

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Appellate Case Number 2014-001278
PSC Docket No. 2014-153-S

RECEIVED

AUG - 7 2014

S.C. Supreme Court

Arch Enterprises, LLC, Appellant,

v.

Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities
and South Carolina Office of Regulatory Staff, Respondents.

MOTION TO DISMISS

Pursuant to Rule 240 of the South Carolina Appellant Court Rules (SCACR), Respondent Palmetto Wastewater Reclamation, LLC d/b/a/ Alpine Utilities ("PWR") hereby moves for an order of this Court dismissing the above-captioned appeal as moot. In support of this motion, PWR would show respectfully show as follows:

1. On April 8, 2014, Arch Enterprises, LLC d/b/a McDonalds, filed a complaint against PWR with the Public Service Commission of South Carolina ("Commission") whereby it sought, *inter alia*, an order of the Commission preventing disconnection of PWR's sewer service to Arch for non-payment for services and a reduction in a past due amount owed by Arch to PWR. A copy of the Arch complaint to the Commission is attached hereto and incorporated herein by reference as Motion Exhibit "A."

2. On April 11, 2014, PWR filed with the Commission and served upon Arch by United States mail a motion to dismiss the Arch complaint in accordance with 10 S.C. Code Regs. 103-829 (2012) asserting, *inter alia*, that the complaint failed to state facts sufficient to constitute a claim for relief as the relief sought would have required PWR to apply to Arch rates other than those approved by the Commission in contravention of 10 S.C. Code Regs. R.103-533 (2012) and that a grant of the relief sought would constitute retroactive ratemaking that is precluded as a matter of law. PWR specifically requested that the motion be decided without oral argument and that the Commission expedite its review. A copy of PWR's motion to the Commission and certificate of service of same upon Arch is attached hereto and incorporated herein by reference as Motion Exhibit "B."
3. Arch was required to respond to PWR's motion no later than April 28, 2014. *See* R.103-829.A, *supra* ("[r]esponses to such motions are due within ten days after service of said motions"). *See also* 10 S.C. Code Regs. 103-831 (2012) (incorporating the computation of time rules provided for in the SCRCPP) and Rule 6(e), SCRCPP (allowing five additional days to act if a notice or other paper is served by mail). No response to the motion was made by Arch.
4. On May 1, 2014, the Commission issued its Order No. 2014-400 granting PWR's motion in part and dismissing Arch's complaint. Therein, the Commission ruled, *inter alia*, that Arch's complaint sought relief that the Commission could not grant as a matter of law, i.e., the retroactive application of rates for the provision of sewer services by PWR to Arch which the Commission had not approved for use by PWR, but had instead approved for use by another utility company. The

Commission ruled that it was prohibited by law from retroactively reducing PWR's previously approved rate and that this was a sufficient basis upon which to grant PWR's motion. A copy of Commission Order No. 2014-400 is attached hereto and incorporated herein by reference as Motion Exhibit "C."

5. On May 14, 2014, Arch filed a petition for rehearing and reconsideration of the Commission's Directive Order. See S. C. Code Ann. §58-5-330 (Supp. 2013) and 10 S.C. Code Regs. 103-854 (2012). A copy of Arch's petition for rehearing and request for reconsideration of Commission Order No. 2014-400 is attached hereto and incorporated herein by reference as Motion Exhibit "D."
6. On May 16, 2014, PWR filed and served its answer in opposition to this petition in accordance with 10 S.C. Code Regs. 103-826 (2012). A copy of this Answer is attached hereto and incorporated herein by reference as Motion Exhibit "E."
7. On May 21, 2014, the Commission issued a directive, indicating its intent to deny Arch's petition. A copy of this directive is attached hereto and incorporated herein by reference as Motion Exhibit "F."
8. On June 26, 2014, the Commission issued Order No. 2014-452, which denied Arch's petition for rehearing and reconsideration. A copy of this order is attached hereto and incorporated herein by reference as Motion Exhibit "G."
9. On June 30, 2014, Appellant Arch filed its Amended Notice of Appeal in this matter,¹ challenging the Commission's dismissal of its complaint without first having conducted an oral argument on same.

