failed to reopen the case and obtain Commission approval of the changes in Water Line Extension financing before initiating construction of the Water Line Extension.²⁹ Mr. Tabb requested that the Commission reopen this proceeding, review the alleged changes in the source of financing and the potential impact on the Company’s rates, and immediately order construction of the Water Line Extension to stop until the changes were approved.³⁰

On January 22, 2019, the Petitioner filed a complaint against the Company at the Commission, generally alleging that the Company was in violation of the July 12, 2018 Commission Order (collectively, the “Complaint Case”).³¹ Therein, the Petitioner asserted that the Commission should: (i) reopen the Company’s closed Certificate Case; and (ii) consolidate the Complaint Case with the reopened Certificate Case.³²

On January 24, 2019, the Staff of the Public Service Commission of West Virginia (“Commission Staff”) filed a petition to reopen the Company’s Certificate Case (the “Petition to Reopen”).³³ As provided in the Petition to Reopen, Commission Staff asserted that: (i) the Water Line Extension’s costs had increased; (ii) the JCDA and the planned WVIJDC funding had been

²⁷ *Id.* 0434-35.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ App. 0229; *see* Case Nos. 19-0059-W-C, *Jefferson County Vision, Inc. and Leigh Smith v. Jefferson Utilities, Inc.*

³² *Id.*

³³ *Id.* 0424-29.

withdrawn; (iii) ROXUL was now providing private financing, and (iv) ROXUL had retained subcontractors and commenced construction of the Water Line Extension.³⁴ While Commission Staff concluded that the scope of the Water Line Extension had not changed, Commission Staff was nonetheless concerned that the significant increase in cost and the change in the source of financing for the Water Line Extension may cause the Company's current rates and charges to increase.³⁵ Commission Staff recommended that the Commission: (i) require the Company to provide specific information regarding any changes to the Water Line Extension; (ii) reopen the Company's Certificate Case; and (iii) consolidate the Complaint Case into the reopened Certificate Case.³⁶

On January 24, 2019, Commission Staff filed a petition to make ROXUL a party to the Certificate Case.³⁷

On January 30, 2019, ROXUL filed a motion in opposition to Commission Staff's request to join ROXUL to the Certificate Case.³⁸

On January 30, 2019, the Company responded to Commission Staff's Petition to Reopen (the "January 30, 2019 Company Response").³⁹ As provided in the January 30, 2019 Company Response, the Company asserted that it remained in compliance with the July 12, 2018 Commission Order and submitted: (i) the Water Line Extension's bid tabulations for Contract No. 1 and Contract No. 2; (ii) all permits and approvals obtained for the Water Line Extension; and (iii) an executed copy of a January 11, 2019 Water User Agreement by and between the

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* 0420-21.

³⁸ *Id.* 0412.

³⁹ *Id.* 0365-408.

Company and ROXUL (the “Agreement”). As provided in the Agreement: (i) ROXUL agreed to construct the Water Line Extension; (ii) due to bid overruns for Contract No. 1 and Contract No. 2, the estimated cost of the Water Line Extension was now \$5,605,229; (iii) ROXUL’s share of the Water Line Extension’s cost was \$5,275,229; (iv) the Company’s share of the Water Line Extension’s costs remained \$330,000; (v) upon completion of the Water Line Extension, ROXUL would convey the Water Line Extension to the Company; and (vi) in return for the Water Line Extension, the Company agreed to pay a monthly use fee to ROXUL in an amount equal to \$2.88 per 1,000 gallons of water sold in the month immediately prior to said month to all customers served by the Company on the Jefferson Orchards site.⁴⁰

Moreover, the Company asserted in its January 30, 2019 Company Response that the Company’s obligation to pay the monthly use fee to ROXUL will expire at the earlier of: (i) such time as ROXUL has been reimbursed the \$5,275,229; or (ii) 40 years from the date of ROXUL’s conveyance of the Water Line Extension to the Company.⁴¹ Accordingly, in its January 30, 2019 Company Response, the Company asserted: (i) the scope of the Water Line Extension was exactly the same as was approved in the July 12, 2018 Commission Order; (ii) while the JCDA had withdrawn from funding the Water Line Extension, ROXUL has stepped into the shoes of the JCDA; and (iii) there is no impact on the Company’s ratepayers because ROXUL has agreed to pay for its share of the cost of the Water Line Extension, and the Company is only responsible for \$330,000 of the costs involved in constructing the Water Line Extension, which is the same amount that was approved in the July 12, 2018 Commission Order.⁴²

⁴⁰ *Id.* 0365-68.

