THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2021 TERM

MARCH SESSION

CASE NO. 2019-0512

APPEAL OF TOWN OF HAMPTON

BRIEF OF APPELLEE AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.

(On Town of Hampton's Rule 10 Appeal from Decisions of the Public Utilities Commission)

Submitted by:

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PROVISIONS OF THE CONSTITUTION, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE APPEAL

1. RSA 365:1 Complaint Against Public Utilities. – Any person may make complaint to the commission by petition setting forth in writing any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission.

2. RSA 365:2 Order. – Thereupon the commission shall cause a copy of said complaint to be forwarded to the public utility complained of, which may be accompanied by an order, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the commission.

3. RSA 365:3 Reparation. – If the public utility complained of shall make reparation for any injury alleged and shall cease to commit or to permit the violation of law, franchise, or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission shall not be required to take any further action upon the charges.

4. RSA 365:4 Investigation. – If the charges are not satisfied as provided in RSA 365:3, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate the same in such manner and by such means as it shall deem proper, and, after notice and hearing, take such action within its powers as the facts justify.

5. RSA 365:29 Orders for Reparation. – On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover

only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

6. RSA 374:1 Service. – Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.

7. RSA 374:2 Charges. – All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission. Every charge that is unjust or unreasonable, or in excess of that allowed by law or by order of the commission, is prohibited.

8. RSA 378:7 Fixing of Rates by Commission. – Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such public utility are insufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. The commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years, but may do so within said period at its discretion.

9. RSA 378:14 Free Service, Etc. – No 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.

10. RSA 541:13 Burden of Proof – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

STATEMENT OF THE CASE

As described in the joint brief of the Town of Hampton and the Town of North Hampton (collectively, the "Towns"), this is a Rule 10 appeal from decisions of the Public Utilities Commission ("PUC" or "Commission") dismissing Hampton's March 26, 2019 complaint, and its July 22, 2109 rehearing request, against Aquarion Water Company of New Hampshire, Inc. ("Aquarion"). Brief at 11.[1] Aquarion is a public utility presently supplying water service to portions of the towns of Hampton, North Hampton, and Rye, New Hampshire.

In the underlying complaint to the Commission, which was brought by Hampton, but has ultimately been joined by both Towns, Hampton alleged that Aquarion had over-earned its return on equity ("ROE") as determined by the Commission in Aquarion's last rate case. NOA at 4. Hampton sought payment of reparations to customers for the earnings Hampton believed were in excess of those allowed. NOA at 6.

Hampton also alleged that Aquarion refused to remove snow from the fire hydrants located in the Towns, and that Aquarion's failure to do so improperly required the Towns use firefighters to do this job at the Towns' cost. NOA at 7. Aquarion disputed that complaint. NOA at 13.

On June 24, 2019, the Commission issued Order No. 26,263 dismissing the complaint. In that order the Commission concluded: "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." NOA at 40. The Commission also stated that "The record is devoid of evidence, furthermore,

[1] References to the Appellants' Brief and its addendum shall be noted as "Brief," references to the appendix to the Brief will be noted as "Appx.", and references to the Notice of Appeal and its appendix will be noted as "NOA."

that Aquarion violated its tariff or charged illegal rates." NOA at 40. On the concerns pertaining to fire hydrants, the Commission concluded that "With regard to the fire hydrants, the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow." NOA at 40. In light of its conclusions, the Commission dismissed the complaint. Following a motion for rehearing, NOA at 42, to which Aquarion objected, NOA at 49, on August 14, 2019, the Commission issued Order No. 26,287, denying rehearing. NOA at 53. This Appeal followed.

STATEMENT OF FACTS

With respect to the issue of Aquarion's earnings, on June 28, 2013, the Commission issued Order No. 25,539 in Aquarion's last rate case, Docket No. DW 12-085, which approved an increase in Aquarion's rates based upon a partial settlement agreement. The parties to that settlement agreed on nearly all of the components to set rates, save for the ROE. Appx. at 6. In that proceeding, the ROE was litigated by the parties, including the Towns, and in Order No. 25,539 the Commission determined that an ROE of 9.6 percent was appropriate. Appx. at 23.

This Court has repeatedly held that the power of the Commission in setting public utility rates is plenary. *See, e.g., Bacher v. Public Serv. Co. of N.H.*, 119 N.H. 356, 358 (1979); *Appeal of Northern New England Tel. Operations, LLC*, 165 N.H. 267, 277 (2013); *Legislative Util. Consumers' Council v. Pub. Serv. Co.*, 119 N.H. 332, 341 (1979). The issue of the appropriate ROE falls well within the "plenary" authority of the Commission to establish rates and tariff services.

This Court has stated that, "The Commission has traditionally performed its ratemaking function by determining a proper rate base, a reasonable rate of return thereon, and finally the amount of revenue required to produce the resulting return." *Legislative Utilities*, 119 N.H. at 341. "The

proper rate of return is a matter for the judgment of the Commission, based upon the evidence before it. In fixing the rate the cost of capital may not be ignored; but what that cost may be is also a matter for determination by the Commission upon the evidence." *New England Tel. & Tel. Co. v. State*, 95 N.H. 353, 361 (1949). "Once determined, [the cost of capital] marks the minimum rate of return to which the company is lawfully entitled." *Id.* The ROE is not a fixed number from which the utility cannot vary, but rather is established by the Commission to indicate a return to which the utility is entitled and which is reasonable as compared "to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606, 635 (1986) (quoting *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 692 (1923) (brackets omitted)).