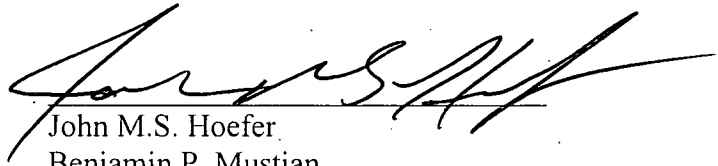
¹ Arch initially filed a Notice of Appeal in this Court on June 13, 2014. Arch amended that Notice on June 30 to include Motion Exhibit "G."

10. On July 23, 2014, Arch filed its initial brief and designation of matter to be included in the record on appeal.
11. Importantly, and prompting the filing of the within motion to dismiss the instant appeal, Arch has failed to raise as an issue on appeal in its initial brief the Commission's substantive ruling that was its basis for dismissing the complaint below, *i.e.*, that Arch's complaint sought relief consisting of an unlawful retroactive rate reduction in the sewer rates previously approved by the Commission for imposition by PWR. Instead, Arch's initial brief raises as its sole issue on appeal a procedural due process question of whether it received notice and an opportunity to be heard (via presentation of an oral argument) prior to the Commission's consideration of a motion to dismiss submitted in advance of the scheduled hearing on the merits of a complaint.
12. Because Arch has not appealed the underlying substantive ruling of the Commission that disposes of the complaint below, the Commission's ruling in this regard is the un-appealed law of the case, and there now exists no case or controversy with respect to these parties or the issues raised in Arch's complaint.
13. Consequently, the single issue presented by Arch on appeal is a hypothetical, academic question that calls for this Court to issue an advisory opinion on a procedural due process question
14. Accordingly, this appeal is moot and should be dismissed as non-justiciable, as there exists no active case or controversy between the parties.

15. PWR submits the exhibits attached hereto in accordance with Rule 240(c)(3), SCACR, and the memorandum in support hereof in accordance with Rule 240(c)(2), SCACR.

Therefore, for the reasons listed above, and as more fully articulated in the accompanying memorandum in support of Respondent's motion to dismiss, Respondent respectfully moves that this appeal be dismissed.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 240 of the South Carolina Appellant Court Rules (SCACR), Respondent Palmetto Wastewater Reclamation, LLC d/b/a/ Alpine Utilities (“PWR”) submits the within memorandum in support of its motion to dismiss the above-captioned appeal.

SUMMARY OF ARGUMENT

This case is in the initial stages of briefing. On July 23, 2014, Appellant Arch Enterprises, LLC (“Arch”) filed its initial brief and designation of matter to be included in the record on appeal. However, Arch has failed in its initial brief to raise as an issue on appeal the lone substantive and dispositive ruling below of the Public Service Commission of South Carolina (“Commission”), which now becomes the law of the case. Instead, Arch has presented the Court with only an academic, procedural due process question that will have no bearing on

this case or these parties, as no case or controversy now exist. PWR submits that there is now nothing left for the Court to act upon in this appeal. Accordingly, PWR respectfully requests that the Court dismiss this appeal as moot and non-justiciable.

FACTUAL AND PROCEDURAL BACKGROUND

A. ARCH COMPLAINT

On April 8, 2014, Arch filed a complaint against PWR with the Commission seeking retroactive review of and a revision to sewer service rates charged to Arch by PWR for the period July 1, 2013, through April 8, 2014. [Motion Exhibit "A".] Arch sought this relief, *inter alia*, to prevent disconnection of service for non-payment. [*Id.* at 4.] Arch further sought an order of the Commission retroactively adopting and applying a rate approved by the Commission for another public utility. [*Id.*]

