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

**JEFFERSON COUNTY VISION, INC.,**

**Petitioner,**

**v.**



**No. 19-0774**

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; and  
Jefferson Utilities, et al.,**

**Respondents.**

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**STATEMENT OF THE RESPONDENT  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF AUGUST 2, 2019  
IN COMMISSION CASE NO. 19-0059-W-C**

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**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
By Counsel,**

**JESSICA M. LANE, ESQ.  
GENERAL COUNSEL  
WV State Bar I.D. No. 7040  
[jlane@psc.state.wv.us](mailto:jlane@psc.state.wv.us)**

**NATALIE N. TERRY, ESQ.  
WV State Bar I.D. No. 11788  
[nterry@psc.state.wv.us](mailto:nterry@psc.state.wv.us)**

**201 Brooks Street  
Charleston, WV 25301  
(304)340-0450**

**October 31, 2019**

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

**Jefferson County Vision, Inc.,**

**Petitioner,**

**v.**

**No. 19-0744**

**Public Service Commission of West Virginia; and  
Jefferson Utilities, et al.,**

**Respondents.**

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**STATEMENT OF THE RESPONDENT  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF AUGUST 2, 2019  
IN COMMISSION CASE NO. 19-0059-W-C**

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:**

The Respondent Public Service Commission of West Virginia (hereafter Commission) hereby tenders for filing its reasons for the entry of its August 2, 2019 Order that is the subject of this appeal.

**STATEMENT OF THE CASE**

The certificated project at issue in the Complaint on appeal relates to a closed certificate case (Case No. 18-0657-W-ECN) (hereafter Certificate case) wherein Jefferson Utilities Inc. (hereafter JUI) applied for, and received, a certificate of public convenience and necessity to construct a public utility water line extension (hereafter Project) to extend water service to a 400-acre tract of property known as Jefferson Orchards where an industrial business park development will house commercial businesses. The West Virginia Infrastructure and Jobs



Development Council (hereafter WVIJDC) approved and designated the Project as an emergency project.<sup>1</sup> The Project was estimated to cost \$4,850,000 but have no project-related rate impact on existing JUI customers. After public notice and evaluation by Commission Staff,<sup>2</sup> the Commission granted the application, subject to conditions. When construction bids were received, the estimated cost of the Project increased approximately fourteen percent and JUI secured a replacement funding source. However, the location, plans and scope of the Project did not change. Moreover, the increase in cost and the replacement funding did not impact JUI customer rates. Because the changes to the Project cost and funding had no rate impact, the utility was not required to petition to reopen the certificate proceeding to seek further Commission approval, provided that JUI submitted an affidavit prepared by a certified public accountant (CPA) attesting to the lack of rate impact.

The Petitioner, Jefferson County Vision, Inc. (hereafter Petitioner or JCV) and Leigh Smith, a JUI customer, jointly made filings in the closed Certificate case and also filed a separate formal complaint (hereafter Complaint case) asserting that JUI was required to seek Commission approval of changes in project scope, cost and financing and requested interim relief in the form of a Commission order directing JUI to immediately cease and desist Project construction until it obtained Commission approval of the changes. The Petitioner also requested the Commission: (1) consolidate Petitioner's complaint case with the Certificate case and consider Petitioner a party to both cases, (2) require JUI to provide public notice of how the revised Project will

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<sup>1</sup> "Emergency project means a project which the [WVIJDC] has determined: (1) is essential to the immediate economic development of an area of the state; and (2) will not likely be developed in that area if construction of the project is not commenced immediately." W.Va. Code §31-15A-2.

<sup>2</sup> Commission Staff is comprised of attorneys from the Public Service Commission Legal Division and technical and financial subject-matter experts that review the positions of all parties to Commission proceedings and present a recommendation for disposition to the Commission in pending matters. Commission Staff is a formal party to Commission proceedings.

impact JUI customer rates, (3) issue a procedural schedule that allows sufficient time for discovery of facts related to the revised Project and whether Commission approval of the changes should be granted, and (4) schedule and conduct an evidentiary hearing.

The Commission issued an Order in the closed Certificate case fully analyzing the issues presented by Petitioner, which were the same issues presented in Petitioner's complaint that is currently on appeal. The Commission declined to reopen the Certificate case because changes to the Project did not meet the threshold to require reopening. The Commission subsequently dismissed the Complaint on grounds that the issues raised by Petitioner were asserted and fully addressed by the Commission Order rendered in the Certificate case declining to reopen the matter.

To put this appeal in proper perspective, the Commission provides the procedural history of the Certificate case and the Complaint case.

I. The Certificate Case - Case No. 18-0657-W-ECN

On May 10, 2018, JUI filed an application for an emergency certificate of convenience and necessity to construct the Project (hereafter Certificate application) to provide public water utility service to new commercial customers located within the JUI service territory at Jefferson Orchards. ROXUL USA Inc. (hereafter ROXUL) planned to build and operate the Rockwool stone wool manufacturing facility and receive water service from JUI once the Project is complete.<sup>3</sup> According to the Certificate application, the Project would include the installation of approximately 18,050 linear feet of 16-inch water line, a 795,000 gallon water storage tank, a

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<sup>3</sup> References to the Roxul manufacturing facility and Rockwool manufacturing facility are used interchangeably throughout this filing, the Commission record and Commission orders because Roxul, Inc. is part of the Rockwool Group. In 2018, after Jefferson Utility, Inc. filed Case No. 18-0657-W-ECN the Roxul name was rebranded to Rockwool.

1,200 gallon per minute triplex pressure booster station, an altitude valve vault, and all necessary appurtenances.

