

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in  
the City of Charleston on the 2<sup>nd</sup> day of August 2019.

CASE NO. 19-0059-W-C

JEFFERSON COUNTY VISION, INC.,  
Shenandoah Junction, Jefferson County,  
and LEIGH SMITH, Ranson, Jefferson County,

Complainants,

v.

JEFFERSON UTILITIES, INC.,  
a private utility,

Defendant,

and

CASE NO. 19-0060-W-C

MICHAEL BRITTINGHAM,  
Charles Town, Jefferson County,

Complainant,

v.

JEFFERSON UTILITIES, INC.,  
a private utility,

Defendant.

**COMMISSION ORDER**

The Commission dismisses both complaints because the issues raised are substantially similar to those decided in Case No. 18-0657-W-ECN.

**BACKGROUND**

Case No. 18-0657-W-ECN

On July 12, 2018, the Commission granted Jefferson Utilities, Inc. (JUI) a certificate to extend potable water service to the Jefferson Orchards location (Project or Water Line Extension) to serve a manufacturing facility planned by ROXUL USA, Inc.

**AAPP 233**

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(ROXUL) and future commercial customers (Certificate Order).<sup>1</sup> Commission approval was contingent on conditions stated in the Certificate Order. The relevant ordering paragraph reads:

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.

Certificate Order at Ordering ¶ No. 6 (Jul. 12, 2018).

On January 22, 2019, David Tabb, a ratepayer, made a closed filing in the certificate case. Mr. Tabb claimed that the Project cost, financing and ownership terms had changed from the previously approved terms and JUI should have reopened the matter to obtain Commission approval of the changes before starting Project construction. Mr. Tabb sought an order directing JUI to immediately cease construction until the Commission examined whether the changes would impact JUI rates and charges.

On January 24, 2019, Staff filed a petition to reopen Case No. 18-0657-W-ECN and require JUI to provide information regarding any changes to the Project. Staff also requested that the above captioned complaint cases be consolidated with the reopened certificate case.

On January 30, 2019, JUI responded to the Staff petition. JUI denied being in violation of the Certificate Order. JUI contended that reopening the case was not warranted because the increased Project cost and ROXUL replacing JCDA to fund the Project did not constitute changes in the plans, scope, terms of financing or rates associated with the Project. JUI stated that the changes to cost and funding would have no impact on JUI ratepayers because ROXUL has agreed to pay the cost, JUI's contribution of cost remains \$330,000 and the reimbursement terms remain \$2.88 per 1,000 gallons of water sold.

By its Order issued on February 22, 2019, the Commission concluded that pursuant to the Certificate Order and Rule 10.3.8 of the Commission Rules of Practice and Procedure, 150 C.S.R. 1 (Procedural Rules), the changes in cost and financing would not require reopening the certificate case if the increased cost and change of funding source did not affect JUI rates. JUI was ordered to submit specific information regarding

<sup>1</sup> Procedural history for Case No. 18-0657-W-ECN occurring prior to July 2018 is set forth in the July 12, 2018, Commission Final Order.

the Project, including an affidavit signed by its certified public accountant in support of its contention that there would be no rate impact.

On March 4, 2019, Jefferson County Vision, Inc. and Leigh Smith (collectively, JCV and Ms. Smith), the Complainants in Case No. 19-0059-W-C, filed a petition to intervene and petition for reconsideration of the February 22, 2019 Procedural Order. JCV and Ms. Smith stated that as JUI ratepayers they have an interest in the certificate case because the Project changes will likely increase JUI customer rates. JCV and Ms. Smith asserted that the Project scope and plans had changed because the cost had increased, ROXUL demand for water decreased, the length of the line decreased, and the JUI debt service to ROXUL was unknown. Furthermore, JCV and Ms. Smith argued that because West Virginia Infrastructure and Jobs Development Council (WVIJDC) withdrew, the Project was no longer a WVIJDC approved project. Without WVIJDC involved to evaluate Project changes and to ensure no rate impact, JCV and Ms. Smith asserted that W.Va. Code §24-2-11(j)<sup>2</sup> should not be applied to prohibit reopening the certificate case.

On March 14, 2019, JUI responded to the February 22, 2019 Procedural Order by filing an affidavit attesting that the Project changes will not affect JUI rates, a projected revenue requirement statement, a projected cash flow analysis, and sample journal entries demonstrating ROXUL's transfer of the Water Line Extension facilities and JUI's monthly payment to ROXUL.