On April 11, 2014, PWR filed its motion to dismiss the Arch complaint which set forth PWR's requests that the matter be decided without oral argument and be given expedited review by the Commission to protect PWR from the regulatory proscription against disconnection of service for non-payment. [Motion Exhibit "B" at pp: 1, 4, 5, 6, 13, and 14.] Arch did not respond to PWR's motion. *Cf.* 10 S.C. Code Regs.103-829.A (2012). [Motion Exhibit "G" at p.2.] PWR's motion was set for consideration by the Commission at its meeting held on May 1, 2014, at which meeting the Commission voted to grant PWR's motion to dismiss Arch's complaint. [Motion Exhibit "G" at pp. 1-2.] On the same date, the Commission issued its Order No. 2014-400 granting PWR's motion to dismiss. [Motion Exhibit "C".] The basis for the Commission's dismissal of the Arch complaint was that it impermissibly sought to have the Commission retroactively apply rates for PWR's provision of sewer services to Arch which the

Commission had not approved for use by PWR, but had instead approved for another public utility. [Motion Exhibit “C” at p. 1.] The Commission determined that Arch’s complaint amounted to a demand for a retroactive rate reduction relative to the sewer rates previously approved by the Commission for PWR’s services. [*Id.*] The Commission found Arch’s request to be unlawful because it would require the Commission to engage in impermissible retroactive ratemaking and dismissed the complaint on that ground. [*Id.*]

On May 14, 2014, Arch filed a petition for rehearing and request for reconsideration of the Commission’s order granting PWR’s motion to dismiss. [Motion Exhibit “D.”] On May 16, 2014, PWR filed and served its answer in opposition to this petition. [Motion Exhibit “E”.] On May 21, 2014, the Commission issued a directive, indicating its intent to deny Arch’s petition. [Motion Exhibit “F”.] On June 26, 2014, the Commission issued Order No. 2014-452 denying the petition for rehearing and request for reconsideration by Arch citing, *inter alia*, this Court’s decision in *S.C. Elec. & Gas. Co. v. Publ. Serv. Comm’n*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980). [Motion Exhibit “G.”] This appeal followed.

ARGUMENT

I. ARCH HAS FAILED TO APPEAL FROM THE SUBSTANTIVE AND DISPOSITIVE RULING OF THE COMMISSION; THEREFORE, THAT RULING IS NOW THE LAW OF THE CASE AND THE INSTANT APPEAL HAS BECOME MOOT AND NOT JUSTICIABLE.

The single issue presented in this appeal is a hypothetical procedural due process question that has no bearing on the issues underlying this case or its parties, as Arch has failed to appeal from the substantive ruling of the Commission dismissing the appeal. There is no issue on appeal presented by Appellant that pertains to the Commission’s substantive ruling below. [Initial Brief of Appellant, Table of Contents and at 1.] There is no argument presented with respect to the Commission’s ruling below that Arch’s complaint sought relief that was

unavailable as a matter of law. [Initial Brief of Appellant at 6-14.]¹ The only relief sought on appeal is a remand to the Commission to conduct an oral argument on PWR's motion to dismiss. [Initial Brief of Appellant at 14.] Accordingly, even if the Court were inclined to agree with Arch² that the Commission did not follow proper notice procedures in considering PWR's motion to dismiss the complaint without conducting an oral argument, it is of no consequence

¹ To the contrary, in its initial brief Arch consciously decides not to address the Commission's substantive ruling. In support of this position, Arch asserts that because it was not given notice and an opportunity to be heard the Commission lacked jurisdiction to adjudicate Arch's entitlement to the unlawful retroactive rate relief that it sought and its orders below are a nullity. [Initial Brief of Appellant at 13-14.] In support of this assertion, Arch cites *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). PWR submits that this is simply an effort by Arch to avoid the substantive issue decided below by bootstrapping the putative procedural due process argument that Arch seeks to have this Court address and is flawed for at least two reasons.

