



**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)**

REPLY BRIEF OF THE PETITIONER

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INTRODUCTION

Rockwool is the first heavy industrial plant with smokestacks to come to Jefferson County in some time. This plant will be located directly across the street from an elementary school. Upon information and belief, Petitioner believes that it will be the first of many such heavy industrial plants to be located at the Jefferson Orchards site. There is something inherently wrong with our system if the Commission, and related governing bodies, have the unfettered authority to declare water utility service to Rockwool an emergency project, and then proceed to obtain the necessary approvals and construct the water line without a public hearing and without virtually any public input. The Commission simply took JUI and Rockwool, a private foreign company, at their word, and ignored the reasonable pleas of the public to implement a fair process through which facts would be gathered and analyzed thereafter. This Court should not permit such a sham on the citizens of this State.

ARGUMENT IN REPLY

Although the Petition, the Commission Order and its Statement of Reasons, together with the Amicus Briefs, contain summaries of the case, given the arguments advanced by the Commission and the Amicus Briefs, the Petitioner will concisely restate the case in the context of JUI's actions, or perhaps inactions, following the issuance of the Certificate and why the underlying complaint was filed.

This case involved an application for a certificate of public convenience and necessity under the provisions of W. Va. Code § 24-2-11 (2019). In order to grant the certificate, the Commission must find that the proposed project is both convenient to the public and necessary. The West Virginia Code directs that "all orders of the commission shall set forth separately findings of facts and conclusions of law, which finding of fact shall make specific reference to

the evidence in the record which supports such findings.” W.Va. Code § 24-1-7 (2019). The Certificate issued to JUI, on July 12, 2018, to construct the water facility, was based on an application that identified Rockwool as the sole customer. No other customers were identified in the application. The project was to be funded by the West Virginia Industrial and Jobs Development Council (WVIJDC), with the funds going to the Jefferson County Development Authority (JCDA). The estimated cost of the project was \$4,850,000, with delivery of water of not less than 320,000 gallons per day. The JCDA would own the facility and JUI would pay a use fee to JCDA of \$2.88 for each thousand gallons sold to Rockwool and any future customer that might be served from the project. The use fee would be used by JCDA to retire the WVIJDC loan. JUI represented that this arrangement would not require an increase in JUI’s current rates and charges. Application, Paragraphs 6-10, filed May 10, 2018. ¹

The 2018 Commission Order granting the certificate had the following 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.

¹ The Statement of Reasons and Amicus Briefs emphasize that this project has been approved by the WVIJDC. They go on to assert that because of the exception in W.Va. Code § 24-2-11 for WVIJDC approved projects, even though costs and financing have changed, the ECN case does not need to be reopened because an affidavit was filed stating there would be no impact on rates. While it may be true that the engineering plans of the project may be the same, it is obvious that the WVIJDC did not review and approve the financing of the revised project. In a WVIJDC project, the WVIJDC reviews the project costs, the expected revenue and approves the funding using state funds. Therefore, the current project is not proceeding as a WVIJDC project calling into question the legitimacy of utilizing the affidavit exception to the reopening requirement. However, the point is that no one has reviewed the costs of this project. The parties, including the Commission have finessed this issue by pointing out that JUI’s payment per thousand gallons sold remains the same. However, the total liability to Rockwool has increased and a greater amount of revenue is being withheld from the utility that would otherwise benefit customers. Would the Commission have paused if the costs went to \$10, 15, 20 million? This approach undercuts the Commission’s duty to ensure that the costs of a project seeking a certificate are reasonable.

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.

These are the standard Commission ordering paragraphs in virtually every case that issues a certificate of public convenience and necessity. The changes are stated in the disjunctive. In other words, JUI was obligated to petition to reopen for approval of changes if (i) there was a change in project plans; (ii) there was a change in project scope; or (iii) there was a change in project financing. For reasons discussed later, the Commission has focused solely on the project plans and project financing and has ignored the changes in project scope. Project scope is inherently a factual question. The reason for the reopening is clear – the applicant is required to show and the Commission is required to determine, by an order based on fact and law, that the certificate issued authorizing the construction, considering the project changes, remains convenient and necessary within the meaning of W. Va. Code § 24-2-11, which would include a review of the project financing, costs, and size in light of reasonably expected demand.