⁴¹ *Id.* 0366-67.

⁴² *Id.* 0367.

On February 22, 2019, the Commission entered a procedural order in the Certificate Case in response to Commission Staff's Petition to Reopen and the January 22, 2019 Tabb Filing (the "February 22, 2019 Procedural Order").⁴³ As provided in the February 22, 2019 Procedural Order, the Commission stated:

Pursuant to *Procedural Rule* 10.3.8 and the July 12, 2018 [Commission] Order, prior to commencing or continuing construction of the Water Line Extension, [the Company] is required to notify the Commission if certain changes occurred. Although [the Company] did not report the cost and funding changes related to the Water Main Line prior to the filing by Mr. Tabb, by its response [the Company] has acknowledged that the estimated cost has increased and ROXUL has replaced JCDA to construct and privately finance the Project.

Based on the conditions established by the Commission, changes in [the Water Line Extension's] cost or financing do not automatically warrant reopening this proceeding. The increased cost [of the Water Line Extension] and change in source of [] financing do not require Commission approval if [the Company] shows that the changes do not affect rates by filing an affidavit prepared by its certified public accountant in accordance with *Procedural Rule* 10.3.8 and the [July 12, 2018 Commission] Order.⁴⁴

Accordingly, the Commission ordered the Company to submit: (i) an affidavit by its certified public accountant attesting to the lack of rate impact related to the increased cost associated with the Water Line Extension; (ii) a detailed revenue requirement calculation and cash flow statement supporting any rate increase, or the absence thereof, for the revised costs associated with the Water Line Extension and change in the source of financing; and (iii) sample journal entries demonstrating the recording of the transfer of the Water Line Extension facilities from ROXUL to the Company, and the monthly use fee to ROXUL (collectively, the "Requested Financial Information").⁴⁵

⁴³ *Id.* 0340-46.

⁴⁴ *Id.* 0343.

⁴⁵ *Id.* 0344.

On March 4, 2019, the Petitioner filed a joint petition to intervene and petition for reconsideration of the Commission’s February 22, 2019 Procedural Order (the “Petition to Intervene and Petition for Reconsideration”).⁴⁶ The Petitioner stated that it had a legal interest in the Certificate Case because the revised project may impact customer rates.⁴⁷ Moreover, the Petitioner contended that, because the Commission had not granted its requests to consolidate the Complaint Case into the closed Certificate Case, the Commission’s February 22, 2019 Procedural Order effectively denied the Petitioner the opportunity to rebut the Company’s contention of no rate impact and denied it the relief it requested in its complaint.⁴⁸

Pursuant to the February 22, 2019 Procedural Order, the Company timely submitted for the Commission’s review the Requested Financial Information on March 14, 2019.⁴⁹

On March 26, 2019, the Commission entered an order denying the various pleadings to reopen the Company’s Certificate Case and denied the Petitioner’s Petition to Intervene and Petition for Reconsideration of the Commission’s February 22, 2019 Procedural Order (the “March 26, 2019 Commission Order”).⁵⁰ Therein, the Commission held that “there has been no change in the scope or plans of the [Water Line Extension as originally approved in the Company’s Certificate Case].”⁵¹ Moreover, “the replacement of WVIJDC funding does not negate the [Water Line Extension’s] prior designation as a WVIJDC approved project.”⁵²

⁴⁶ *Id.* 0326-0330; *Id.* 0331-37.

⁴⁷ *Id.* 0326-27.

⁴⁸ *Id.* 0329.

⁴⁹ *Id.* 0289-97.

⁵⁰ *Id.* 0280-88.

⁵¹ *Id.* 0283.

⁵² *Id.* 0284.