First, the Commission obtained jurisdiction to rule on Arch's complaint and jurisdiction over Arch when Arch submitted the complaint to the Commission. *Cf. White v. Preferred Research, Inc.*, 315 S.C. 209, 432 S.E.2d 506 (Ct. Apps. 1993)) (holding that a party submitting a claim to binding cannot assert lack of personal jurisdiction). Second, the partial holding of the court of appeals in *Blanton* quoted by Arch does not support its contention that the Commission's orders are a nullity. To the contrary, the court of appeals in *Blanton* held that procedural due process had been provided where a defendant had been given notice and an opportunity to be heard on the plaintiff's motion to confirm an arbitration award. In the instant case, Arch was on notice that a motion to dismiss was filed and that the motion could be decided without oral argument by counsel. [Motion Exhibit "B" at 1, 4, 5, 6, and 14.] Further, Arch was on notice that it had the opportunity to be heard by way of a written response to the motion to dismiss -- which opportunity it chose to ignore. *See* R. 103-829.A, *supra*. Moreover, Arch was given another opportunity to be heard on the substantive issue in its petition for rehearing or reconsideration (Motion Exhibit "D" at para. 17) and was in fact heard by the Commission as it considered and ruled upon the argument advanced in the petition for rehearing. [Motion Exhibit "G" at 3-4.]

Arch confuses the opportunity to be heard under S.C. Const. art. 1, §22 with an oral argument of counsel. In fact, and as noted by the court in *Blanton*, this Court has long held that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* 351 S.C. at 541, 570 S.E.2d at 569, *citing Stono River Envt'l Protection Ass'n v. S.C. DHEC*, 305 S.C. 90, 406 S.E.2d 340 (1991). This Court has further held that "due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2007). In sum, Arch was accorded due process and the jurisdictional argument it now makes based on *Blanton*, *supra*, is wholly without merit. At every stage of this matter -- including in the instant appeal -- Arch has failed to confront the substantive question presented by PWR's motion to dismiss below. PWR submits that this is because Arch cannot, consonant with law, advance such an argument.

² PWR disputes the merits of the procedural due process question presented in this appeal for the reasons described in n.1, *supra*, but also because Arch misreads the plain language of the applicable regulation, R. 103-829. However, for the purposes of the instant motion, the merits of the single issue presented to this Court by Arch are irrelevant as the dispositive ruling of the Commission has not been appealed.

where the appellant has failed to appeal from dispositive holdings on the underlying substantive issue. Consequently, this appeal is moot, as there exists no justiciable controversy between the parties and this action does not meet one of the articulated exceptions to the doctrine of mootness.

“A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy.” *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996).

The concept of justiciability includes the doctrine of mootness. *Jackson v. State*, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing *Jackson*, 331 S.C. 486, 489 S.E.2d 915). “A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” *Seabrook v. City of Folly Beach*, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Here, the Commission ruled that the relief requested by Arch in its complaint was unlawful, as it constituted an improper request for a retroactive reduction of the utility’s charges imposed under an approved rate schedule of the Commission. [Motion Exhibit “C” at p. 1, Motion Exhibit “G” at p. 4 (citing *S.C. Elec. & Gas Co. v. Public Service Comm’n*, 275 S.C. 487,

272 S.E.2d 793 (1980)]. The Commission ruled that its dismissal was based on the fact that Arch had failed to state facts sufficient to constitute a claim on which relief could be granted, as it requested the application of rates which had been approved for another utility but not PWR and would have essentially revoked the rate schedule approved for PWR by the Commission previously. [Motion Exhibit "G" at pp. 3-4] The Commission further held that, because the relief sought was unavailable as a matter of law, dismissal without oral argument was reasonable. [*Id.*]

Notwithstanding these holdings of the Commission in dismissing the complaint, Arch has not appealed the substantive issues which the Commission determined were dispositive. Under longstanding case law, the Commission's holdings are now the law of the case. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). Importantly, however, because the only substantive holding of the Commission has not been appealed, there exists no case or controversy with respect to these parties, and this action is moot and non-justiciable. Stated differently, even if Arch could succeed in its argument to the Court on perceived procedural notice defects which comprises the sole issue on appeal, because the underlying merits of Arch's complaint have been resolved without appeal the requested remand to the Commission would be futile.

As such, the appeal proffered to the Court is the definition of a hypothetical: do applicable regulations require the Commission to hear oral argument on all prehearing motions? However, the Court is restricted from entertaining hypothetical appeals that will have no bearing on underlying merits of the parties' respective positions by the case or controversy requirement of justiciability. See *In re: Treatment & Care of Luckabaugh*, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (stating that a contingent, hypothetical or abstract dispute does not constitute a

justiciable controversy) (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). This Court, consequently, is without jurisdiction to hear this action and the appeal should be dismissed.

