THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2019-0512

APPEAL OF THE TOWN OF HAMPTON

MOTION TO DISMISS
OF
AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.

Aquarion Water Company of New Hampshire, Inc. ("Aquarion" or the "Company"), hereby moves, pursuant to Supreme Court Rule 21, for the New Hampshire Supreme Court (the "Court") to dismiss as moot the appeal of the Town of Hampton of Order No. 26,263 issued by the New Hampshire Public Utilities Commission (the "Commission"), and affirmed by Order No. 26,287, that dismissed a complaint filed by the Town of Hampton after determining that "there is no basis for the complainant's dispute and no need for an independent investigation." Order at 1; HAP at 36.[1] In support hereof, Aquarion states as follows:

PROCEDURAL HISTORY

A more extensive history of this proceeding is set out in Aquarion's Motion for Summary Affirmance filed on September 20, 2019 in this proceeding and need not be repeated here. For purposes of this motion, the relevant history is as follows. On March 27, 2019, pursuant to RSA 365:1 and N.H. Code of Admin.

[1] References to the Appeal Appendix of the Town of Hampton are noted as "HAP" and the page number.

Rules Part Puc 204, "Complaints Against Public Utilities," Hampton filed a complaint with the Commission concerning rates charged and services rendered by Aquarion. HAP at 3. Hampton complained of two things: 1. Aquarion's rates were excessive because the Company had been overearning its return on equity as determined by the Commission in the Company's most recent ratemaking proceeding to establish tariffed rates; and, 2. Aquarion failed to remove snow from fire hydrants located in Hampton and should be ordered by the Commission to do so.

The Commission investigated Hampton's complaints per RSA 365:1, *et seq.* and Rule Puc 204.01, *et seq*. and found,

> [T]here is no basis for Hampton's complaint. Even when the complaint is viewed in the light most favorable to Hampton, the Town has not demonstrated a violation of law, the terms and conditions of Aquarion's franchise or charter, or a Commission order. *See* RSA 365:1.

Order No. 26,263 at 5; HAP at 40. Thus, the Commission stated "we find that reasonable grounds do not exist to warrant a further investigation pursuant to RSA 365:4 and dismiss the complaint." *Id.*

Furthermore, in dismissing the complaint the Commission clarified that the "preferred mechanism to address the issue of overearning or underearning by a utility is a full rate proceeding, which we note is set for 2020, pursuant to Order No. 26,245." *Id*. As to Hampton's claim regarding the hydrants, the Commission found that "the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow." *Id*.

Hampton sought rehearing of Order No. 26,263 contending that the Commission erred in various respects by dismissing its complaint. Aquarion timely objected to Hampton's motion for rehearing, and on

August 14, 2019, the Commission denied the request for rehearing in Order No. 26,287. Hampton appealed the Commission's Order pursuant to Supreme Court Rule 10 and RSA 541:6.[2]

ARGUMENT

This Court Should Dismiss this Appeal as it has Become Moot.

As this Court has held "Generally, . . . a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *In re Juvenile 2005-212*, 154 N.H. 763, 765 (2007). While the "question of mootness is not subject to rigid rules, but is regarded as one of convenience and discretion... [a] decision upon the merits may be justified where there is a pressing public interest involved or future litigation may be avoided." *In re Guardianship of R.A.* 155 N.H. 98, 100-01 (2007). Here, the issues at stake have become academic or dead; declaring this matter moot will both avoid unnecessary future litigation, and is in the public interest of this public utility's customers.

In rejecting Hampton's claims in Order No. 26,263, the Commission made clear that to the extent Hampton sought to challenge or dispute the return on equity earned by Aquarion, the proper venue for such challenge was a "full rate proceeding," otherwise referred to as a rate case. Rather than await the filing of a rate case, which was required of Aquarion in 2020 pursuant to a settlement to which Hampton is a signatory, Hampton elected to commence this appeal.

Contemporaneously with this submission, on December 18,

[2] On March 18, 2020, the Court granted the motion to intervene of the Town of North Hampton. The Town of North Hampton's issues and concerns are coextensive with those of the Town of Hampton in this appeal, and, therefore, the arguments in this motion are equally applicable to the Town of North Hampton.

2020, Aquarion filed all of the necessary documentation to commence a full rate proceeding with the Commission. Accordingly, Hampton now has the venue and opportunity to directly address its claim regarding Aquarion's return on equity, should it wish to pursue it further. Accordingly, the litigation of this issue, and this appeal, may be avoided.

Moreover, should this Court determine that there is not only cause to continue this appeal but also that Hampton is entitled to relief, and Aquarion contends there is no such cause, the remedy would be to provide Hampton with something it already has. Assuming, *arguendo*, that Hampton could prevail, its appeal is based upon the premise that the Commission prematurely dismissed its complaint about Aquarion's return on equity without developing an adequate record. As stated in Hampton's objection to Aquarion's Motion for Summary Affirmance "Hampton appeals because the Commission dismissed the Complaint with no investigation, no hearing or opportunity to present evidence on the merits that would permit the Commission to make the required findings as to whether Aquarion's rates and its terms of service were just and reasonable." Hampton Objection to Motion for Summary Affirmance at 2-3, *see also*, Hampton's Motion for Rehearing at 3; HAP at 44 ("The dismissal of Hampton's Complaint illegally and unreasonably cuts off access to such a hearing and investigation, with no explanation for the overearning being required of Aquarion."). Accordingly, the remedy to be provided by this Court in such a case would be to remand the matter to the Commission to have the Commission assess the issues anew. That is precisely what the rate case will do.