The Commission Rules of Practice and Procedure, 150 CSR 1, Rule 10.3.8 (2019) (formerly designated as Rule 10.3.h. prior to February 8, 2019) is headed “Change in certificated project scope, funding, revenue requirement and/or rates” and states the following:

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.

Several points are noteworthy regarding the Rule. The language regarding project changes, like the Commission order, is stated in the disjunctive. The Rule plainly states that in the event of a project change a petition to reopen must be filed by the utility and receive approval before "beginning or continuing construction of such project." If the project has been approved by the WVIJDC and the change is the cost of the project but the change does not impact rates established for the project, the utility is still required to notify the Commission that there has been a change in project costs and submit an affidavit that rates are not impacted.

Instead of filing a petition to reopen or notifying the Commission and submitting the required affidavit, construction of the project began. When the local newspaper reported a story about the commencement of construction and changes to the project, Petitioners filed the underlying complaint. The complaint simply alleged that JUI failed to reopen the case based upon the obvious changes to the financing and structure of the Project and the ownership of the line.

Additionally, the complaint requested, among other relief, (i) "that the Commission immediately issue an order granting interim relief and preserving the status quo by directing JUI to immediately cease and desist from further construction activities regarding this project until it has obtained proper authority"; (ii) "that the Commission adopt a procedural schedule that will allow the Complainants sufficient time to engage in discovery of substantive factual matters relating to this revised project and the issue of whether approval should be granted for this Project to move forward"; and (iii) "that the Commission conduct a hearing in this matter." Quite simply, Petitioners wanted a fair, thorough and, most importantly, transparent process.

JUI filed an answer stating that it was not required to do anything. The Commission took no action on the complaint for the request for interim relief except to dismiss the complaint by the Order dated August 2, 2019, which is the subject of this appeal. Instead of promptly acting on the complaint by establishing a procedural schedule, the Commission issued what it called a procedural order in the ECN case on February 22, 2019 that concluded reopening was not necessary if JUI filed the required affidavit stating changes to project costs and financing did not affect rates. The Commission also announced that it would not take any further action until the affidavit was filed. Once this statement was made, it was obvious that the Commission intended to take no action on the Complaint and that it did not intend to provide a hearing on the matter. JUI filed the affidavit and, upon receipt, the Commission promptly issued the order denying the Staff petition to reopen the certificate case finding that reopening was not required.

A. The Commission Order unfairly characterized and improperly treated the Complaint.

In its August 2, 2019 Order, the Commission stated:

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.

In its Statement of Reasons to this Court, the Commission continues the same argument but asserts that its statement does not violate this Court's decision in the *Affiliated Construction Trades* case because the Commission fully considered the Petitioner's arguments (an argument also made in the Amicus Briefs). 211 W.Va. 315 (2002). By referring to Petitioner's arguments,

the parties presumably mean arguments made in the complaint and the petitions for reconsideration of the procedural order of February 22, 2019 in the ECN case in which the Commission decided that reopening was not necessary if an affidavit attesting to no impact on rates was filed and the final order of March 26, 2019 where the Commission decided not to reopen the ECN case based on the affidavit.

Petitioner challenges the Commission's position for the following reasons:

(a) The complaint does not "challenge the legality of a certificated project" as stated in the Order. The complaint asserts as a cause of action that JUI failed to comply with an ordering paragraph of the ECN Order, and because of that failure, there should be a reopening of that case and a determination made as to whether approval should be given to the revised project. The Complaint asked for an evidentiary hearing on the project changes. As argued in the Petitioner's initial brief, the Commission viewed the complaint filed in the *Affiliated Construction Trades* case as an attempt to undo a certificate order and dismissed the complaint. This Court set aside that part of the Commission's decision and found that it was totally appropriate for a complaint to be filed regarding a utility's failure to comply with a Commission order. The Commission has repeated its mistake and this part of the Commission Order should be vacated and set aside as inconsistent with the *Affiliated Construction Trades* decision.