The ROE determined to be reasonable by the Commission as part of a ratemaking proceeding for Aquarion was one part of the overall ratemaking process used to ultimately set the rates that became part of a Commission-approved tariff for Aquarion. "[T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between a utility and its customers." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (citations omitted). "They have the force and effect of law and bind both the utility and its customers." *Id.*; *see also Appeal of Verizon New England*, 158 N.H. 693, 695 (2009). It is the final tariffed rates that set the relationship between a utility and its customers, not a utility's rate base, its expenses, nor its allowed rate of return or ROE.

Following the completion of its 2012 rate case, from 2013 through 2016 Aquarion applied the tariffed rates approved by the Commission as a result of Order No. 25,539, as they were adjusted by the Commission to

account for Aquarion's Water Infrastructure Conservation Adjustment ("WICA") mechanism in 2014 (Docket No. DW 14-300)[2] and in 2015 (Docket No. DW 15-476). This limited, annual rate adjustment mechanism had been in place since the Commission approved it in 2009. Appx. at 13. While Hampton participated in those dockets to express concerns about the WICA itself, Hampton did not challenge Aquarion's ROE.

During Aquarion's 2016 WICA proceeding (Docket No. DW 16-828), however, Hampton objected to implementing a change to Aquarion's rates on various grounds including that Aquarion may have been achieving a greater ROE than had been determined in its last rate case. Appx. at 34-35. In objecting, Hampton pointed to information on Aquarion's earnings the Commission had already required Aquarion to file. In response to the complaints in that WICA proceeding, the Commission noted:

> Further, this is not the proper proceeding for Hampton and the North Hampton Water Commission to investigate allegations that Aquarion is exceeding its last Commission approved rate of return on equity of 9.6 percent. While Aquarion's WICA tariff provisions do not contain an earnings test, ***we did require Aquarion to file an evaluation of its 2016 earnings with its annual report for our review***. Nonetheless, we do not review and approve the Company's earnings in WICA proceedings.

Order 25,982 at 5; Appx. at 37 (emphasis added). Thus, while it was not relevant to the determination on the WICA, the Commission made plain that it had already required Aquarion to report earnings information for Commission review. The Commission also stated how the WICA and the complained-of earnings issue would be handled through Aquarion's next rate case. Appx. at 37-38. Further, the Commission noted that Hampton's summation of Aquarion's earnings history had "numerous errors and

[2] There was an additional credit returned to customers to address certain tax law changes in 2013, *see* Order No. 25,750 in Docket No. DW 14-075, but that credit is not germane to this appeal or the rates in issue.

omissions," Appx. at 38, and did not provide a relevant analysis. Because the Commission found the issue of Aquarion's earnings irrelevant to the WICA proceeding, it rejected Hampton's claims. Appx. at 39.

In Aquarion's next WICA filing in 2017, Hampton raised essentially the identical concern and again the Commission rejected it. Appx. at 43, 44-45. After noting that Hampton had raised the same issue before, the Commission stated that it had "clearly indicated that the design of the WICA program and ***matters related to Aquarion's earnings position would be addressed as part of Aquarion's next rate proceeding***." 26,094 at 6; Appx. at 45 (emphasis added). The Commission further stated that it would continue requiring Aquarion to report on its earnings and based on those reports "If Staff believes that Aquarion is over-earning, we expect that Staff will file a recommendation for a mandatory rate case proceeding." 26,094 at 6; Appx. at 45. Thus, the Commission had clearly stated that the issue of Aquarion's earnings would be addressed through a rate case, and if there was a need to address earnings prior to Aquarion making a rate case filing, it expected the Commission Staff to recommend such a course. The Commission Staff did not, and has not, recommended such a course.[3]

Aquarion's 2018 WICA filing in late 2018 coincided, to a degree, with Aquarion's need to implement certain changes as a result of the Federal Tax Cuts and Jobs Act ("TCJA") enacted at the end of 2017. The resolution of both the 2018 WICA and the TCJA issues came in the form of a settlement agreement signed on April 15, 2019 between Aquarion, the Commission Staff, and Hampton. Aquarion Brief Appendix ("AQ Appx.") at 1. In that settlement the parties agreed that Aquarion would file a rate case no later than 2020 using the prior year as a test year. AQ Appx. at 7. Thus,

[3] Notably, the Towns also did not ever request that the Commission mandate a rate case filing. In fact, as discussed throughout this brief, Hampton is signatory to a settlement agreement that specified when Aquarion agreed it would file a rate case.

once information on the whole of 2019 was available, as part of a settlement agreement between multiple parties, Hampton agreed that Aquarion would use that information to prepare and file a rate case where all matters pertaining to its rates and charges could be addressed in a comprehensive manner and that Aquarion had through the end of 2020 to file the agreed-upon rate case.[4] Furthermore, the settlement specifically noted that while Hampton had requested that Aquarion include an analysis of the cost of snow removal in that rate case, Aquarion did not agree to its request. AQ Appx. at 7-8.

During the time Hampton was negotiating the agreement it signed in April 2019, Hampton filed the complaint underlying this appeal. Accordingly, at the time of the complaint, the Commission had already ruled that the issue of Aquarion's earnings would be handled in a rate case, and Hampton was in the middle of reaching an agreement specifying the timing for that same rate case. In its complaint, Hampton raised the same earnings issues that it had raised previously and that the Commission had specifically reserved for a rate case. Aquarion objected to the complaint. NOA at 14-17.