The Certificate application stated an estimated Project cost of \$4,850,000. JUI would provide up to \$330,000 of funding from cash flow. Jefferson County Development Authority (hereafter JCDA) intended to provide the rest of the funding through a loan from the West Virginia Water Development Authority (WDA) and the WVIJDC for a term of forty years at no more than 1.0 percent interest. Under the terms of a long-term Lease and Purchase Agreement between JUI and JCDA, JCDA would own the Project but JUI would have the exclusive right to use the water line extension for a period of forty years, after which JCDA would sell the water line extension to JUI for \$1.00. Under the terms of the agreement, JUI would operate and maintain the water line extension and pay a monthly fee to JCDA of \$2.88 per 1,000 gallons of water sold to all customers located on the Jefferson Orchards site. JCDA would use the monthly fees received to satisfy the debt service associated with the WDA/WVIJDC loan. JUI, JCDA and ROXUL also entered into a Memorandum of Understanding and Water User Agreement to memorialize the entities' agreements related to the Project. The foregoing agreements were filed with the Certificate application.

A. Public Notice of the JUI Certificate Application

Full and complete notice of the JUI certificate filing was provided as required by W.Va. Code §24-2-11. On May 10, 2018, the Commission issued an Order directing JUI to give public notice of its filing. The Order and the notice stated, among other things, that in the absence of substantial protest, the Commission could waive formal hearing and grant the relief requested in the application.



Publication of the notice in the *Spirit of Jefferson Advocate* occurred on May 16, 2018. (June 1, 2018, JUI Responses to Staff First Discovery Request at Attachment No. 1-3 Certificate of Publication). The published legal notice provided that anyone desiring to protest or intervene should do so within thirty days of publication. All interested parties, including the Petitioner, had notice and the opportunity to participate in this matter. The deadline to file a request to intervene was June 15, 2018. No protests or petitions to intervene were filed in response to publication.

JCV did not request to intervene by the June 15, 2018 deadline or at any time before the Commission issued its July 12, 2018 Final Certificate Order granting a certificate for the Project.

B. Review of JUI Certificate Application

On June 27, 2018, Commission Staff filed a final memorandum providing a detailed analysis of the Certificate application. Commission Staff stated that JUI's current customer rates and the projected water usage by ROXUL, minus the dedicated bond repayment, should provide adequate revenue to cover the operation and maintenance expenses associated with the Project. The Project plans complied with the Commission's Rules for the Government of Water Utilities, 150 C.S.R. 7. Because no protests against the Project were filed, Commission Staff stated that the Certificate application did not require a hearing. Commission Staff, therefore, recommended that the Commission: (1) Grant the JUI application for a certificate of convenience and necessity to construct the Project contingent on JUI filing all related permits and approvals with the Commission; (2) Approve, generally, the agreements between JUI, JCDA and ROXUL with minor changes; (3) Require JUI to promptly file, for each contract associated with the Project, a copy of the certified tabulation of bids and certificates of substantial completion; and (4) Require JUI to seek Commission approval of changes in the plans, scope or Project-related rates,

however, because the Project was WVIJDC-approved, if changes in cost or funding do not impact JUI rates, further approval of the revised cost or funding should not be required if JUI files an affidavit executed by its CPA verifying the lack of rate impact.

JUI filed a letter stating that it had no objection to Commission Staff's final recommendations.

On July 12, 2018, the Commission issued a Final Order granting the JUI Certificate application pursuant to W.Va. Code §24-2-11. The Order stated that the emergency Project was necessary, appropriate and would have no rate impact on existing JUI customers. The Commission determined that a hearing was not necessary because the Project would not increase rates and no protests were filed opposing the application. The Commission adopted Staff's recommendation and conditioned its approval on JUI filing copies of specific Project-related information with the Commission and filing a petition to reopen the case to seek Commission approval of certain changes to the Project.

C. Revisions to Project

Six months after the Commission granted the Certificate, on January 22, 2019, David Tabb, a JUI customer and non-party to the Certificate case, filed a "Motion to Review July 12, 2018 Commission Order 18-0657-W-ECN - Motion of a Stop Work Order." Mr. Tabb stated that he informed JUI of his concerns that the water line extension Project may need further Commission approval because JCDA and the WDA/WVIJDC funding were no longer involved with the Project. Mr. Tabb believed JUI had violated the July 12, 2018 Final Certificate Order by not requesting Commission approval of the changes. Mr. Tabb asked the Commission to order JUI to stop construction and review the status of the Project.

On January 24, 2019, the Commission Staff filed a Petition to Reopen the Certificate case. Commission Staff provided the current status of the Project and stated that: (i) WDA/WVIJDC had withdrawn its offer of funding to JCDA, (ii) before withdrawing from the Project, JCDA advertised and received bids for construction of the Project that exceeded initial cost estimates, (iii) ROXUL agreed to provide substitute funding, and (iv) ROXUL and JUI executed an agreement to replace the Lease and Purchase Agreement and Water Use Agreement between JUI and JCDA. Commission Staff recommended that the Commission reopen the Certificate case and require JUI to provide complete details on revised aspects of the Project because Staff had concerns about possible rate impacts on JUI customers. Commission Staff filed a separate petition to join ROXUL as a necessary party.

On January 30, 2019, ROXUL filed a Motion in Opposition to Commission Staff's Petition to Join ROXUL as a Necessary Party. ROXUL opposed Commission Staff's request and stated that it had simply stepped into the shoes of JCDA as a funding source. ROXUL reasoned that because the Commission did not require JCDA to be a party to the Certificate case, there was no reason for ROXUL to be a party.