(b) Like trial courts of record, the PSC complaint process requires only a notice pleading. At the time the complaint was filed, the Petitioners had little facts in their possession other than a newspaper article and public statements by JUI officials. Once a cause of action is stated, a complaint is set for evidentiary hearing. To say that the Commission gave full consideration to the Petitioner's arguments is to ignore the fact that the Petitioner was never given the opportunity to factually support the complaint through discovery, a public hearing, etc.

as dictated by W. Va. Code 24-1-7. For this reason alone, the Commission Order should be reversed.

B. There were clear changes in the scope of the Project.

As previously stated, three (3) separate changes in a project can trigger the need to reopen and obtain Commission approval that the project is still warranted given the changes, i.e., changes in project plans, changes in project scope and changes in project terms of financing. In its Order, and now in its Statement of Reasons, the Commission arguably focused on changes in project plans and specifications (JUI asserted that the same project was being built) and the project terms of financing. Regarding the terms of financing, the Commission decided in its February 22, 2019 Order that the entire issue of reopening went away if the terms of financing did not impact rates if so stated in an affidavit submitted by the project CPA. Setting aside for the moment, the changes regarding plans and terms of financing and its impact on rates, the Commission ignored changes in project scope which cannot be addressed by a CPA affidavit.

Project scope involves an identification of the work that needs to be done in order to complete the project. Scope would include a list of everything that forms the framework for the project including goals, deliverables, features, functions, tasks, deadlines, responsibility of parties and monitoring costs within a given budget. Project scope and associated project scope changes are inherently a factual inquiry. In terms of a budget for the revised project, there are almost a million dollars in increased estimated project costs that are unexplained. What we know about the project scope is unfortunately limited to information submitted in the original ECN case, including the proposed water user agreement, and the January 30, 2019 answer and motion to dismiss filed by JUI in response to the Petitioner's complaint, that included the water user agreement, and the January 30, 2019 filing by JUI opposing Staff's petition to reopen the

ECN case. Based upon that limited information (provided by JUI not Rockwool), it is known that changes in project scope include the following:

- (1) The financing has changed. Instead of the WVIJDC extending a loan to the JCDA (who would own the project), Rockwool will fund the project. The Commission ECN order approved the funding of the JCDA loan from the WVIJDC for a term of forty (40) years and the lease arrangement between the JCDA and JUI. The significance of the WVIJDC involvement is that the WVIJDC would engage in due diligence before extending a loan ensuring that project is not being overbuilt, is a reasonable cost, meets reasonably expected demand and that there will be future adequate revenue to repay the loan. That review no longer exists in the current project scope;
- (2) The Commission Order issued the certificate to JUI. However, JUI's Answer filed in response to the Petitioner Complaint is quite clear that JUI is no longer constructing the project. Rockwool is constructing the project. Rockwool has entered into the construction contracts; Rockwool will pay the construction costs; Rockwool will own the facilities, and at some time post construction, it will transfer its interests in the facilities to JUI, which will then reimburse Rockwool for Rockwool's costs;
- (3) Although JUI was issued the ECN and will own the facilities with the obligation to pay back Rockwool's costs, unlike the arrangement with the JCDA, JUI will not be in control of the construction of the project. Instead, Rockwool will contract with the contractors necessary to construct and equip the project. JUI will have no control over the construction;
- (4) Not only have the estimated project costs increased from \$4,850,000 (original ECN filing) to \$5,605,229 (revised project), the bid tabulations submitted after the complaint was filed show that Rockwool awarded a contract for construction of the waterline extension, altitude valve and booster pump station in the amount of \$3,019,444.50 and a contract for construction of the water storage tank of \$1,284,657.25 for a total of \$4,304,101.75. JUI states that its share of total costs is \$330,000 and that the estimated cost of the project has increased to \$5,605,229. That leaves almost a million dollars of increased costs left unexplained (\$5,605,229 minus \$4,634,101.75) – costs that JUI has obligated itself to repay to Rockwool out of utility revenues.
- (5) In the ECN Application, JUI asserted that the Project will provide it with the ability to provide the Rockwool facility with 160,000 gallons of water per day during construction increasing to not less than 320,000 gallons per day, including fire protection. ECN Application, Paragraph 6. However, the Water User Agreement dated January 11, 2019, signed by JUI and Rockwool and submitted as an exhibit to JUI's Motion to Dismiss contains the following provision: "JUI shall plan, design, and obtain the required permits for the Water Line Extension, which extension will be planned, designed and permitted to provide the Facility with water service. The Facility will require an average approximately 12,875 gallons of water per month through the construction period,

expected to be 8 months, and, upon the completion of acquisition, construction and equipping of the Facility, not less than 125,000 gpd and fire protection service.”