In addition to repeating the same contention that Aquarion was overearning based on information already available to the Commission, Hampton also complained that Aquarion's fire protection service was inadequate because Aquarion did not clear snow from hydrants. NOA at 7. With respect to this issue, Hampton requested that the Commission order Aquarion to perform snow clearing. NOA at 8. Hampton also admitted in its complaint that Aquarion did not include the cost of snow clearing in its cost of service, NOA at 8, and was thus not compensated for that service. Aquarion objected to Hampton's claims on fire protection, noting that there

[4] Indeed, Aquarion has done as anticipated by the settlement and its rate case filing is currently pending before the Commission as Docket No. DW 20-184. Both Towns are intervenors in that proceeding.

was no rule or other requirement that it clear snow and that the costs of clearing snow were not included in its rates. NOA at 17-18.

On June 24, 2019, the Commission issued Order No. 26,263 where it found "no basis for Hampton's complaint." NOA at 40. More explicitly, the Commission concluded that "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." NOA at 40. Further, the Commission stated that "With regard to the fire hydrants, the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow." NOA at 40. Accordingly, the Commission dismissed the complaint. Hampton sought rehearing of the Commission's order by essentially raising the identical arguments again and on August 14, 2019, the Commission denied rehearing. NOA at 42-46. This appeal followed.

SUMMARY OF THE ARGUMENT

In this case, the Commission exercised its judgment and discretion to determine that the proper venue for addressing the earnings and snow removal issues raised by the Towns was a rate case and, therefore, it did not need to conduct an investigation or hold a hearing. Rather, the Commission was acting within its discretion to dismiss the complaint. In such a case, there is no reason for the Court to substitute its judgment for that of the Commission and the Court should dismiss this appeal.

As to the specific arguments, first, there is no requirement in New Hampshire law specifying that an investigation must be undertaken and a hearing held on a complaint such as the one underlying this appeal. RSA Chapter 365 describes the requirements the Commission is to follow in evaluating a complaint and states that the Commission is to investigate and hold a hearing only when "it shall appear to the commission that there are

reasonable grounds" for an investigation and hearing. RSA 365:4. At the time of the underlying complaint, which was brought pursuant to RSA 365:1, the Commission was already aware of the issues raised by the Towns, and had previously found that a rate case was the proper means to evaluate them. The Commission concluded that even accepting the complaint as true, Aquarion did not violate any provision of law, the terms and conditions of its franchise or charter, or any order of the Commission and that there was no reasonable grounds for an investigation and hearing. Instead, noted its awareness of the issue and made clear that it would investigate the matter in a rate case. Accordingly, the Commission acted well within its discretion to dismiss the complaint without a hearing.

Additionally, the Towns do not identify any other law that requires the Commission to hold a hearing on a complaint about a utility's earnings or rates. Further to this point, Aquarion's earnings flowed from the rates it was authorized and obliged to charge, *see* RSA 378:14. In that the Commission had found Aquarion's rates to be just and reasonable at the time of its last rate case, and in a series of proceedings before and at the time of the complaint, and because Aquarion had charged the rates required by the Commission, Aquarion had not acted illegally or improperly. Therefore, there was no basis for the Commission to determine that Aquarion's rates were unjust, unreasonable, or illegal and no cause for it to investigate further.

Additionally, at the time it was evaluating the complaint, the Commission had before it a settlement signed by Hampton which included provisions relative to Aquarion's earnings and the timing of a rate case where earnings and rates would be investigated. The Commission approved that settlement, including its rate case provisions, in May 2019. Under RSA 365:4, the Commission may investigate issues raised in a complaint "in such manner and by such means as it shall deem proper." In this case the Commission had repeatedly found that the proper forum for addressing the

earnings issue was a rate case, and it had now approved an agreement specifying the timing for that rate case. The Commission had ample authority to dismiss the complaint in June 2019 after approving the settlement.

In the event the Court may conclude that the Commission should have conducted an investigation and held a hearing, and if the Court determines to remand the matter to the Commission for such process, the result would be the same because the Commission already had all the relevant evidence before it. The Towns do not allege that there was or would be any additional evidence to present to the Commission, only that the Commission should have concluded differently based upon the information it had. The Commission was completely aware of the issues in the complaint and had concluded, within its discretion, that the proper forum for addressing them was a rate case.

Because there is no additional information for the Commission to consider, and since the Commission had already concluded that a rate case was the correct venue for addressing the issue, there were no "reasonable grounds" for a further investigation or a hearing. The Commission could assume the truth of all the information before it and still reasonably reach the conclusion to dismiss the complaint.

Further, the Towns already have the relief they seek – an opportunity for an investigation and hearing. As Aquarion pointed out in its December 18, 2020 motion to this Court, consistent with the settlement agreement referenced above, Aquarion has commenced a rate case at the Commission and both Towns are intervenors in that docket. They have also already raised their concerns about Aquarion's ROE and snow clearing with the Commission. Accordingly, they already have and are using the additional process they are requesting from this Court to litigate the exact same claims they have raised before.

With respect to reparations under RSA 365:29, such reparations are only appropriate after the Commission has held a hearing and concluded that there is a basis for reparations. In this case, the Commission found that the complaint did not even rise to the level of justifying a hearing. Accordingly, it had no basis for awarding reparations. Further, as noted, the Commission had concluded both before and during the time of the complaint that Aquarion's rates were just and reasonable. It, therefore, had no reason to then conclude that there was a basis for awarding reparations.

As to the issue of single-issue ratemaking, as noted above, there was no basis for the Commission to convene a hearing in the first place. Thus, the Commission's to dismiss the complaint was not error. In that there was no basis for an investigation and hearing, the Commission bolstering its conclusion to dismiss the complaint based upon its long-standing precedent of avoiding single-issue ratemaking was likewise not error.

Regarding the fire hydrants, the Commission correctly concluded that by not clearing snow Aquarion had not done anything that violated any legal obligation. The Towns argue that the costs of the hydrants are relevant to determining Aquarion's responsibilities in this case, but they are not. The costs are driven by the services Aquarion provides, which do not include snow removal. In fact, the Towns have acknowledged that Aquarion is not compensated for any snow removal.