On January 30, 2019, JUI filed a Response to the Commission Staff Petition to Reopen. JUI acknowledged that Project costs had increased from \$4,850,000 to \$5,605,229 based on bids received and ROXUL had replaced JCDA as the Project funding source. JUI stated that the Project scope remained unchanged because the plans and specifications remained exactly as reviewed and approved by the Commission in its July 12, 2018 Order granting the Certificate. The changes did not impact customer rates because the JUI share of cost remained at \$330,000, the exact amount approved in the Commission's July 12, 2018 Order.

JUI stated that after construction of the Project, ROXUL would convey ownership of the Project to JUI, and that JUI agreed to make a payment to ROXUL equal to the payment JUI would have made to JCDA had it remained involved in the Project. The substitute funding adds no financial risk to JUI or its existing customers because if no customers locate and take water utility service on the Jefferson Orchards site, where Rockwool is located, then JUI has no obligation to reimburse ROXUL. Just as was the case with JCDA funding, the JUI monthly payment amount is based on gallons of water sold to customers on the Jefferson Orchards site. Furthermore, regardless of whether the JUI payments have reimbursed all of ROXUL's funding of the Project, JUI's obligation to make monthly payments expires at the earlier of (i) JUI reimbursement to ROXUL of \$5,275,229, or (ii) forty years from the date that ROXUL transfers ownership of the project to JUI.

JUI stated that beyond the repayment method approved by the Commission, which only applies if water is sold to customers on the Jefferson Orchards site, the revised funding source placed no additional risk of increased rates on JUI customers.

By Order issued February 22, 2019, the Commission reiterated the threshold conditions stated in the July 12, 2018 Order that would require JUI to request further Commission approval of Project changes. Specifically, the Order required JUI to petition to reopen the Certificate case for Commission approval of changes to the Project plans, scope, or terms of financing, except that changes to Project costs or financing would not require separate approval if the changes did not affect rates and if JUI submitted an affidavit from a CPA attesting to the lack of rate impact. Before deciding the Petition to Reopen, the Commission required JUI to submit its CPA affidavit attesting to the lack of rate impact. To further aid the Commission in deciding whether the case should be reopened, JUI was also required to file a detailed revenue requirement calculation and

cash flow statement and sample journal entries demonstrating the recording of the transfer of the Project from ROXUL to JUI and the monthly payment to ROXUL. The Commission held other matters in the Certificate case in abeyance until further Order.

On March 4, 2019, almost nine months after the intervention period expired in the Certificate case, JCV and Leigh Smith filed a joint Petition to Intervene in the closed Certificate case. JCV and Ms. Smith summarized the arguments stated in their separately-docketed Complaint that is now on appeal and asserted that the February 22, 2019 Commission Order in the Certificate case did not allow them an opportunity to present their views regarding revisions to the Project.

Also on March 4, 2019, JCV and Ms. Smith filed a Petition for Reconsideration of the February 22, 2019 Commission Order. They argued that because the revised funding source for the Project was not approved by the WVIJDC, JUI was required to seek Commission approval of the substitute ROXUL funding. JCV and Ms. Smith also asserted that Project plans and scope had changed and required Commission approval. They further argued that the change to the funding source for the Project would impact JUI rates. Finally, they asserted that the Commission erred by not joining ROXUL as a party and not requiring ROXUL to secure a second certificate to construct the Project. JCV and Ms. Smith asked the Commission to reopen the Certificate case, allow them to intervene, add ROXUL as a party, and consolidate the Certificate case with their Complaint case and a similar complaint case filed by a JUI customer.

On March 14, 2019, JUI filed an affidavit prepared by its CPA attesting that the increased Project cost and substitute financing will not affect JUI rates. JUI also submitted a projected revenue requirement statement, a projected cash flow analysis and projected journal entries demonstrating the recording of the monthly payments to ROXUL and the transfer of the Project



from ROXUL to JUI. JUI also filed a Response objecting to the Petition to Intervene and Petition for Reconsideration filed by JCV and Ms. Smith.

By Order issued March 26, 2019, the Commission denied the Commission Staff Petition to Reopen and the JCV and Ms. Smith Petition for Reconsideration of the February 22, 2019 Order. The Commission concluded that because the scope and plans for the Project were unchanged and the cost increase and funding revisions did not impact JUI customer rates, Commission approval was not required. In its Order, the Commission addressed all of the arguments put forth to warrant reopening the Certificate case, including the Petitioner's. The issues addressed by the Commission were the same issues presented in the Petitioner's Complaint case on appeal.

On April 5, 2019, JCV and Ms. Smith filed a Petition for Reconsideration of the Commission's March 26, 2019 Order. They asserted, among other things, that the Commission denied them due process by not allowing JCV and Ms. Smith to pursue and contest factual issues regarding the Project.

On April 15, 2019, JUI filed a reply to the JCV and Ms. Smith Petition for Reconsideration of the Commission's March 26, 2019 Order. JUI argued that the Commission accorded JCV and Ms. Smith full due process and the opportunity to petition to intervene and be heard when the Certificate case was filed and notice was provided. JUI stated that JCV's and Ms. Smith's failure to timely intervene does not constitute a due process violation by the Commission. In addition, JUI argued that JCV and Ms. Smith presented no new facts or genuine issues to justify reconsideration of the March 26, 2019 Order. JUI stated that the filing was a reworked version of the JCV and Ms. Smith Petition for Reconsideration of the Commission Order of February 22, 2019, cloaked as a new Petition for Reconsideration.