Additionally, none of the three recognized exceptions to the doctrine of mootness are applicable to this action.³ *Cf. Sloan v. Greenville County*, 356 S.C. 531, 551-55, 590 S.E.2d 338, 349-51 (Ct. App. 2003) (finding an appeal moot due to the construction project's completion before further finding that an exception existed). First, this Court could take jurisdiction over this matter, despite mootness, if the issue raised is capable of repetition but evading review. *Curtis*, 345 at 568, 549 S.E.2d at 596. Here, under longstanding case law, the Commission is prohibited from retroactive ratemaking on the whim of a customer complaint, so while customers make seek this recourse in the future, the Commission is bound to follow this Court's clear directives and review of the issue in this or any future case would be futile. Additionally, with respect to Arch's procedural due process claim, while the issue of the Commission disposing of prehearing issues without oral argument is certainly capable of repetition,⁴ there is absolutely no indication that this issue is evading or will evade review in the future.

³ "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596 (2001); *see also Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.*

⁴ Again, PWR disputes Arch's position that the Commission is required to hold oral argument on these types of motions, which is mistaken and finds no support in the plain language of the applicable regulation. *See* 10 S.C. Code Regs. 103-829 (2012). Further, even accepting Arch's interpretation of the Commission's regulation as being correct, the Commission was authorized to waive its regulation in view of PWR's specific request that its motion below be decided without oral argument and on expedited basis and Arch's failure to respond to that – or any other part of the motion below. *See* 10 S.C. Code Regs.

Second, this case does not present the Court with a question of imperative or manifest urgency to establish a rule for future conduct in matters of public interest. *See Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (discussing the public interest exception). Simply put, a complaint filed by a single commercial customer requesting relief, through unlawful means, from utility rates which have been previously reviewed and approved by the Commission does not present a question of public interest, and there is no manifest urgency to decide the issue for future guidance.

Finally, this appeal does not present an issue that could affect future events or have collateral consequences for the parties. The hypothetical question posed by this appeal can have no effect on the issues raised by Arch in its complaint, as the dispositive holding of the Commission was not appealed and is the law of the case. Moreover, because the Commission adhered to this Court's longstanding proscription against retroactive ratemaking, the practical effect of the Commission's Order is the continued application of an established rule of law going forward. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn't make any difference, doesn't matter.”).

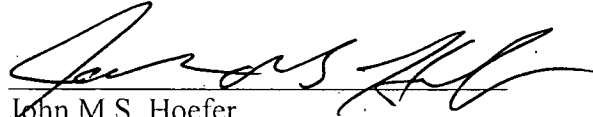
CONCLUSION

Arch has failed to appeal from the single, substantive and dispositive holding of the Commission in the Order underlying this appeal. The single issue presented by Arch in its initial brief presents the Court with an academic, procedural due process question which will have no bearing on this case or these parties going forward due to its failure to preserve the substantive issue which served as the basis for the relief sought in its complaint. Accordingly, no case or controversy remains. PWR respectfully submits that there is nothing left for the Court to modify

103-803 (2012). The Commission did, in fact, find that a waiver of its regulation allowing for oral arguments was consistent with R. 103-803. [Motion Exhibit “G” at p.3.]

or amend through this appeal, which is now moot and therefore non-justiciable. Moreover, none of the three recognized exceptions to the doctrine of mootness are present in this case. For these reasons, Respondent hereby respectfully moves that this case be dismissed.

Respectfully submitted,



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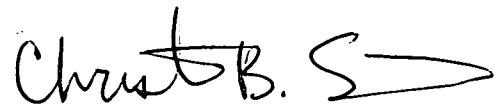
Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities
and South Carolina Office of Regulatory Staff, Respondents.

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefler, P.A. have caused to be served this day one (1) copy of **Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Supporting Exhibits** via United States Postal Service first class postage affixed, and addressed as follows:

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Christine B. Severin

Columbia, South Carolina
This 7th day of August, 2014.