Moreover, while Aquarion is obliged to maintain the hydrants in the Towns, that maintenance obligation does not include any requirement to clear snow. Neither the Commission's rules on maintenance, nor Aquarion's tariff require that Aquarion remove snow from the hydrants. Accordingly, the Commission acted appropriately in concluding that even if the Towns' accusations were true, they did not justify an investigation and hearing. This Court should uphold the Commission's determinations and dismiss this appeal.

ARGUMENT

I. STANDARD OF REVIEW

Aquarion agrees with the Towns that this appeal is governed by RSA 541:13 which provides that:

> the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

The burden "in this appeal is imposed by RSA 541:13, under which we "will not sustain the appeal, except for errors of law, unless the [appellant] demonstrates by a clear preponderance of the evidence that the commission's decision was unjust or unreasonable or reflects an abuse of the commission's discretion." *Appeal of Public Serv. Co. of N.H.*, 130 N.H. 748, 750 (1988) (brackets omitted) (quoting *Appeal of Granite State Electric Co.*, 124 N.H. 144, 146 (1983)). Further:

> Findings of fact by the PUC are presumed prima facie lawful and reasonable. RSA 541:13; *see Appeal of Bretton Woods Tel. Co.*, 164 N.H. at 386, 56 A.3d 1266. "When we are reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking." *Appeal of Pennichuck Water Works*, 160 N.H. 18, 26, 992 A.2d 740 (2010) (quotation omitted). "The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the PUC and not to the preference of reviewing courts." *Id.* (quotation and brackets omitted). However, "[w]hile we give the PUC's policy choices

> considerable deference, we do not defer to its statutory interpretation; we review the PUC's statutory interpretation de novo." *Id*.

Appeal of Northern New England Telephone Operations, LLC, 165 N.H. at 270-71.

Accordingly, the Towns bear the burden to demonstrate that the Commission's decision was contrary to law or, by a clear preponderance of the evidence, unjust or unreasonable. Furthermore, in that this case does not involve the Commission's statutory interpretation, but rather the Commission's exercise of its discretion and informed judgment, considerable deference is owed to its conclusions.

The Commission's Order No. 26,263 dismissing Hampton's Complaint, and its Order No. 26,287 denying rehearing, were treated with the same standard that courts treat motions to dismiss in that the Commission assumed the truth of the facts alleged by the Towns and construed all reasonable inferences in the light most favorable to them in determining whether the allegations were reasonably susceptible of a construction that would permit recovery. *See, e.g., Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 446 (2020). In so doing, the Commission did not disregard the evidence presented (which it had seen on numerous occasions), but determined that the evidence provided did not merit the relief sought.

II. THE COMMISSION DID NOT ERR BY DISMISSING THE COMPLAINT WITHOUT A HEARING

A. No Hearing Was Ever Required

The Towns' primary argument to this Court is less about the ultimate decision on Aquarion's earnings or the issue of snow clearing at fire hydrants, but more about the process used by the Commission in addressing

the complaint. As indicated by their desired relief from this Court to remand to the Commission for further proceedings, their primary criticism is that they did not have the opportunity to present information at a hearing. Brief at 43. There was, however, no need for a hearing in this case and there was no additional information for the Towns to present. Accordingly, the Commission did not err in dismissing the complaint without a hearing.

Initially, it is unclear from the Towns' Brief whether they believe a hearing was mandatory or discretionary. *Compare* Brief at 30 ("RSA 365:4 therefore ***required*** that the Commission 'shall investigate the [complaint]' and provide notice and a hearing." (emphasis added, brackets in original)) *and* Brief at 33 ("The statutory ***requirement*** to conduct an investigation and hold a hearing under RSA 365:4 and RSA 378:7 takes precedence over the Commission's preference to avoid single issue ratemaking." (emphasis added)) *with* Brief at 33 ("***Even in the absence of a statutory requirement*** to hear a complaint, there are good reasons to reject the Commission's reliance on its unwritten 'single issue' ratemaking policy." (emphasis added)). To remove any doubt, Aquarion stresses that there is no requirement in law for the Commission to hold a hearing on a complaint such as this.

Despite the Towns' protestations, there is no requirement in law for a hearing, and the Towns do not point to any legal requirement in their brief. The Towns contend that "It is odd to consider that the Commission refused to hear a complaint alleging that a public utility had over-earned." Brief at 28; and "The Commission's refusal to hear a complaint, confirmed by its own staff, is puzzling." Brief at 30. Regardless of whether it is "odd" or "puzzling" to the Towns, neither statement asserts an error of law. There is no requirement in law for a hearing and the Commission did not err in dismissing the complaint without one.

RSA Chapter 365 pertains specifically to complaints to the Commission. RSA 365:1 states that:

> Any person may make complaint to the commission by petition setting forth in writing any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission.

Upon receiving a complaint alleging that a utility has done something that violates a provision of law, the terms and conditions of its franchise or charter, or an order of the Commission, the Commission is to forward that complaint to the utility for a response. *See* RSA 365:2. Should the utility not voluntarily make reparation for the complained of injury under RSA 365:3, then the Commission may, but is not required to, take additional steps. Pursuant to RSA 365:4, "If the charges are not satisfied as provided in RSA 365:3, ***and it shall appear to the commission that there are reasonable grounds therefor***, it shall investigate the same in such manner and by such means as it shall deem proper, and, after notice and hearing, take such action within its powers as the facts justify." (emphasis added). At no point in this process is a hearing absolutely required. Rather, a hearing is only justified under RSA 365:4 when the Commission, in the exercise of its independent judgment, concludes that there are reasonable grounds for an investigation and hearing.[5]

In this case, Hampton's complaint specifically identified its counts as being governed by RSA 365:1 ("Count I: Overearning by Aquarion as to allowed Return on Equity and allowed rate of return, pursuant to N.H. RSA 365:1 and 29." NOA at 4; and "Count II: Clearing Snow from Fire Hydrants, pursuant to N.H. RSA 365:1." NOA at 7.) That complaint was premised upon the same information that had been brought to the Commission previously and it expressly identified the information already in the

[5] The Commission does have its own, independent authority to conduct investigations pursuant to RSA 365:5, but did not exercise that authority here, and that statute is not implicated by this appeal.