By Order issued May 3, 2019, the Commission denied the April 5, 2019 Petition for Reconsideration because JCV and Ms. Smith failed to satisfy the standard for reconsideration. The Petition did not contain new facts or substantive issues that the Commission had not already adequately addressed in its prior Orders. The Commission determined that JCV and Ms. Smith were accorded notice and the opportunity to participate in the Certificate case, but failed to timely intervene. Due process was not denied. The Commission restated its conclusions that (1) the scope of the Project was unchanged, (2) the substitution of the WDA/WVIJDC funding by ROXUL did not negate WVIJDC's prior approval of the Project,<sup>4</sup> and (3) the increased Project costs and substitute financing did not impact JUI rates.

## II. Background of Case on Appeal, Case No. 19-0059-W-C

On January 22, 2019, JCV and Ms. Smith filed the Complaint that is now on appeal. They alleged that JUI was in violation of the July 12, 2018 Certificate case Order for failing to petition to reopen Case No. 18-0657-W-ECN and secure Commission approval for changes to the scope, cost and financing of the certificated Project.

JCV and Ms. Smith stated that their Complaint was based on information gleaned from an article published in *The Spirit of Jefferson* on January 11, 2019, which reported that the WVIJDC loan had been withdrawn and JCDA would no longer be involved in the project and would not own the project infrastructure. The news article reported the project would be financed by ROXUL, the cost of the Project increased, and construction had commenced. JCV and Ms. Smith alleged the new financial arrangement was likely to increase rates to other JUI customers. (Complaint at 3, Attachment). JCV and Ms. Smith requested interim relief in the

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<sup>4</sup> The Commission's practice has been to include the option to file the CPA affidavit in final orders granting certificates regardless of WVIJDC involvement with the project. (Certificate case – May 3, 2019 Order at 3).

form of an order directing JUI to immediately stop construction of the Project. They requested the Commission reopen the Certificate case to review the Project changes, consolidate the 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 Project.

On April 22, 2019, Commission Staff filed its memoranda recommending that the Commission dismiss the Complaint case if the Commission denied the JCV and Ms. Smith petition for reconsideration of the March 26, 2019 Order issued in the Certificate case.

By Order issued August 2, 2019, the Commission dismissed the Complaint case on grounds that the Petitioner sought the same relief in its Complaint case that it sought in the closed Certificate case. The Commission stated that although the Petitioner was not a party to the Certificate case, the Commission considered and decided all of the Petitioner's arguments in its February 22, 2019, March 25, 2019 and May 3, 2019 Certificate case Orders. The Commission, therefore, dismissed the Complaint case.

### **SUMMARY OF ARGUMENT**

The appeal and relief requested are technically moot. If, however, the Court engages in a review of the substantive arguments in the appeal, the Court should affirm the Commission's August 2, 2019 Final Order dismissing Petitioner's Complaint. The Commission fully considered and decided the legal arguments Petitioner asserted in its Complaint. There was no reason to reopen the Certificate case because Project plans and scope did not change and because the changes to Project funding and costs did not result in a rate impact. The Commission did not dismiss the Complaint on the basis of standing, collateral attack or procedural deficiencies, as Petitioner claims. The Commission's Order on appeal, instead, properly dismissed the Complaint after evaluating its merits. The Commission decisions in both the Complaint on

appeal and the related Certificate case were consistent with its statutory obligation set forth in W.Va. Code §24-1-1(a) to balance the interests of current and future utility customers, the needs of the State's economy, and the interests of the utility companies.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Court has designated this appeal for oral argument on January 15, 2020, pursuant to Rule 19 of the Rules of Appellate Procedure.

### **STANDARD OF REVIEW**

Review of a final order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is provided in W.Va. Code §24-5-1. This Court has stated,

We employ a highly deferential standard of review when examining an order of the Public Service Commission: 'An 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. United Fuel Gas Co. v. Public Serv. Comm'n, 143 W.Va. 33, 99 S.E.2d 1 (1957). Syl. Pt. 5, in part, Boggs v. Public Serv. Comm'n, 154 W.Va. 146, 174 S.E.2d 331 (1970).'

Ohio Valley Jobs Alliance, Inc. v. Pub. Serv. Comm'n, Case No. 18-0249, 2018 W.Va. LEXIS 655, \*7-9 (November 1, 2018) (memorandum decision) (citing Syl. Pt. 1, Broadmoor/Timberline Apartments v. Pub. Serv. Comm'n, 180 W.Va. 387, 376 S.E.2d 593 (1988)).

This Court has explained that its function is not to substitute its judgment for that of the Commission:

In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's

responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Id., (citing Syl. Pt. 2, Monongahela Power Co. v. Pub. Serv. Comm'n., 166 W.Va. 423, 276 S.E.2d 179 (1981)); See Syl. Pt. 1, Jefferson County Citizens for Econ. Preservation, et al. v. Pub. Serv. Comm'n., Case No. 18-0659, \*12, 820 S.E.2d 618, 623 (2018).

In Monongahela, this Court adopted the comprehensive standard of review applied by many states that consists of a three-prong analysis as follows:

The first is a rather broad inquiry centering on whether the Commission abused or exceeded its statutory jurisdiction and powers. The second step relates to an analysis of the Commission methodology and a determination of whether there is adequate evidence to support the Commission's findings. The third analysis looks to the substantive result of the Commission's Order to see if it has arrived at a proper determination.

Monongahela, 166 W.Va. at 428 (applying Permian Basin Area Rate Cases, 390 U.S. 747 (1968)).

