

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5903

Investigation into Service Quality Standards,)
Privacy Protections, and Other Consumer)
Safeguards for Retail Telecommunications)
Service)

Order entered: 04/10/98

**ORDER REGARDING PETITION OF FRANKLIN TELEPHONE COMPANY FOR BOARD REVIEW OF
DEPARTMENT OF PUBLIC SERVICE BILL-BACK CHARGES**

Introduction

On November 12, 1996, Franklin Telephone Company (“Franklin”) filed with the Public Service Board (“PSB” or “Board”) a letter requesting a hearing to evaluate the “billback on Docket 5903 for services of Raymond Associates” sent them by the Vermont Department of Public Service (“DPS” or “Department”).¹ In the letter, Franklin indicated that it “feels very strongly that this billback is unnecessary and excessive.” Finally, Franklin requested an expedited hearing due to docket workshops being scheduled to begin on November 20, 1996.² Pursuant to 30 V.S.A. § 8, the Board has appointed David Farnsworth, Staff Attorney, to serve as the Hearing Officer for this issue.

By letter of November 26, 1996, the DPS notified the Board that the DPS and Franklin had agreed to a schedule for hearing Franklin’s petition.³ On the same day, Franklin filed prefiled testimony and discovery requests with the DPS.⁴ On December 6, 1996, the DPS filed objections to the prefiled testimony, requesting the Board to strike portions of Franklin’s testimony on the grounds that it is “irrelevant and immaterial to facts of consequence” to the billback dispute.⁵ By letter of December 6, 1996, to Secretary of Administration William Sorrell, copied to the Board, Franklin indicated that the Department had offered to pay Franklin’s share of the billback attributable to

1. Letter of Kimberly Gates Maynard, November 12, 1996.

2. *Id.*

3. Letter of DPS, November 26, 1996.

4. Filing of November 26, 1996, of K.G. Maynard on behalf of Franklin. On December 9, 1996, the DPS filed Responses to Franklin’s First Set of Information Requests with parties in this docket.

5. DPS Objection to Prefiled Testimony, December 6, 1996, at 3. Also on December 6, 1996, the DPS filed a Motion in Limine to limit the scope of the December 13, 1996, hearing scheduled to review Franklin’s petition. Franklin replied by letter of December 10, 1996, to the motion.

Raymond Associates in this docket.⁶ An attachment to Franklin's December 6 letter — a letter from William Sorrell to Kimberly Gates Maynard — indicated that the Secretary of Administration had approved the DPS consultant contract expenses for this docket “with the exception of the allocated cost to Franklin Telephone, Shoreham Telephone and Topsham Telephone.”⁷

On December 9, 1996, the DPS filed a motion to dismiss Franklin's billback petition.⁸ In its motion, the DPS argued that inasmuch as the billback charges to Franklin had been withdrawn, that Franklin's petition was moot because there are no costs proposed to be allocated to it.⁹ The DPS also argued that Franklin has no standing.¹⁰

On December 11, 1996, the Clerk of the Board issued a notice to parties in 5903 canceling the December 13 hearing pending the Hearing Officer's ruling on the DPS motion to dismiss. On December 11, 1996, Franklin filed a Response to the DPS Motion in Limine, Objection to Prefiled Testimony, and Motion to Dismiss.¹¹ In the motion, Franklin argued that the actual allocation in this case “was never the issue;” but rather that there are broader problems with the DPS use of billbacks.¹² Thus, argues Franklin, “the issue of billbacks is capable of repetition but evades review unless the PSB allows Franklin's petition to go to hearings with all the evidence.”¹³

Discussion

A dispute is moot when it no longer presents an actual or justiciable controversy.¹⁴ Therefore, relief is available only when a party is suffering from “the threat of actual injury to a protected legal interest.”¹⁵ In this case, even if Franklin was improperly allocated billback charges,

6. Letter of K.G. Maynard, December 6, 1996.

7. Letter of William Sorrell, Secretary of Administration, December 3, 1996.

8. DPS Motion to Dismiss Franklin's 30 V.S.A. § 21 Petition (“DPS Motion to Dismiss”). On December 10, 1996, the DPS also submitted Prefiled Testimony on this issue.

9. DPS Motion to Dismiss at 2. Citing *In re Moriarty*, 156 Vt. 160, 163 (1991), the DPS described this issue as “no longer *live* and Franklin as having no “legally cognizable interest in the proceeding's outcome.” *Id.*

10. The DPS cites Section 21 of 30 V.S.A. which reads in pertinent part “. . . public service *company to which costs are proposed to be allocated* . . .” (Emphasis added). Citing *In re Terry*, 56 B.R.538, 540 (Bankr. D. Vt. 1986), the DPS states that when a statute specifies the parties to a cause of action, only persons specified may bring an action under the statute. The DPS contends that Franklin is no longer a party under Section 21 of 30 V.S.A., and thus can no longer bring the petition. DPS Motion to Dismiss at 2.

11. Franklin's Response to the DPS Motion to (sic) Limine, Objection to Prefiled Testimony, and Motion to Dismiss, December 11, 1996.

12. *Id.*

13. *Id.* The DPS responded to Franklin's arguments, by letter of December 17, 1996, and essentially reiterated its earlier arguments. The DPS also noted that since there is no issue within the scope of a section 21 review, then it is incorrect to say that the issue is “capable of repetition but evades review.” DPS Letter of December 17, 1996.

14. *Doria v. University of Vermont*, 156 Vt. 114, 117-118 (1973).

15. *Id.* citing *Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982).

“the harm has already passed, and there is no longer a threat of actual injury.”¹⁶ The DPS no longer proposes to allocate any portion of the costs at issue to Franklin. This issue is moot. As a result, there is no justiciable controversy, and Board review of the issue is inappropriate.

The Vermont Supreme Court has held that, while in general mootness defeats a court’s jurisdiction to review plaintiff’s claims, it does recognize an exception “for a narrow class of cases which are ‘capable of repetition, yet evading review.’”¹⁷ The applicability of this exception is dependent on the satisfaction of a two-part test: “(1) the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [must be] a reasonable expectation that the same complaining party [will] be subjected to the same action again.”¹⁸

Franklin has not met the first element of the *Weinstein* test; if the issue were to arise again, Franklin would have adequate opportunity to litigate it. Section 20 of the billback statute provides for sufficient notice, and if Franklin finds fault with the particular facts associated with a billback in the future, it will have the opportunity to bring it to the attention of the Board.

Neither has Franklin demonstrated that it meets the second part of the *Weinstein* test. Franklin, as a regulated utility, appears before the Board with relative frequency. Thus, Franklin may continue to find problems, as it did in this instance, with future proposed billback by the Department. However, a petitioner must “show a ‘demonstrated probability’ that it would once again become entangled in the same controversy before he may invoke this mootness exception. Franklin has not demonstrated that, in a future docket, it will encounter the same controversy which it had here.

For these reasons, I conclude that Franklin’s petition is moot, and grant the Department’s motion to dismiss.

SO ORDERED.

DATED at Montpelier, Vermont, this 10th day of April, 1998.

s/ David Farnsworth
David Farnsworth, Esq.
Hearing Officer

16. *Id.*

17. *Id.* citing *State v. Tallman*, 148 Vt. 465, 468, (1987).

18. *Id.* at 18 citing to *United States Supreme Court in Weinstein v. Bradford*, 423 U.S. 147, 149(1975).

OFFICE OF THE CLERK

Filed: April 10, 1998

Attest: s/ John Bentley
(Acting) Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.