Accordingly, pursuant to Rule 10.3.8 of the *Procedural Rules* and the July 12, 2018 Commission Order,

[C]hanges to [the Water Line Extension's] costs or financing would not require separate approval if the changes did not affect rates and [the Company] provided an affidavit from a certified public accountant attesting to the lack of rate impact. Reopening is not necessary in this case because the scope and plans for the Project remain unchanged and because the Project cost and funding changes do not require separate Commission approval.⁵³

Thus, as the Company complied with Rule 10.3.8 of the *Procedural Rules* and the July 12, 2018 Commission Order, the Commission: (i) denied Commission Staff's motion to join ROXUL as a party; (ii) denied all motions for reconsideration of its February 22, 2019 Procedural Order; (iii) denied all motions for reopening the Company's Certificate Case; and (iv) dismissed the matter and removed it from the Commission's docket of active cases.

On April 5, 2019, the Petitioner filed a petition for reconsideration of the March 26, 2019 Commission Order (the "April 5, 2019 Petition for Reconsideration").⁵⁴ Therein, the Petitioner alleged: (i) the March 26, 2019 Commission Order effectively denied JCV due process of law; (ii) the financial affidavit exception of Rule 10.3.8 of the *Procedural Rules* does not apply; (iii) the plans and scope of the Water Line Extension have changed; and (iv) the increased cost and changes to the Water Line Extension's scope will negatively impact the Company's current rates and charges.⁵⁵

On April 15, 2019, the Company filed its response to the Petitioner's April 5, 2019 Petition for Reconsideration (the "April 15, 2019 Company Response").⁵⁶ As provided in the

⁵³ *Id.* 0283.

⁵⁴ *See id.* 0251.

⁵⁵ *Id.*

⁵⁶ *Id.*

April 15, 2019 Company Response, the Company asserted that the arguments found within the Petitioner's April 5, 2019 Petition for Reconsideration have already been directly addressed and rebutted by the Commission in its March 26, 2019 Commission Order.⁵⁷

On May 3, 2019, the Commission entered an order denying the Petitioner's April 5, 2019 Petition for Reconsideration of the March 26, 2019 Commission Order (the "May 3, 2019 Commission Order").⁵⁸ Therein, the Commission held: (i) the March 26, 2019 Commission Order did not deny JCV due process of law; (ii) the financial affidavit exception of Rule 10.3.8 of the *Procedural Rules* still applies; (iii) the plans and scope of the Water Line Extension have not changed; and (iv) the increased cost of the Water Line Extension will not result in an increase to the Company's current rates and charges.⁵⁹ In particular to the Petitioner's due process claim, the Commission stated the following:

The Commission takes its responsibility to evaluate utility certificates of convenience and necessity seriously. This utility certificate has attracted a high level of public interest because of its role in development of the Jefferson Orchards site located in Jefferson County. As fully explained in this Order, denying reopening of this certificate proceeding is consistent with law, Commission rules and case precedent. In light of that clarity, a Commission decision to reopen this proceeding would be inconsistent with legislative mandates that the Commission promote economic development while balancing the interests of utility customers, the state's economy and utilities subject to our jurisdiction.⁶⁰

The Commission did not violate [the] due process rights of JCV by denying the requests to reopen this proceeding and denying the JCV petition to intervene. Full and complete notice of the [the Company] certificate filing was provided as required by law. W. VA. CODE § 24-2-11. The published legal notice stated the June 15, 2018 deadline to file a request to intervene. All interested parties, including JCV, had notice and the opportunity to participate in this matter. JCV did not request to intervene by the June 15, 2018 deadline or at any time before

⁵⁷ *Id.*

⁵⁸ *Id.* 0248-0256.

⁵⁹ *Id.* 0255-56.

⁶⁰ *Id.* 0248.

the Commission issued its [July 12, 2018] Commission Order. JCV petitioned to intervene on March 4, 2019, eight months after the [July 12, 2018 Commission] Order. In short, JCV failed to timely intervene in this case. Due process was not denied.⁶¹

Accordingly, the Commission: (i) upheld the March 26, 2019 Commission Order; (ii) denied the Petitioner's April 5, 2019 Petition for Reconsideration; and (iii) dismissed the matter and removed it from the Commission's docket.

On August 2, 2019, the Commission dismissed the Complaint Case (the "August 2, 2019 Dismissal Order").⁶² As provided in the August 2, 2019 Dismissal Order, the Commission stated:

[T]he Commission has 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. We believe that repeating our analysis of the issues is not necessary. Furthermore, the appropriate action to challenge the legality of a certificated 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.⁶³

Accordingly, the Commission: (i) dismissed the Complaint Case; and (ii) removed the Complaint Case from the Commission's docket of active cases.