## **ARGUMENT**

### **I. This Appeal is Technically Moot Because Construction of the Water Line Extension Portion of the Project is Complete.**

In Sections II and III of this Statement of Reasons, the Commission fully addresses the substantive issues raised on appeal; however, the Court has grounds to affirm the Commission Order based on the appeal being technically moot. Affiliated Constr. Trades Found. v. Pub. Serv. Comm'n., 211 W.Va. 315, 321, 565 S.E.2d 778, 784 (2002). There is no realistic remedy now. The appeal is moot because the water line extension portion of the Project is complete. (Certificate case - October 3, 2019 Certificate of Partial Substantial Completion for Contract No. 1). Only the water storage tank and chlorine booster remain uncompleted, however, JUI



represented on October 3, 2019, that the Certificate of substantial completion for Contract No. 2 would be forthcoming. (Id.).

Although this Court retains the discretion to address issues raised in technically moot cases, there are no grounds to do so in this case. E.g., Gallery v. West Va. Secondary Schs. Activities Comm'n, 205 W.Va. 364, 367, 518 S.E.2d 368, 371 (1999). In Syllabus Point 1 of Israel v. West Va. Secondary Schs Activities Comm'n, 182 W.Va. 454, 388 S.E.2d 480 (1989), the Court set forth guidelines for deciding whether and when to address such issues:

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

There will be no collateral consequences to justify relief because, as explained below, dismissal of the Complaint on appeal was proper. The appeal does not present issues of great public interest that would provide for future guidance because the Petitioner had notice and the opportunity to participate in the Certificate case but did not do so. Also, as discussed below, the Petitioner's arguments were given full consideration by the Commission in the Certificate and Complaint case Orders. (Certificate case – March 26, 2019 Order; May 3, 2019 Order; Complaint case – August 2, 2019 Order). After reviewing the Project status, the Commission concluded that reopening the Certificate case was not warranted. Although the Petitioner objects that the Commission decided the Complaint case without a hearing, the Petitioner presents no legal authority that requires the Commission to hold a hearing before resolving complaints.

Finally, there are no fleeting issues at hand. There are statutory and regulatory mechanisms that provide for notice and, when applicable, the opportunity for persons to protest or intervene and participate in certificate, as well as rate and complaint proceedings pending before the Commission. Also, administrative procedures exist so that changes to a certificate project are reviewed by the Commission and Commission Staff experts determine the impact of the changes, if any. Finally, this appeal does not present issues likely to escape appellate review because, pursuant to W.Va. Code §24-5-1, “any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals” for review.

Because this appeal is technically moot and none of the factors are present that would justify the Court’s in-depth review of the issues, the Court should affirm the Commission’s August 2, 2019 Final Order.

II. The Commission Fully Considered the Petitioner’s Arguments and Legislative Directives in its Orders.

Even though Petitioner was not a party to the Certificate case,<sup>5</sup> the Commission fully considered whether the legal arguments presented in the Petitioner’s Petition to Intervene, Petition for Reconsideration of the February 22, 2019 Commission Procedural Order, and Petition for Reconsideration of the March 26, 2019 Commission Final Order, presented grounds to reopen the Certificate case. (Certificate case – March 4, 2019 Petition to Intervene and Petition for Reconsideration; April 5, 2019 Petition for Reconsideration). As discussed in

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<sup>5</sup> The Petitioner failed to timely protest or intervene in the Certificate case. The Certificate case concluded on the entry of the July 12, 2018 Final Order granting JUI the certificate. On March 4, 2019, the Petitioner filed a Petition to Intervene in the closed Certificate proceeding. Had the Petitioner timely requested to intervene and demonstrated a legal interest in the Certificate case, it would have attained party status, Procedural Rule 12.6.1, and the opportunity to propound discovery requests, Procedural Rule 13.6.2. Procedurally, a request to intervene in a case that has been removed from the Commission active docket is improper. See Procedural Rule 12.6.1.

Sections II. A. and B. of this Argument, the Commission's Orders evaluated whether (1) the increase in Project cost or the substitute funding or (2) changes to a length of pipe and projected quantity of water to be sold required reopening and concluded that the changes did not affect the Project-related rates or constitute a change in scope to require JUI reopen the Certificate case.

A. Changes to Project Cost and Funding did not Meet the Statutory, Regulatory or Commission Order Requirements to Warrant Reopening the Certificate Case.

The Commission evaluated and disagreed with the Petitioner's argument that the changes to cost and funding-source for the Project required that the Certificate case be reopened. (Complaint Case - January 22, 2019 Complaint; Certificate Case – March 4, 2019 Petition for Reconsideration at ¶ 2-3; April 5, 2019 Petition for Reconsideration at ¶ 7, 11, 13). The certificated Project was a designated emergency project. (Certificate case - May 10, 2018 Certificate application at Ex. 24 (Project No. 2017E-174); See supra note 1). A statutory standard governed, in this specific instance, when a change in cost would warrant reopening and that standard was not met.

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

(W.Va. Code §24-2-11(j)). West Virginia law establishes that utilities holding certificates for WVIJDC-approved projects are not required to, and cannot be compelled to, reopen a certificate proceeding if the cost of a project changes but the change does not affect the rates established for the project. (Id.).

Procedural Rule 10.3.8 reflects the same directive as W.Va. Code §24-2-11(j) regarding WVJICD-approved projects.

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 effect 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.

Procedural Rule 10.3.8. Consistent with W.Va. Code §24-2-11(j) and Procedural Rule 10.3.8, the Commission's July 12, 2018 Final Order that granted JUI Certificate application, states,

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 case – July 12, 2018 Final Order at Ordering ¶ No. 6).