As the Commission previously found, the return on equity "was only an input into the Commission's calculation of the rates the

Commission set for the Company." Order No. 26,263; HAP at 40. What's more, "[e]xamining the individual issue of ROE outside the context of setting appropriate rates leads to single-issue ratemaking, which the Commission 'does not favor.'" *Id*. Thus, the rate case will review the return on equity as part of the overall investigation of Aquarion's rates, as should be done, and is in the public interest. Unlike this appeal, at the Commission the review would not be an abstract exercise. Rather, it would be an evaluation tethered to the realities of Aquarion's actual costs and revenues and would lead to the substantive outcome Hampton claims to seek.

In that any review of the return on equity, including upon remand, would occur in the context of a full rate proceeding, and that a full rate proceeding is now pending before the Commission, there is no basis to continue this appeal. This appeal is merely academic at this juncture and any remedy would give only that which Hampton already has. Under these circumstances, continuing the appeal would be a waste of resources in pursuit of avoidable and unnecessary litigation.

With respect to Hampton's second ground, the issue of snow removal, the pending rate case renders that moot as well. As initially found by the Commission, failing to remove the snow as Hampton requests is not a violation of any tariff or law, and Hampton cites to no provision of law, regulation, or tariff where the removal of snow from hydrants is required as part of the Company's services. Indeed, Hampton impliedly admitted in the April, 2019 Settlement Agreement it signed that the cost of snow clearing is not included in Aquarion's present rates.[3] Thus, not only is there no basis in law, regulation, or

[3] The Settlement Agreement that called for Aquarion to file a general rate case in 2020, and which has now been filed, notes at Paragraph 11, k, "The Settling Parties

tariff for requiring Aquarion to remove snow from hydrants, but the Town is asking that Aquarion be ordered to perform that service without compensation.

As previously raised by Aquarion, under RSA 378:14 "[n]o public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered." The Town is requesting Aquarion perform a service that it recognizes is not covered by Aquarion's schedules on file, and that Aquarion is prohibited from providing for free. To the extent that such a service should be considered (as well as whether the costs of that service should be part of Aquarion's rates) that consideration would occur in a full rate case. Again, now that a rate case has been filed, Hampton has the forum and opportunity to raise and address that very issue; the Court, and the parties, need not expend time and resources pursuing an appeal that has become redundant.

Further, as with the issue of the return on equity, should Hampton succeed on any claim in this appeal (which Aquarion contends it cannot) the remedy would be to remand that issue to the Commission to consider in light of Aquarion's overall rates and service offerings. In other words, the Commission would review it as one of the issues in a rate case. Since even a complete victory on

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also agree that Aquarion will conduct a cost of service study in this rate case, pursuant to the Partial Settlement Agreement approved in Order No. 25,539. The Settling Parties also recognize that Hampton requested that Aquarion include the estimated cost of snow removal from Aquarion-owned fire hydrants at Aquarion's expense in the cost of service study. Aquarion disagrees that snow removal costs are appropriate costs to include in a cost of service study." Since the cost of removing snow from hydrants is not part of Aquarion's cost of service, present rates do not include any compensation to Aquarion for performance of the requested snow removal service.

appeal would only provide relief already available to Hampton, any determination by this Court would serve, at most, as an input to the larger rate case calculations and analyses that are going to happen in any event. In such an instance, further pursuing this issue on appeal merely prolongs unnecessary litigation in quest of an outcome that would have little, if any, continuing applicability. The matter has become academic for this Court and the Court should dismiss this matter accordingly.

CONCLUSION

For the reasons stated above, the matters in this appeal have become academic or dead, and granting this motion to dismiss will avoid future litigation. As noted by Aquarion in its Motion for Summary Affirmance, there are no novel issues of law at stake, and with the rate case filing, this Court has no remedy to offer beyond what the appellant already has available. In short, there is no cause to continue this appeal. To the extent Hampton may be interested in continuing to press its claims, it may do so in the proper forum and context at the Commission as part of a full review of Aquarion's rates and charges for the services it provides, consistent with the law and public interest.

WHEREFORE, Aquarion respectfully requests that this honorable Court:

A. Dismiss this matter as moot; and

B. Grant such other and further relief as may be just and proper.

Respectfully submitted this 18th day of December, 2020,

AQUARION WATER COMPANY OF NEW HAMPSHIRE

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Certificate of Service

I hereby certify that on December 18, 2020, I served the foregoing Motion by email to the parties on the electronic service list.

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Matthew J. Fossum