Commission's possession that Hampton believed supported its claims.

Consistent with its obligations under RSA 365:2, the Commission forwarded that complaint to Aquarion for a response. Aquarion responded to the complaint but did not, and could not, make reparation under RSA 365:3.[6] Accordingly, the next step in the Commission's process would be an investigation and hearing if, but only if, "it shall appear to the commission that there are reasonable grounds" for such investigation.[7] The Commission found no such reasonable grounds.

In reviewing the complaint and the response information it was provided, the Commission stated that "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." Order No. 26,263 at 5; NOA at 40. Thus, the Commission made explicit findings on the issues identified in RSA 365:1 that Aquarion did not violate any provision of law, the terms and conditions of its franchise or charter, or any order of the Commission. The Commission, therefore, concluded that there were no reasonable grounds for a further investigation and dismissed the complaint as it was entitled to do. Declining to hold a hearing was not error and provides no basis for this Court to vacate the Commission's order.

B. Aquarion's Charges Were Not Illegal or Unjust

The Towns also contend that the Commission should have conducted an investigation and held a hearing because it had been presented with

[6] Aquarion could not make reparations because, as discussed later in this brief, it is bound by the tariffed rates approved by the Commission. *See* RSA 378:14

[7] Of note, though the statute contemplates that there would be only a complaint and a response, the Commission permitted multiple exchanges of information and argument by various parties. *See* NOA at 3-35. Accordingly, the Commission provided a greater opportunity to the Towns to make their case than was strictly required by statute.

information about overearning and was therefore obliged by RSA 374:1, RSA 374:2 and RSA 378:7 to do more than it did. Brief at 24, 28. That is simply not the case.

The statutes cited by the Towns require that public utilities such as Aquarion provide services that are safe and adequate and otherwise just and reasonable (RSA 374:1), and that they charge rates that are just and reasonable for the services they provide (RSA 374:2). Neither statute imposes an affirmative obligation on either the utility or the Commission to do anything with respect to a complaint such as the one in issue here.

With respect to RSA 378:7, that statute provides that "Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint" that utility rates are unjust or unreasonable, it will determine the just and reasonable or lawful rates. By its plain terms, before fixing new rates, this statute requires the Commission to have held a hearing. While the Towns make numerous arguments about what is called for by RSA 378:7, their reading of the law attempts to create an obligation for a hearing where there is none – exactly the reverse of what is required. RSA 378:7 states what the Commission can or must do to set rates after a hearing, but does not, itself, require a hearing. The Towns' reading puts the cart before the horse.

Putting aside the lack of statutory support, even if the allegation is simply that Aquarion's rates merited review because they were unjust or unreasonable by some other standard, the Towns are not correct. The Commission had authorized the rates and charges in Aquarion's tariff as just and reasonable and those were the rates and charges that Aquarion applied. The Commission had approved Aquarion's rates at the conclusion of its rate case in 2013, and in each year thereafter through the WICA proceedings, including in the years up to and through the time of the complaint. Moreover, it had done so with full knowledge of Aquarion's earnings and

with knowledge of the issues raised by the Towns.

Aquarion, at all times, charged only the rates the Commission had authorized it to charge, as it was obliged to do. Under RSA 378:7, once the Commission has determined what a utility's rates ought to be, it "shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed." In other words, because the Commission set rates "to be observed," the violation would have been for Aquarion to charge rates other than those specified by the Commission. *See also* RSA 378:14 ("No 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."). In that Aquarion charged only the rates it was authorized and obliged to charge, and which the Commission had determined were just and reasonable, there was no violation and no basis for a hearing on complaint under RSA Chapter 365. As the Commission found "The record is devoid of evidence . . . that Aquarion violated its tariff or charged illegal rates." NOA at 40.

It is also noteworthy that in March 2019 Hampton filed its complaint about Aquarion's earnings with full knowledge that the Commission was soon to be reviewing a settlement which included provisions relative to Aquarion's earnings and the timing of a rate case where earnings and rates would be investigated. The Commission approved that settlement in May 2019 and dismissed this complaint in June 2019. In so doing, the Commission had set a clear and reasonable path for reviewing the issue and, as anticipated, now has a rate case in which to do so. Pursuant to RSA 365:4, the Commission is authorized to investigate issues raised in a

complaint "in such manner and by such means as it shall deem proper." In this case the Commission had repeatedly found that the proper forum for addressing the earnings issue was a rate case.

As noted, Hampton was a signatory to a settlement specifying a date for an Aquarion rate case in 2020. Accordingly, it had contractually agreed that the Commission need not act on Aquarion's rates until a rate case was filed in 2020. *Moore v. Grau*, 171 N.H. 190, 194 (2018) ("Generally, parties are free to settle a case on any terms they desire and that are allowed by law. Settlement agreements are contractual in nature and, therefore, are generally governed by principles of contract law." (internal quotations and citations omitted)). Through the underlying complaint Hampton is seeking something that it already bargained away, *i.e.*, an opportunity to dispute Aquarion's earnings. Hampton is estopped from arguing that the Commission erred when it deferred a rate case to the date that Hampton itself had agreed upon.[8] Accordingly, even without other justification, that settlement agreement gave the Commission ample reason to conclude that there was no reason for it to pursue Hampton's complaint further, and Hampton's continued litigation amounts to a breach of its duty as a party to the Commission-approved settlement agreement.