On March 26, 2019, the Commission issued an Order denying the requests to reopen the certificate case and to reconsider the February 22, 2019 Procedural Order made by JCV and Ms. Smith. The Commission held that pursuant to the Certificate Order, Procedural Rule 10.3.8 and governing case law:

1. There had been no change in the scope or plans of the Project;
2. The increased Project cost and change to the source of Project funding did not require Commission approval because the changes would not impact JUI rates;
3. The fact that WVIJDC is no longer involved with the Project does not negate the fact that WVIJDC previously approved the Water Line Extension, thus pursuant to the Certificate Order the affidavit exception applies to the certificate case;

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<sup>2</sup> W.Va. Code §24-2-11(j) reads:

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.

4. It would be inappropriate to join ROXUL and require ROXUL to apply for and secure a second certificate for the certificated Project, therefore ROXUL is not a necessary party to the certificate proceeding; and
5. The joint petition to intervene filed by JCV and Ms. Smith should be denied as moot because there are no grounds to reopen the certificate proceeding.

On April 5, 2019, JCV and Ms. Smith filed a petition for reconsideration of the March 26, 2019 Order. On April 16, 2019, JUI responded by requesting the Commission deny the request for reconsideration.

By an Order issued on May 3, 2019, the Commission denied the petition for reconsideration on grounds that it failed to satisfy the standard for reconsideration. The Commission concluded that JCV and Ms. Smith failed to present any new facts or substantive issues for Commission consideration that were not previously addressed by the February 22, 2019 and March 26, 2019 Commission Orders.

Case No. 19-0059-W-C

On January 22, 2019, JCV and Ms. Smith filed a complaint against JUI regarding the certificated Project. They alleged that JUI was in violation of the Certificate Order for failing to reopen Case No. 18-0657-W-ECN and secure Commission approval for changes to the cost, financing and scope of the certificated Project.

JCV and Ms. Smith stated that their allegations and arguments were based on information gleaned from an article published in The Spirit of Jefferson on January 11, 2019. Based on the publication, Complainants alleged that:

- (i) the WVIJDC loan had been withdrawn;
- (ii) [JCDA] would no longer be involved in the [P]roject and would not own the [P]roject infrastructure;
- (iii) the [P]roject 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 completed 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.

Complaint at 3, Attachment. For these reasons they requested interim relief in the form of an order directing JUI immediately stop Project construction. They requested the Commission reopen Case No. 18-0657-W-ECN to review the Project changes, consolidate this complaint case with the certificate case, treat JCV and Ms. Smith as

parties to both cases, and issue a procedural order allowing for discovery and a hearing regarding the certificated Project.

Case No. 19-0060-W-C

On January 22, 2019, Michael Brittingham filed a complaint against JUI asserting that the entire scope of the certificated Project, as well as Project funding, had changed. He alleged that JUI violated the Certificate Order by not seeking Commission approval for changes to the Project scope and funding terms. Based on an article published in The Spirit of Jefferson, Mr. Brittingham stated that the Project no longer includes: (i) Jefferson County Development Authority (JCDA) funding, (ii) a JUI contribution toward costs and (iii) the three agreements among JCDA, JUI and ROXUL that were approved by the Commission. Brittingham Complaint at 3, Attachment. He also alleged that ROXUL and JUI had entered their own agreement for ROXUL to privately fund the Project.

Mr. Brittingham requested interim relief in the form of an Order rescinding Commission approval of the Project. He also requested the Commission require JUI to file a new application seeking Commission approval and issuance of a certificate for the current project, and that JUI include financial information pursuant to Rule 42 of the Commission Rules for the Construction and Filing of Tariffs, 150 C.S.R. 2 (Tariff Rules).

Recommendations by Commission Staff

Staff filed the same Joint Staff Memoranda in both complaint cases on January 24, 2019, recommending that the Commission consolidate and track the complaint cases with Case No. 18-0657-W-ECN if Staff's request to reopen the certificate case is granted.

On April 22, 2019, Staff filed its Final Joint Staff Memoranda in both complaint cases and recommended that if the petition for reconsideration of the March 26, 2019 Order was denied, the Commission also should dismiss the complaint cases.

DISCUSSION

The complaint cases both allege that the scope, cost and funding for the certificated Project have changed and request that Case No. 18-0657-W-ECN be reopened for the Commission to evaluate if the changes will affect JUI rates.