On September 2, 2019, the Petitioner appealed the Commission's August 2, 2019 Dismissal Order to the Supreme Court of Appeals of West Virginia. The Petitioner generally alleges that the Commission erred in: (i) dismissing the Complaint Case as collateral attacks on the Commission's prior resolution of the Company's Certificate Case; and (ii) not permitting any discovery or an evidentiary hearing in the Complaint Case prior to its dismissal.

⁶¹ *Id.* 0251-52 (emp. added).

⁶² *Id.* 0004-0011.

⁶³ *Id.* 0010.

On October 3, 2019, the Company submitted in a closed-entry filing with the Commission its Certificate of Substantial Completion for Contract No. 1.

II. SUMMARY OF ARGUMENT

The record is undisputed that the Commission did not err in issuing its August 2, 2019 Dismissal Order, wherein the Commission: (i) dismissed the Complaint Case as a collateral attack against the Commission's prior resolution of the Company's Certificate Case, as provided in the July 12, 2018 Commission Order, February 22, 2019 Procedural Order, March 26, 2019 Commission Order, and May 3, 2019 Commission Order; and (ii) in so doing, refused to permit discovery or an evidentiary hearing prior to dismissal of the Complaint Case.

As the Petitioner failed to timely intervene in the Certificate Case before the July 12, 2018 Commission Order and the Commission has already addressed all of the Petitioner's arguments in the Certificate Case, the Commission did not err in dismissing the Complaint Case as a collateral attack against the Certificate Case without first engaging in discovery or an evidentiary hearing did not violate due process.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Company submits that resolution of the appeal under R. App. P. 21 is appropriate where no substantial question of law is presented and under the applicable standard of review and record presented, summary affirmance is warranted.

IV. ARGUMENT

A. STANDARDS OF REVIEW.

The Petitioner confuses the proper standards of review applicable to its appeal.⁶⁴ The Court has held that the Commission is entitled to substantial deference because of its expertise and discretion in its issuance of final orders relating to the regulation of public utilities throughout the State of West Virginia. In *United Fuel Gas Co. v. The Public Service Commission*, 143 W. Va. 33, 99 S.E.2d 1 (1957), this Court held: “[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.”⁶⁵ Moreover, in *Pool v. Greater Harrison Cty. Pub. Serv. Dist.*, 241 W. Va. 233, 237, 821 S.E.2d 14, 18 (2018), this Court stated:

The detailed standard for our review of an order of the Public Service Commission . . . 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.⁶⁶

Thus, this Court should defer to the Commission’s expertise and discretion in its issuance of orders relating to the regulation of public utilities.

⁶⁴ Pet’r Br., at 6.

⁶⁵ *United Fuel Gas Co. v. The Pub. Serv. Comm’n*, 143 W. Va. 33, 99 S.E.2d 1 (1957).

⁶⁶ *Greater Harrison Cty. Pub. Serv. Dist.*, 241 W. Va. 233, 237, 821 S.E.2d 14, 18 (2018).

B. AS THE PETITIONER FAILED TO TIMELY INTERVENE IN THE CERTIFICATE CASE, THE COMMISSION CORRECTLY CONSTRUED THE APPLICABLE STATUTES, LEGISLATIVE RULES, AND ITS PRIOR COMMISSION ORDERS IN DISMISSING THE COMPLAINT CASE AS COLLATERAL ATTACKS AGAINST THE CERTIFICATE CASE WITHOUT FIRST ENGAGING IN DISCOVERY OR AN EVIDENTIARY HEARING.

At its core, the Petitioner's entire appeal precipitously rests on an unfounded violation of due process. Indeed, the Petitioner generally alleges that the Commission erred in: (i) dismissing the Complaint Case as a collateral attack on the Commission's prior resolution of the Company's Certificate Case; and (ii) not permitting any discovery or an evidentiary hearing in the Complaint Case prior to its dismissal.

Since the Petitioner failed to timely intervene in the Certificate Case as provided in W. VA. CODE § 24-2-11(b) and the Commission's May 10, 2018 Procedural Order, and the Commission has already addressed all of the Petitioner's arguments in the Certificate Case, the Commission's dismissal of the Complaint Case as a collateral attack against the Certificate Case without first engaging in discovery or an evidentiary hearing did not violate due process.