Based on final bids, the Project's cost increased from the estimated \$4.850 million to \$5.605 million. (Certificate case – January 30, 2019 JUI Response to Petition to Reopen). JUI filed a CPA affidavit attesting that the increased Project cost and substitute financing will not affect rates. (Certificate case – March 14, 2019 JUI Response to Comm'n Order). JUI also submitted an updated projected revenue requirement statement, projected cash flow analysis, and journal entries demonstrating its accounting for the transfer of ownership of the Project to JUI and the monthly payment JUI will make to ROXUL. (Id.).

In accordance with W.Va. Code §24-2-11(j), the Commission relied on the CPA affidavit. (March 26, 2019 Order at 5, Finding of Fact ¶ 7). The Commission also relied on the updated revenue requirement calculation, cash flow statement and sample journal entries that demonstrated that the increased Project cost and substitute funding would not impact JUI rates. (Id. at 5). The change in Project cost is inconsequential because JUI's portion of the Project cost remains limited to \$330,000 and JUI's monthly payment to ROXUL (really a revenue offset) remains \$2.88 per thousand gallons of water sold to all customers served by JUI on the Jefferson Orchards site. Under the governing authorities, the Commission considered the Petitioner's legal arguments regarding the increased cost and replacement funding and concluded that the changes would not affect the Project-related rates. (Certificate case – March 26, 2019 Order at 5, FOF ¶¶ 1, 2, 6, 7, COL ¶¶ 2, 5; May 3, 2019 Order at 5-6, FOF ¶ 5, COL ¶ 5; Complaint Case – August 2, 2019 Order at 5-7).

The Commission decision was not an unprecedented departure from prior decisions. See e.g., City of Keyser, Case No. 12-1675-S-CN (Final Order Aug. 20, 2014) (dismissed request to reopen because the slight increase in project cost and revised project funding did not impact project-related rates and the utility filed the required CPA affidavit); City of Keyser, Case No. 12-1679-W-CN (Final Order Aug. 26, 2014) (denying the request to reopen because the increased project cost and additional funding did not involve a change in scope and did not affect the utility's project-related rates), cf. Southwestern Water District, Case No. 09-0066-PWD-CN (Final Order Mar. 3, 2010) (reopened for the limited purpose of finding that the revised project funding did not impact rates; no hearing or discovery on the matter occurred; utility filed the required CPA affidavit).



B. The Commission Considered the Petitioner's Argument Regarding Scope of the Project and Decided that the Scope Remained Substantially the Same.

The Commission has discretion to decide whether changes to a certificated project constitute a change in the scope, and the Commission does not regard *de minimis* alterations to project specifications to necessitate reopening a proceeding. In this case, the slight reduction in the length of the pipeline between the preliminary engineering report and the final Project design was not a change in scope that required JUI to move to reopen the case and seek Commission review and approval before proceeding with construction.<sup>6</sup> Project changes that require a reopened certificate typically are more significant.

Examples of changes that the Commission has deemed to constitute a change in scope include:

- the addition or removal of neighborhoods from a project,
- relocation of a treatment plant,
- significant increases in project costs that require additional loan financing, or
- major deviations from the preliminary design.

See e.g. Central Boaz Pub. Serv. Dist., Case No. 11-0889-PWD-CN-PC (Final Order June 15, 2012) (reopened when construction bids exceeded estimated costs by \$431,822 required a \$120,000 additional loan and utility proposed to eliminate a booster station, a back-up generator, and radio-read meters from the original project); City of Charles Town, Case No. 09-1980-S-CN (Final Order June 19, 2012) (reopened when the scope of the certificated project expanded to include a new pumping station and force main although affidavit of no rate impact

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<sup>6</sup> Petitioner alleged that the scope of the Water Line Extension had changed because the final Project bids reflected 1,685 fewer feet of pipe than the 20,185 feet that engineers estimated in the Project's preliminary design. (Certificate case – Compare May 22, 2018 Revised Project Specifications (20,185 feet of PVC pipe), with January 30, 2019 Response to Petition to Reopen at Exh. B (18,500 feet of PVC pipe)).

was provided by the utility); Town of East Bank, Case No. 10-0349-W-CN (Final Order Aug. 20, 2012) (reopened when certificated project was completed without exhausting all of the previously approved funding and the utility sought to use remaining project funding to replace a water line that was not a part of the original project); Wetzel County Pub. Serv. Dist., Case No. 12-0832-PWD-CN (Final Order Jul. 15, 2014) (reopened to approve modification of project for utility to construct an additional extension to serve forty-seven new customers).

The Petitioner's argument that the scope of the Project changed because ROXUL decreased its demand for water<sup>7</sup> is flawed because the decrease does not change the Project design and has no rate impact. (Certificate case – March 4, 2019 Petition for Reconsideration at 3; March 26, 2019, Final Order at 3, 4, COL No. 1; Complaint case – August 2, 2019 Final Order at 6). The Project is intended to serve Jefferson County customers, not just ROXUL, thus JUI promised JCDA that it would design the Project to be capable of maintaining “the capacity to deliver not less than 500,000 gallons per day to the Jefferson Orchards Site.” (Certificate case – Application Exh. 27 (Lease and Purchase Agreement executed by JUI and JDCA).