In other words, estimated costs have increased by 15% while Rockwool's minimum water usage has declined by 60%. This is significant. Again, this project was justified on the basis of service to Rockwool. The project and the payments by JUI over the next 40 years represents a significant investment compared to JUI's existing plant. As the proposed owner of these facilities, in addition to repaying Rockwool over a period of time that could extend for 40 years, JUI and its customers will have the future obligation to maintain, repair, extend and replace these facilities as needed. Facilities that were authorized to be constructed based solely on Rockwool's expected needs.

Under both the terms of the Commission's ordering paragraphs in the ECN order and the Commission rules, these changes in project scope act independent of project plans and project terms of financing and require that JUI petition the Commission to reopen the ECN case, justify the changes including the revised water user agreement and obtain Commission approval.

C. This case is not moot.

The statement of reasons and the Amicus Briefs argue that the case is moot because the construction of the first phase of the project has been substantially completed. It is not moot.

As indicated in the Rockwool brief, completion of the second phase (construction of a 795,000 gallon water tank) will not be finished for six months, which would be the end of April, 2020. The Water User Agreement defines the project as consisting of both phases. Section 7 of the Agreement provides that no later than 90 days after completion of the project, which is anticipated to be the end of April, 2020, Rockwool will transfer ownership of the project to JUI and at that time, JUI has the obligation to begin repaying Rockwool \$2.88 per thousand gallons for all water sold on the Jefferson Orchards site. Rockwool states that it would incur a great

hardship if it had no water service. If the Court were to reverse the Commission's decision and remand the case to the Commission, the Petitioner anticipates that the issues to consider would include reasonableness of the water user agreement that could include the ownership issue, should JUI or Rockwool own this line, if JUI owns the line what is a reasonable sharing of future cost risk between JUI, and its customers, and Rockwool to be considered in context of the size of the project, its costs, future impact on customer rates and reasonably expected future demand.

More to a general point, this Court should not concede the case is moot based simply on the fact that the water line is built. If this is acceptable, any private company, with the blessing of the Commission, can seek approval of a project despite not following the proper process. Notwithstanding any challenge, project construction can commence. By the time complainants can raise any issues before this Court, the project is built and both the Commission and company can claim the issues are moot. This would be dangerous precedent.

CONCLUSION

The Commission issued a certificate to a utility to build a project to serve a large customer and its approval of a known amount of funding for the project. JUI represents in its Amicus Brief that it immediately began construction upon receipt of the certificate (even though the WVIJDC funding had not been finalized and eventually fell through). There is something inherently wrong with a situation where the certificated project has morphed into a situation where the utility is no longer building the project, the customer is; the quantified state funding no longer exists; the estimated costs of the project have significantly increased; the utility agrees to reimburse the customer its costs whatever they turn out to be; the water demand of the only identified customer has gone down; and the utility will own the facility with the obligation to make all future maintenance, repairs, replacement and extensions where there may be

insufficient revenue; the utility provided no notice to the Commission of these significant changes; and then when it was brought to its attention, the Commission refusing to reopen the certificate case and addressing the merits of the complaint.

As the Commission has acknowledged in its statement of reasons, it has the statutory duty to ensure economical utility service and the “well-planned development of utility resources”. W. Va. Code § 24-1-1 (2019). Without further scrutiny by the Commission, the revised project cannot be said to be well-planned development of utility resources or adequate consideration of the interests of current and future customers. Furthermore, the Commission is obligated under W. Va. Code § 24-2-11 to ensure that a proposed project is necessary and convenient to the public. *Sexton v. Public Service Commission*, 188 W. Va. 305, 423 S.E. 2d 914 (1992). Its role in economic development does not trump these duties.

The Petitioner respectfully requests that the Court reverse the Commission Order and remand the matter back to the Commission for further consideration.

Dated: November 20, 2019

Respectfully submitted,



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