B.I. AS THE PETITIONER FAILED TO TIMELY INTERVENE IN THE CERTIFICATE CASE, THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT CASE AS A COLLATERAL ATTACK ON THE COMMISSION'S PRIOR RESOLUTION OF THE COMPANY'S CERTIFICATE CASE.

From the outset, it is important to note that that the Complaint Case was *solely* filed to collaterally attack the Company's Certificate Case.⁶⁷ As mentioned, the July 12, 2018 Commission Order: (i) concluded that no substantial protests were filed by the Commission-ordered deadline for intervention (*i.e.*, June 15, 2018); (ii) granted the Company's application for an emergency certificate of convenience and necessity for the Water Line Extension; and (iii)

⁶⁷ See Pet'r Br., at 7.

closed the Certificate Case and removed it from the Commission's docket of active cases.⁶⁸ Thus, as of July 12, 2018, the Company's Certificate Case was closed and has never been reopened by the Commission.

The Commission's August 2, 2019 Dismissal Order directly addressed the Petitioner's attempt to collaterally attack the Company's Certificate Case through the Complaint Case. Therein, the Commission stated:

[T]he Commission has 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. We believe that repeating our analysis of the issues is not necessary. Furthermore, the appropriate action to challenge the legality of a certificated 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.⁶⁹

Thus, the Commission held that the appropriate manner in which the Petitioner could challenge the Company's closed Certificate Case was through a petition to reopen the Certificate Case. Accordingly, the Commission's August 2, 2019 Commission Order dismissed the Complaint Case.

The *Procedural Rules* directly addresses the manner in which the Petitioner may petition to reopen the Company's Certificate Case. Rule 19.5 of the *Procedural Rules* clearly provides that petitions to reopen a certificate proceeding may only be made by those who were parties to the proceeding at the time of entry of the Commission order approving the certificate case.⁷⁰ Thus, under Rule 19.5 of the *Procedural Rules*, the Petitioner may only petition to reopen the

⁶⁸ App. 1426-29.

⁶⁹ *Id.* 0010.

⁷⁰ W. VA. CODE R. § 150-1-19.5.

Company's closed Certificate Case if it was a party to the Certificate Case as of the July 12, 2018 Commission Order.

The Petitioner openly acknowledges that it was not a party to the Certificate Case as of the July 12, 2018 Commission Order:

Based upon the Procedural Rules of the Commission . . . [the Petitioner] could not move to reopen the Certificate Case, as they were not parties to that proceeding at the time of entry of the [July 12, 2018 Commission Order] granting the [Company's certificate of convenience and necessity.]”⁷¹

Thus, by its own admission, Rule 19.5 of the *Procedural Rules* barred the Petitioner from petitioning to reopen the Company's Certificate Case unless the Petitioner petitioned to intervene in the Certificate Case prior to the Commission's July 12, 2018 Commission Order. The record is undisputed that the Petitioner failed to do so.

Indeed, the Petitioner had ample opportunity to intervene in the Company's Certificate Case. Under W. VA. CODE § 24-2-11(b) and the Commission's May 10, 2018 Procedural Order, the Company published its Notice of Filing on May 16, 2018 in the *Spirit of Jefferson Advocate*, which notice clearly stated that interested parties, including the Petitioner, could petition to intervene in the Certificate Case.⁷² The Petitioner, however, did not petition to intervene in the Certificate Case until 269 days after the Commission-ordered intervention deadline.⁷³ The Petitioner has simply failed to use the rights afforded to it under W. VA. CODE § 24-2-11(b) and the Commission's May 10, 2018 Procedural Order—failing to act does not constitute a violation

⁷¹ Pet'r Br., at 7.

⁷² App. 1426-29.

⁷³ *Id.* 0251-52.

of due process.⁷⁴ Accordingly, as the Petitioner failed to timely intervene in the Certificate Case as provided in W. VA. CODE § 24-2-11(b) and the Commission's May 10, 2018 Procedural Order, the Commission's dismissal of the Complaint Case did not violate due process.