A comparison of the proposed preliminary Project specifications to the final Project design and final bid specifications reveal that there was no change to the water line extension's design capacity. (Certificate case – May 22, 2018 Revised Specifications; January 30, 2019 Response to Staff Petition to Reopen at Exh. A). Specifically, the Project still requires the originally planned 792,000 gallon water storage tank, 450 gallon per minute booster pump

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<sup>7</sup> Based on the terms of the Water User Agreement between JUI, JCDA and ROXUL, JUI agreed to plan and design the Project to provide the Rockwool facility no less than 320,000 gallons per day. (Certificate case – May 10, 2018 Application at Exh. 26 (Exh. B Water User Agreement at 2). The terms of the Water User Agreement among JUI and ROXUL, however, state that JUI will plan and design the Project to provide the Rockwool facility with no less than 125,000 gallons per day. (Certificate Case – January 30, 2019 Response to Staff Petition to Reopen at Exh. A).

station and sixteen-inch diameter pipe. (January 30, 2019 Response to Staff Petition to Reopen at Exh. A). The Project was planned and designed to deliver at least 500,000 gallons of water per day, capable of providing water service to all the commercial customers that may locate on the 400-acre industrial park at Jefferson Orchards. (Certificate case – May 10, 2018 Application at Exh. 26 (Memorandum of Understanding)).

Furthermore, ROXUL's reduced water usage will have no impact on JUI rates. JUI's projected net revenue requirement is based on JUI selling 120,000 gallons per day to new customers served by the water line extension. (Certificate Case - May 10, 2018 Application at Exh. 3; March 14, 2019 JUI Response to Comm'n Order at Exh. B). The fact that the minimum ROXUL demand changed to 125,000 gallons of water per day, does not mean that rates to other customers will be affected because the projected net revenue requirements related to the Project reflect revenue from sales of 120,000 gallons per day. At that level of sales, ROXUL's reduced water usage alone, without considering the usage of other customers served by the Project, exceeds the revenue required to fully cover JUI's portion of the Project costs. (*Id.*). ROXUL's minimum daily water demand, therefore, remains consistent with the revenue requirement relied on by the Commission when it certificated the Project.

Finally, when Commission Staff reviewed the minor project alterations, Staff found the scope of work being constructed remained comparable to the scope of work presented in JUI's certificate application. (Certificate case – January 24, 2019, Staff Petition to Reopen at 3-4). Because final project designs typically present slight adjustments, the Petitioner's argument that the adjustments to line length and projected water sales required JUI to request to reopen the Certificate case were not persuasive.

C. The Court should Affirm the Commission Order Because it is Consistent with the Commission's Duty to Balance the Interests of Utility Customers, the State Economy and Utility Companies.

The Commission, by its May 9, 2019 Order issued in the Certificate case, stated:

A decision to reopen the Certificate 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.<sup>8</sup> The Commission is charged with the responsibility to appraise the cases before it to balance (i) the interests of current and future utility customers, (ii) the general interests of the state's economy, and (iii) the interests of the utilities subject to its jurisdiction and decisions.

(Certificate case – May 3, 2019 Final Order (citing W.Va. Code §24-1-1(b)). When balancing the interests in this matter the Commission considered:

- Changes to the Project that occurred after the Commission's approval on July 12, 2018 do not affect the positive economic impacts of the Project.
- The Project is being constructed to provide water service to an industrial business park for multiple potential commercial businesses. (Certificate case - May 10, 2018 Application at Exh. 3; March 14, 2019 JUI Response to Comm'n Order at Exh. B).
- The installation of gas utility services to serve the industrial park has been completed. See Mountaineer Gas Company, Case No 18-1115-G-390P (Final Order Dec. 21, 2018).
- The public utility JUI, and not ROXUL, will own the water line extension from the outset and have the exclusive right to use it to provide utility service.

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<sup>8</sup> W.Va. Code §24-1-1(a) (the Commission shall ensure fair and prompt regulation; provide availability of economical and reliable utility service; encourage development of utility resources consistent with state needs); W.Va. Code §24-1-1(b) (the Commission must balance (i) the interests of current and future utility customers, (ii) the general interests of the state's economy, and (iii) the interests of the utilities).

- The water line extension will initially serve the North Jefferson Elementary School. (Complaint Case – January 30, 2019, JUI Answer and Motion to Dismiss at Exh. C). The Commission understands the school is currently taking water service.

- The Project is necessary to accommodate future growth in Jefferson County and constitutes the well-planned development of utility resources consistent with State needs. W.Va. Code §24-1-1(3).

- JUI has a separate petition currently pending before the Commission seeking to acquire the water system assets of a 255 resident neighborhood along the water line extension.<sup>9</sup>

- The economic growth facilitated by the Project comes with no rate impact to JUI ratepayers.

- The investor and the utility relied on the finality of the Final Order in the Certificate case when constructing the water line extension.

In consideration of the above factors, a decision to reopen the Certificate proceeding would have been 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. The record is clear that the Commission fulfilled its legislative role under W.Va. Code §24-1-1 to appraise and balance all of the germane interests. (Certificate case – May 3, 2019 Final Order (citing February 22, 2019 Order; March 26, 2019 Final Order)).

III. The Commission did not Dismiss the Complaint for Lack of Standing or Violate its Own Rules.

The Petitioner's attempt to categorize the dismissal of its Complaint on appeal as a decision that the Petitioner lacked standing should be rejected. The Petitioner's reliance on this

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<sup>9</sup> Jefferson Utilities, Inc., Case No. 19-0404-W-PC is currently pending before a Commission Administrative Law Judge, and no decision has yet been issued.