The threshold for reopening the certificate case requires that there be a change in the plans, scope, terms of financing or cost of the Project, but a change in the Project cost does not require reopening the proceeding if JUI submits an affidavit from a certified public accountant attesting that the change in cost does not affect rates. JUI, Case



No. 18-0657-W-ECN at Ordering ¶ No. 6 (Jul. 12, 2018). To decide the filings in the certificate case the Commission reviewed the current status of the Project to evaluate if changes had occurred and if so whether the changes satisfy the threshold requirement for reopening the proceeding. Consequently, by resolving the certificate case filings, the Commission also decided the issues raised in the complaints as discussed below.

Both Complainants contend that the changes to the Project scope warrant reopening Case No. 18-0657-W-ECN. In the certificate case, the Commission considered the same ground for relief. Upon finding that the Project scope and plans had not changed, the Commission decided that reopening the certificate proceeding on this ground was not warranted. Id. at 4, FOF No. 4, COL No. 1 (Mar. 26, 2019); Id. at 5, FOF No. 4, COL No. 4 (May 3, 2019). In those Orders the Commission specifically addressed the JCV and Ms. Smith argument that the reduction of the amount of sixteen-inch pipe and amount of water to be sold to ROXUL constituted a change in the scope and plans of the Project. Id. at Petition for Reconsideration (Mar. 4, 2019); JUI, 4 (Mar. 26, 2019).

The Complainants allege that the terms of financing for the Project have changed because WVIJDC funding and JCDA are no longer involved and the prior agreements among JUI, JCDA and ROXUL have been replaced by a new agreement. In the certificate case, the Commission found that although the terms of the prior agreements were replaced by terms contained in the new Water User Agreement between JUI and ROXUL, the terms of financing contained therein remained essentially the same. Id. at 4, FOF Nos. 3, 4 (Feb. 22, 2019); Id. at 5, FOF No. 5, COL No. 5 (Mar. 26, 2019); Id. at 6-7, FOF No. 5 (May 3, 2019). We also discussed in detail that the withdrawal of WVIJDC funding and JCDA from the Project did not change the terms of financing for the Project. Id. at 5, COL No. 5 (Mar. 26, 2019); Id. at 6-7, FOF No. 5 (May 3, 2019). Again, the Commission considered and decided arguments directly asserted in the certificate case by JCV and Ms. Smith. Id. at Petition for Reconsideration, ¶ 7 (Apr. 5, 2019); Id. at Petition for Reconsideration, ¶ 3 (Mar. 4, 2019).

The Complainants contend that because the Project cost increased, the Commission must reopen the certificate proceeding. According to the Certificate Order, a change to the Project cost would not warrant reopening the matter if JUI provided an affidavit attesting that the change in cost would not affect rates. JUI, Ordering ¶ No. 6 (Jul. 12, 2018). Although JUI acknowledged that the Project increased from the estimated cost of \$4.850 million to \$5.605 million based on final bids, JUI also submitted an affidavit stating that the increased cost would not impact JUI rates. The Commission therefore concluded, based on the affidavit and other Project-specific data, that the increased Project cost did not satisfy the threshold to reopen the certificate proceeding. Id. at Order at 5, FOF No. 7, COL No. 2 (Mar. 26, 2019); Id. at 6-7, FOF No. 5, COL No. 5 (May 3, 2019).

As discussed above, the 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.

#### FINDINGS OF FACT

1. The issues regarding the certificated Project raised by JCV and Ms. Smith and Mr. Brittingham are substantively and substantially similar to those raised in Case No. 18-0657-W-ECN. January 22, 2019, JCV-Smith Petition; January 22, 2019, Brittingham Petition.

2. The Commission decided the issues raised in the complaint filed by JCV and Ms. Smith and the complaint filed by Mr. Brittingham in its Orders issued in certificate case. Case No. 18-0657-W-ECN, Commission Orders May 3, 2019, March 26, 2019, February 22, 2019.

#### CONCLUSION OF LAW

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.

#### ORDER

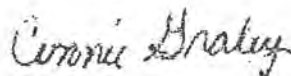
IT IS THEREFORE ORDERED that the complaint filed in Case No. 19-0059-W-C by Jefferson County Vision, Inc. and Leigh Smith is dismissed.

IT IS FURTHER ORDERED that the complaint filed in Case No. 19-0060-W-C by Michael Brittingham is dismissed.

IT IS FURTHER ORDERED that on entry of this Order these cases shall be removed from the Commission docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,



Connie Graley, Acting Executive Secretary

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