In the end, the Towns' arguments are based entirely upon their belief that the Commission should have concluded differently than it did about the proper means to review Aquarion's rates and earnings and not upon any requirement in the law. This is not a case where the Court should supplant the judgment of the Commission with its own analysis. The Commission had received the same reports and information that were provided in the complaint, was fully aware of the status of Aquarion's earnings, had stated

[8] Whether North Hampton is likewise estopped is irrelevant since North Hampton's claims rest entirely upon the complaint brought by Hampton and North Hampton never brought a complaint of its own nor demonstrated any unique issue or injury pertaining to it.

that it would review the matter in a rate case, had stated that it would rely on its Staff to instigate a rate case when and if needed, and had approved a settlement agreement to which Hampton was a party specifying when a rate case would occur regardless of the Staff's actions. There was nothing more for the Commission to investigate and it did not err in dismissing the complaint.

C. A Hearing was Not Necessary Because there was no Additional Evidence to Present

Despite the above, even if the Court were to conclude that the Commission should have conducted an investigation and held a hearing, and even if it were to remand the matter to the Commission for such process, there is nothing to indicate the result would be any different. The Towns do not allege that there was or would be any additional evidence to present and they do not make such an allegation because there is no additional evidence. The outcome of any remanded case would be the same as it was at the time of the Commission's decision on the underlying complaint.

As stated previously, the issue of Aquarion's earnings had been raised multiple times with the Commission, the Commission had required additional reporting on the status of Aquarion's earnings, the Commission's audit staff had done its own analysis of Aquarion's books and established the status of Aquarion's earnings, and Aquarion had not made any claim that the Commission's information was incorrect. *See Appeal of Pennichuck Water Works*, 160 N.H. 18, 26 (2010)("[I]n arriving at its conclusions, the PUC may rely not only upon the evidence presented, but also upon its own expertise and that of its staff."). Relying upon the evidence presented, and the information from its Staff, the Commission was completely aware of Aquarion's earnings and had concluded that the proper forum for addressing them was a rate case. There was no other evidence for it to investigate or

analyze.

At no point did the Towns present anything for the Commission to consider beyond the information it already had, nor did they contend that more evidence was needed or could be found. Likewise, they have not given this Court any indication that there is, or would be, any additional or further information. Since there is no additional information for the Commission to consider, and since the Commission had already concluded that a rate case was the correct venue for addressing the issue, there were no "reasonable grounds" for a further investigation or a hearing. The Commission could, as it did, assume the truth of all the information before it and reach the conclusion it did – Aquarion's earnings would be addressed in a rate case and the complaint should be dismissed. The Court should reach the same conclusion with respect to this appeal.

Furthermore, beyond any remand not changing the ultimate result, the Towns already have the relief they seek from this Court. The Towns' requested remedy is that this Court vacate and remand the Commission's order with instructions to conduct an investigation and hold a hearing. Brief at 43. As noted previously, there is nothing to suggest that any additional process on the complaint would yield a different result. However, even if additional process were justified, the requested remedy is already being used by the Towns because the Commission is presently conducting an investigation and will hold a hearing on the issues affecting the Towns' allegations as part of Aquarion's pending rate case.

As Aquarion argued in its December 18, 2020 motion to this Court, consistent with the settlement agreement to which Hampton is a party, Aquarion has commenced a full rate proceeding with the Commission. As of the date of this submission, both Towns have been granted status as intervenors in that docket, have renewed their concerns about Aquarion's ROE and snow clearing with the Commission, and have begun the process of

discovery. Accordingly, the Commission had stated that it would review the complained-of matters in a rate case, and now that the rate case is occurring, the Towns have the venue and opportunity to directly address their claims, including receiving a hearing, and are actively doing so. In other words, they already have and are using the additional process they are requesting from this Court to litigate the exact same claims set forth in this appeal in the context of Aquarion's rate case that is currently pending before the Commission.

Accordingly, even assuming this Court felt compelled to grant the Towns their requested relief in this case, the remedy to be provided would be to remand the matter to the Commission. Because both Towns have already been granted intervenor status in Aquarion's pending rate case, which enables them to litigate and receive a hearing on the exact same claims asserted in this appeal, there is no further remedy to grant.

III. REPARATIONS ARE NOT APPROPRIATE OR JUSTIFIED

The Towns next claim that the Commission's dismissal deprived them of the right to reparations. Brief at 37.[9] The Towns' arguments presume a conclusion that is without support. Not only are reparations not justified for the reasons set out above, there is no basis in law for awarding them.

Pursuant to RSA 365:29:

> On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, ***and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service***, the commission may order the public utility which has collected the same to make due

[9] The Towns' Brief, at 37, states "By dismissing Hampton's Complaint, the Commission denied Hampton and Aquarion's customers their statutory right to recovery of unjust or unreasonable rates." Aquarion presumes the intended reference is to Hampton and North Hampton's customers rather than Aquarion's customers.

> reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

(emphasis added). As already discussed, the Commission did not find that there was any merit to the complaint raised by Hampton. The Commission had repeatedly concluded that Aquarion's rates were just, reasonable, and appropriate during the prior rate case and during the WICA proceedings and Aquarion had charged only the rates it had been authorized to charge. Thus, the Commission had concluded both before and during the time of the complaint that Aquarion's rates were just and reasonable. In that the Commission had already reached these conclusions, there was no basis for the Commission to then reach the opposite conclusion and award reparations.