Court's decision in Affiliated Constr. Trades Found. v. Pub. Serv. Comm'n, 211 W.Va. 315, 565 S.E.2d 778 (2002) is not persuasive because in the instant case the Commission gave the Petitioner's arguments full consideration. In Constr. Trades, the Affiliated Construction Trades Foundation (ACT) filed a formal complaint with the Commission requesting that the Commission revoke or reopen a certificate case on grounds that the utility misrepresented to the Commission that it would hire local workforce to construct its facility, but then it did not. The Commission dismissed the ACT complaint on grounds that ACT was not a party to the certificate case and lacked standing to file its formal complaint. ACT appealed. This Court held that the language of W.Va. Code §24-4-6 granted standing to ACT to file its complaint even though ACT was not a party to the Certificate.

The statute permits a complaint where the alleged actions offend the conditions under which the PSC has authorized the utility to act or offend any other requirement of the code relating to public utilities. ACT alleged that [the utility] had included in its application substantial misrepresentations, which, if proved, would violate the duty of truthfulness expressly imposed by West Virginia Code §24-4-2 (1935) (Repl. Vol. 2001).

Id., 211 W.Va. at 323, 565 S.E.2d at 786. The Court made clear, however, that a complaint may not be used as a substitute for a timely appeal or participation, by way of protest and/or intervention, in the initial proceedings:

We do not perceive the complaint process as a substitute for a timely appeal and do not, by our ruling today, imply that a complaint may be used as a substitute for a timely appeal.

Id.

Unlike the overturned Commission decision in the Constr. Trades case, in the instant Complaint on appeal, the Commission did not dismiss the Complaint for lack of standing. Instead, the Commission properly dismissed the Complaint because the issues regarding the

certificated Project, including those asserted by Petitioner, were already presented, fully evaluated and decided. If the Commission intended to dismiss the Complaint for lack of standing, it would not have given the Petitioner's arguments consideration and evaluation in its Orders.

The Petitioner also incorrectly asserts that the Commission erred by not considering Petitioner's arguments and dismissing the Complaint as a collateral proceeding. (Pet's Brf. at 7-8). The Commission fully complied with W.Va. Code §24-4-6 and Procedural Rules 6.2 et seq. by docketing the Complaint and requiring the defendant utility JUI to file an Answer. (Complaint case – January 23, 2019 Procedural Order). W.Va. Code §24-4-6 describes a complainant's right to file a formal complaint with the Commission but does not guarantee or require a hearing. Procedural Rule 6.2.6 provides that the Commission may set a time and place for an evidentiary hearing, but does not guarantee or require that the Commission hold a hearing. A review of the record reveals that Petitioner's allegation that the Commission did not follow its own rules is baseless.

The Petitioner objects in its appeal to the Commission description of its Complaint as a collateral proceeding. (Pet's Brf. at 7-8). This argument is a red herring. The Commission did not dismiss the Complaint until after it evaluated each of Petitioner's arguments asserted in the Complaint case and the Certificate case and decided that the changes did not constitute a change in Project scope and did not meet the legal standards to reopen the Certificate proceeding. (Certificate case – March 26, 2019 Final Order; Complaint case – August 2, 2019 Final Order). In its August 2, 2019 Final Order issued in the Complaint case the Commission stated:

As discussed above, the Commission has completely considered and decided the Complainant's arguments by the 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 certificate 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.

(Complaint case – August 2, 2019 Final Order at 7). Only after deciding each of the Petitioner’s arguments did the Commission describe the Complaint as a collateral proceeding. A collateral proceeding is “a proceeding brought to address an issue incidental to the principal proceeding.” (Black’s Law Dictionary, 558 (Bryan A. Garner ed. 2nd pkt. ed. 2001)). Because the Petitioner filed its Complaint case to address whether JUI was in violation of the Commission Final Order in the Certificate case, the Commission description was not in error.

W.Va. Code §24-4-6 provides that after the filing of a formal complaint and receipt of the answer of a public utility, “it shall be the duty of the commission to investigate the same in such manner and by such means as it shall deem proper.” Here, the Commission had before it filings showing the increased cost of the Project and substitute funding would not affect JUI rates. Commission Staff obtained information confirming that the scope of the project before and after the revisions was “comparable.” (Certificate case - Petition to Reopen, January 24, 2019). The Commission properly evaluated the Project changes pursuant to its discretion under W.Va. Code §24-2-11 and its established certificate case processes. Only after finding insufficient grounds to warrant reopening the Certificate case, the Commission dismissed Petitioner’s Complaint. (Complaint case – August 2, 2019 Final Order; Certificate case – filings from Jan. 2019 to Apr. 2019; February 22, 2019 Order; March 26, 2019 Final Order; May 3, 2019 Final Order).

## CONCLUSION

WHEREFORE, the Public Service Commission in its Final Order of August 2, 2019, has properly and within the scope of its authority dismissed the Complaint filed by Petitioner, in which it sought to have the Commission suspend its July 12, 2018 Final Order granting an emergency certificate of convenience and necessity for construction of a Project. The Commission applied governing law and established certificate case processes when evaluating the acknowledged changes to the Project and concluded that there was no need to reopen the Certificate case. The Commission thoroughly considered, addressed and decided all of the legal arguments that Petitioner asserted in its Complaint on appeal and in its filings made in the Certificate case. The Commission appropriately balanced the interests of current and future utility customers, the State economy and the public utility in its Orders. Thus, the substantive result to dismiss Petitioner's complaint was proper. The Commission respectfully requests that this Court affirm the Commission Final Order of August 2, 2019, in Commission Case No. 19-0059-W-C.

Respectfully submitted this 31 day of October 2019.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
By Counsel,

  
JESSICA M. LANE  
State Bar I.D. No. 7040

NATALIE N. TERRY  
State Bar I.D. No. 11788