Moreover, the Commission has acknowledged that the Petitioner's failure to timely intervene in the Company's Certificate Case prevented the Petitioner from petitioning to reopen the proceeding under Rule 19.5 of the *Procedural Rules*. In its May 3, 2019 Commission Order, the Commission stated:

The Commission did not violate [the] due process rights of JCV by denying the requests to reopen this proceeding and denying the JCV petition to intervene. Full and complete notice of the [Company's] certificate filing was provided as required by law. W. VA. CODE § 24-2-11. The published legal notice stated the June 15, 2018 deadline to file a request to intervene. All interested parties, including JCV, had notice and the opportunity to participate in this matter. JCV did not request to intervene by the June 15, 2018 deadline or at any time before the Commission issued its Commission Order. JCV petitioned to intervene on March 4, 2019, eight months after the [July 12, 2018 Commission] Order. In short, JCV failed to timely intervene in this case. Due process was not denied.⁷⁵

Accordingly, as the Petitioner failed to timely intervene in the Certificate Case, the Commission did not err in dismissing the Complaint Case as a collateral attack on the Commission's prior resolution of the Company's Certificate Case.

⁷⁴ *Id.*

⁷⁵ *Id.* 0251-52.

B.II. AS THE COMMISSION PREVIOUSLY ADDRESSED THE PETITIONER’S ARGUMENTS IN THE COMPLAINT CASE IN THE CERTIFICATE CASE, THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT CASE WITHOUT FIRST ENGAGING IN DISCOVERY OR AN EVIDENTIARY HEARING.

In dismissing the Complaint Case for failure to comply with Rule 19.5 of the *Procedural Rules*, the Petitioner allege that the Commission’s August 2, 2019 Dismissal Order effectively denied the Petitioner the ability to substantively challenge the Company’s Certificate Case.⁷⁶ The Petitioner asserts that the Petitioner could only file a complaint to protest the Company’s Certificate Case, and the Commission’s characterization of the Complaint Case as a collateral proceeding “clearly illustrate that the Commission was determined not to give the Complaint [Case] any substantive consideration.”⁷⁷ As demonstrated by the record, such assertions are patently false.

The Commission’s dismissal of the Complaint Case was appropriately reviewed and weighed by the Commission prior to its dismissal. Indeed, in its August 2, 2019 Dismissal Order, the Commission explicitly stated that it has “completely considered and decided the [Petitioner’s] arguments [in the Complaint Case] by its Orders issued in the [C]ertificate [C]ase, Case No. 18-0657-W-ECN, on [its] February 22, 2019 [Procedural Order], March 26, 2019 [Commission Order], and May 3, 2019 [Commission Order].”⁷⁸ Thus, as the Commission already addressed the Petitioner’s arguments in the Complaint Case in the Company’s Certificate Case, the Commission did not err in dismissing the Complaint Case without first engaging in discovery or an evidentiary hearing.

⁷⁶ Pet’r Br., at 7.

⁷⁷ *Id.*, at 6-7.

⁷⁸ App. 0010.

B.III. THE WATER LINE EXTENSION IS ALMOST FULLY CONSTRUCTED.

The Company would be remiss in failing to acknowledge that, as of October 31, 2019, the Water Line Extension is almost fully constructed. Indeed, the Water Line Extension has been in the process of construction ever since the Commission first approved the Company's application for a certificate of convenience and necessity in the July 12, 2018 Commission Order.

As noted, the Water Line Extension is comprised of two distinct expansion projects: (i) Contract No. 1: the installation of approximately 18,050 linear feet of 16-inch water line, a 1,200 gallon per minute triplex pressure booster station, an altitude valve vault, and all other necessary appurtenances; and (ii) Contract No. 2: the installation of a 795,000 gallon water storage tank.⁷⁹ Accordingly, an overwhelming proportion of the construction involved in the Water Line Extension falls within Contract No. 1.

On October 3, 2019, the Company submitted in a closed-entry filing with the Commission its Certificate of Substantial Completion for Contract No. 1. Thus, all that is left to complete the Water Line Extension is the installation of a single water storage tank.

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⁷⁹ See App. 1386-87.

V. CONCLUSION

For the reasons provided herein, the Company respectfully requests that this Court summarily affirm the Commission's August 2, 2019 Dismissal Order.

JEFFERSON UTILITIES, INC.

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