With respect to the Towns' claims that the Commission erred by not awarding reparations based upon its conclusions regarding single-issue ratemaking, it is the case that the Commission relied, in part, on its desire to avoid single-issue ratemaking in dismissing the complaint. However, such reliance was only part of the Commission's reasoning and was not error in any event.

In justifying its decisions in Order No. 26,263 the Commission stated:

> Although the Commission approved an ROE in Aquarion's last rate case, that ROE was only an input into the Commission's calculation of the rates the Commission set for the Company. Examining the individual issue of ROE outside the context of setting appropriate rates leads to single-issue ratemaking, which the Commission does not favor.

Order No. 26,263 at 5; NOA at 40 (internal quotation omitted). As noted in Aquarion's April 16, 2019 response to the underlying complaint:

> As the Commission stated in 2001, "[s]ingle-issue rate cases are frowned upon in utility ratemaking because the objective of ratemaking is not to ensure recovery dollar for dollar of every

> expenditure made by a utility, but rather to ensure that the company has a reasonable opportunity to earn a reasonable overall return on investments dedicated to public utility functions. . . . Single-issue rate cases . . . focus on the change in a single expense (or revenue) item since the last rate case, ignoring completely what changes may have taken place in the other factors of net income." *Connecticut Valley Electric Co.,* Order No. 23,887 in Docket No. 01-224, 86 NH PUC 947, 950-51 (2001).

NOA at 15. According to the Towns, however, "Even in the absence of a statutory requirement to hear a complaint, there are good reasons to reject the Commission's reliance on its unwritten 'single issue' ratemaking policy." Brief at 33.

Accepting first the Towns' acknowledgement that there was no statutory requirement for the Commission to convene a hearing, the Towns contend that it was an error of judgment by the Commission to find as it did because, despite the Commission's prior rulings on the topic, "A rate of return is not a single issue or single component of rates. A return on equity is the end-result of all of the factors impacting the utilit[y's] revenues and expenses are [*sic*] taken into account." Brief at 33. The Towns support this argument by noting that the general calculation for determining a utility's revenue requirement may be reconfigured to determine a utility's achieved return. The Towns' math, while perhaps interesting, does not undo the fundamental fact that the ROE is but one component used by the Commission to determine a utility's revenue requirement and the rates to be charged.

As the Commission has stated "The Revenue [*sic*] requirement is determined by multiplying rate base by a rate of return and including a utility's known and measureable [*sic*] expenses as found in a utility's sample test year." Order No. 25,539 at 22; Appx. at 24. The revenue requirement, in turn, translates into the tariffed rates to be charged by a utility. Changing

any one component of the revenue requirement calculation changes the revenue requirement and the utility's tariffed rates, but without accounting for any other adjustments that may be justified or necessary.

The treatment of the ROE as a single input into a broader revenue requirement calculation is shown clearly in the Commission's rate case order pertaining to Aquarion's ROE in 2013. *See* Order No. 25,539 at 21-23; Appx. at 23-25. In fact, Hampton acknowledged that the ROE is an input into a broader calculation in its motion for rehearing on the complaint where it stated that, "the determined cost of equity was the driver in determining the Company's revenue requirement". NOA at 42. The Commission's desire to avoid the unbalanced adjustment to Aquarion's revenue requirement and rates sought by the Towns in line with its long-standing precedent, coupled with absence of any obligation to conduct an investigation or hold a hearing, supports its decision.

IV. THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT ABOUT FIRE PROTECTION SERVICE

The Towns only briefly discuss the matter of fire protection and Aquarion shall do likewise. The Towns argue that Aquarion should be required to clear snow from the public fire hydrants in its service territory, but point to no legal requirement, obligation, or agreement that it do so. The Towns provided nothing to the Commission and have provided nothing to this Court to demonstrate that Aquarion has any legal duty or obligation to clear snow. Thus, the Commission did not err in dismissing the complaint relative to snow clearing.

As the Commission described in Order No. 26,263, "With regard to the fire hydrants, the Company has not violated any provision of its tariff nor committed any wrongdoing by failing to clear them of snow." NOA at 40. Neither the truth of that statement nor the circumstances it was based upon

have changed since time of the complaint. In disputing the Commission's conclusion, the Towns raise essentially two arguments, one of which is irrelevant, and the other of which is incorrect.

With respect to relevance, in their brief to this Court, and repeatedly before the Commission, the Towns described the cost of the fire protection service included in Aquarion's tariff. That cost, however, has no bearing whatsoever on any obligation to clear snow or any other issue in this appeal. Aquarion's rates for fire protection service are based upon the costs it incurs to provide the services outlined in its tariff or required by statute or Commission directive, none of which require snow removal. The fact that the Towns may pay a particular amount over a month or a year does not dictate whether Aquarion has a duty to perform a given service. Accordingly, there was no reason for the Commission to consider those costs in reviewing the complaint, and there is no cause for the Court to heed them now.

On this item, Aquarion pauses to make one additional point. The Towns allege that the costs to clear snow should be considered because the Towns' costs are passed through to taxpayers, some of whom do not have fire protection service.[10] Even if the costs were reassigned to Aquarion, however, that would not change the population of customers for whom fire protection service is available. Some customers would still have the water needs of their residences or businesses served by Aquarion, but would not have public fire hydrants nearby. What would change is the amount of costs included in Aquarion's rates – adjusted to include the costs of snow removal – to be passed back to the Towns for fire protection service. The Towns

[10] On this point, the Towns complain of the costs associated with using "highly trained and compensated firefighters," Brief at 39, to clear snow. However, just as the there is no support for requiring Aquarion to clear snow, there is likewise no need for the Towns to use firefighters to do it. To the extent the Towns feel compelled to clear snow, they could use other employees or contractors to perform the services, presumably at lower cost. The Court should not allow these inflated costs to drive any decision here.

would be required to pay those increased tariffed rates, and presumably all citizens of the Towns, including those without access to fire protection service, would ultimately pay these increased costs via their municipal taxes. Accordingly, customers with and without public fire hydrants will bear the costs regardless of whether the Towns or Aquarion removes snow. Thus, not only are the costs themselves irrelevant, the cost allocation between the Towns or Aquarion is likewise irrelevant.

As to the Towns' other contention that as part of Aquarion's maintenance obligation Aquarion is required to clear snow and that by not clearing snow it is derelict in that duty, the Towns' argument is incorrect because it is missing one crucial element – Aquarion is not actually required by any law, rule, tariff, or contract to remove snow as part of its maintenance. Aquarion does not dispute, and has never disputed, that it is responsible for maintenance of the public fire hydrants on its system. Importantly, though, snow removal is not part of maintenance under the Commission's rules or Aquarion's tariff.

The Commission's rules and Aquarion's tariff both place the obligation of maintenance on Aquarion, and Aquarion has not sought to shift that obligation to any third party, including the Towns. In defining hydrant maintenance, the Commission's rules describe certain required acts, but do not require, and to Aquarion's knowledge have never required, snow removal.

As referenced by the Towns in their Brief, the Commission's Puc 600 Rules govern water service, including public hydrants, provided by utilities. Brief at 40. Those rules provide in relevant part:

> Puc 606.03 Fire Protection and Hydrants.
> (a) A utility and an applicant may negotiate regarding fire hydrants, public and private fire protection facilities and connecting mains, as to the following:
> (1) Specifications;

(2) Location;
(3) Installation;
(4) Responsibility for maintenance; and
(5) Ownership.

(b) Fire hydrants and public and private protection facilities shall be installed in conformity to the requirements of the utility.

(c) Hydrants maintained by the utility shall be inspected and flushed at least once each year, and shall be checked for freezing as often as necessary to insure that they are functioning properly.

(d) A record of each hydrant shall be maintained showing the size, type, location, date of inspection and flushing and the results thereof.

(e) Reports of periodic inspection of flushing of hydrants shall be reported to the commission on Form E-17, described at Puc 609.10 once a year.

Appx. 169-170. While the rules specify that hydrants maintained by a utility will be inspected and flushed annually, and that they will be checked for freezing, there is nothing in the rules requiring snow removal. Further, referenced in Puc 606.03 is Form E-17, which is defined in Puc 609.10, AQ Appx. at 11, as the record of inspections and maintenance for the Commission. That form says nothing about snow removal.

An administrative agency's interpretation of its own regulations is entitled to deference by a reviewing court on appeal. *See, e.g.*, *Vector Mktg. Corp. v. New Hampshire Dep't of Revenue Admin.*, 156 N.H. 781, 783 (2008). Additionally, "[w]hen interpreting agency rules, where possible, we ascribe the plain and ordinary meanings to the words used"; *id.*; and this Court will not rewrite or read words into an agency rule or a tariff that do not exist. After applying these standards to the Court's review of the Commission's interpretation of its own regulation, there is no basis for

overturning the Commission's interpretation.

Similarly, Aquarion's tariff provides that it will install and maintain hydrants, but it likewise does not make any reference to snow removal. As stated in Section 35[11] of Aquarion's tariff,

> 35. Public fire hydrants will be installed and maintained by the Company upon receipt by the Company of a written order from the properly authorized officers of the Town or Fire Precinct. Such written order shall state the exact location in the public streets at which the hydrant is to be placed. After a hydrant has been installed, the cost of any change in its location shall be paid for by the Town or Fire Precinct requesting change.

Appx. at 150. This provision does not require snow removal, and there is no other provision of Aquarion's tariff that relates to maintenance of public fire hydrants, and the Towns do not cite to or rely upon any other provision. Also, Aquarion's tariff contains no rate or charge for snow removal, which Hampton has acknowledged. NOA at 8.

There is nothing in the Commission's rules nor Aquarion's tariff that requires snow removal and no basis for the Commission or this Court to summarily require Aquarion to perform that service. Because the Towns have attempted to create responsibility and liability where there is none and for which existing rates provide no compensation, the Commission's conclusion that the Towns' allegations did not justify further inquiry is not error.

V. CONCLUSION.

For the reasons stated herein, Aquarion requests that the Court deny the Towns' requested relief and dismiss this appeal.

[11] The Towns' Brief at 40 states that the relevant provision is on page 35 of Aquarion's tariff, but the relevant provision is Section 35 on Original Page 8 of Aquarion's tariff.

WHEREFORE, Aquarion respectfully requests that this honorable Court:

A. Dismiss this matter; and

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

Respectfully submitted this 15th day of April, 2021,

AQUARION WATER COMPANY OF NEW HAMPSHIRE

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CERTIFICATION AS TO SERVICE AND WORD COUNT

I hereby certify that a copy of the foregoing has this day been forwarded to all parties by electronic service in accordance with Supreme Court Rule 26, and that the word count, exclusive of the table of contents, table of citations, provisions of statutes, etc., and the addendum hereto does not exceed 9,500 words consistent with Supreme Court Rule 16.

REQUEST FOR ORAL ARGUMENT

Oral argument is hereby requested in the amount of 15 minutes pursuant to Supreme Court Rule 16 (h), to be given by attorney Matthew J. Fossum, Esq.

/s/ Matthew J. Fossum

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Matthew J. Fossum