

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6574

Petition of J. Peter Yankowski vs. Mountain Cable)	Hearing at
Company, d/b/a Adelfhia Cable Communications, in re:)	Rutland, Vermont
dispute concerning the charges related to the use of cable)	December 10, 2002
converter boxes)	

Order entered: 9/8/2004

PRESENT: John P. Bentley, Esq.
Hearing Officer

APPEARANCES: J. Peter Yankowski
Pro se

Richard H. Saudek, Esq.
Cheney, Brock & Saudek, PC
for Adelfhia Cable Communications

Dixie Henry, Esq.
for Vermont Department of Public Service

I. INTRODUCTION

This docket concerns a complaint by a cable television customer, J. Peter Yankowski, about certain practices of Mountain Cable Company, d/b/a Adelfhia Cable Communications ("Adelfhia"). Mr. Yankowski complains that, when he discontinued subscribing to certain premium services from Adelfhia, he was not told that he no longer required a set-top converter box. As a result, he paid for the converter box for thirty-six months. His concern has been, not only the amount he needlessly paid, but for other subscribers who may also have paid Adelfhia money for nothing. The Vermont Department of Public Service ("Department") investigated this claim, concluded that there were few subscribers in the same situation as Mr. Yankowski, and negotiated a settlement with Adelfhia, in the form of a stipulation that was entered into evidence. I recommend that the Board accept that stipulation.

The following report is made to the Board pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

II. FINDINGS

1. Adelphia is a cable television operator that holds Certificates of Public Good to operate cable systems in several Vermont municipalities, including Rutland. Final Order dated April 28, 2000, Docket 6101.

2. In order to receive some levels of service from Adelphia, customers need a converter box. Tr. at 25–26.

3. At the time of the hearing, Adelphia, in all its systems together, had 7000 subscribers who possessed analog converter boxes where the customer was not taking a level of service that required a converter. Only one such box is located in the Rutland system. Tr. at 24, 26.

4. At the time of the complaint and of the hearing, the converter box cost the subscriber \$3.25 per month. Tr. at 31.

5. Some subscribers may intentionally continue paying for the converter box even though they do not presently need it: it allows them to use a remote control if their television is not so equipped, it provides an always-correct clock, it helps identify the channel being viewed, and it makes it possible to order pay-per-view programming. Tr. at 30.

6. Mr. Yankowski is a customer on Adelphia's Rutland system, who subscribed to Adelphia's premium services until March 10, 1998. For the succeeding 36 months he paid Adelphia for the converter box. He did not realize that the converter was not necessary to receive Adelphia's cable service on his television. Tr. at 52.

7. Mr. Gould, the manager of Adelphia's Rutland system, is not aware of any cable system in Vermont that requires *all* customers to use a converter in order to receive cable service. Tr. at 62.

8. Mr. Yankowski has received a refund of all of his payments since he discontinued actually needing the converter box. Tr. at 12.

9. As part of its annual quality of service notice, Adelphia includes information to subscribers that the box may not be needed. Exh. Adelphia A; tr. at 29, 32.

10. Adelphia plans to eliminate all of the analog converter boxes from its system eventually. Tr. at 39.

11. The Department has received only two complaints on this subject, including Mr. Yankowski's. Tr. at 34.

12. Shortly before the hearing in this docket, an article describing Mr. Yankowski's complaint appeared in both the *Rutland Herald* and the *Barre-Montpelier Times Argus*; the Department received no phone calls from subscribers in response. Newspaper accounts of other problems in the past have resulted in the Department's consumer hot line being "flooded" with calls. Tr. at 60. The Department sees this as, at least, a marked absence of evidence that the problem of which Mr. Yankowski complains is widespread. *Id.*

13. At the hearing, witnesses for both Adelphia and the Department spoke in favor of a stipulation they had negotiated. Exh. Joint 1.

14. In short, the stipulation would have Adelphia communicate with each customer situated similarly to Mr. Yankowski, that is, renting an analog converter box but not subscribing to a level of service that requires such a converter. Subscribers who turn in unwanted converter boxes and ask for refunds will receive a refund on their bill for converter rental payments made during the six months preceding the turn-in or since the customer dropped premium service, whichever is less. Adelphia will also complete an accelerated program to eliminate analog converter boxes from its systems. These programs will cover not only the Rutland system but all systems operated by the eight "Adelphia" operating companies in Vermont. Exh. Joint 1.

III. DISCUSSION

Stipulation

Since Adelphia has already refunded all the payments made by Mr. Yankowski for his converter, he does not have a monetary stake in this proceeding. He did, however, express his opinion that the stipulation does not provide the most appropriate remedy, and that it would be more fair for Adelphia to "split the difference," that is, to refund half the rental payments made to

Adelphia after a given customer has given up the last service that required the converter. He also thought it unfair that the stipulation placed the burden upon the subscriber to complain and ask for a refund. The Department's witness was persuasive in her argument that this problem does not appear to affect very many people. The fact that there was no response to fairly prominent articles in the local newspapers in the days before the hearing was especially convincing; many years of involvement in the regulation of cable television companies has demonstrated to me that customers are not, in general, shy about making known their unhappiness when misconduct is alleged. The stipulation is designed to attract the attention of customers who may have paid for a converter box without realizing that they did not need one, while not requiring an expensive, wholesale refund of payments to customers who may very well have preferred to keep the converter box for its convenience. Finally, I should note, as was repeatedly mentioned during the hearing, that it is the Department's statutory duty to protect and represent the subscribers of Adelphia, and it appears to have fulfilled that duty in this case. Mr. Yankowski has presented no basis for concluding that his judgment of the terms of the settlement ought to be substituted for that of the Department. I conclude, therefore, that the stipulated settlement between the Department and Adelphia is the most sensible path toward resolution.

Motion to Expunge Documents

During the pendency of this docket the petitioner, Mr. Yankowski, sent two letters, one to Ms. Frankel at the Department and one to the Clerk of the Board, that, in part, discussed some aspects of the give and take of negotiations among himself, the Department, and Adelphia. The Department filed letters in response asking that Mr. Yankowski's two letters be "expunged from all Board records." The Department's request was renewed at the technical hearing.

Since the letters from Mr. Yankowski were not, and were never intended to be, offered into evidence, the general prohibition in V.R.E. 408 of evidence of negotiations and offers of settlement does not apply to them. Instead, the Department argues that it would be contrary to public policy to allow a party to Board litigation to unilaterally disclose settlement negotiations.

V.R.E. 408 does not support the Department's argument. As the Reporter's Notes make clear, "[t]he bar to admissibility applies only in questions of liability and damages. The evidence

may be used for other purposes." Further, all of the cases cited to annotate the Rule find no error in the admission of settlement information. The Supreme Court has explained:

This rule does not create a privilege; at best, it creates an argument that settlement negotiation information should not be disclosed because it is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

Douglas v. Windham Superior Court, 157 Vt. 34, 38 (1991). Since settlement information may actually be presented to a jury in proper cases, it follows that public policy does not require that Mr. Yankowski's references to terms of negotiations be expunged, and the Department's request therefor is denied.

IV. FURTHER DISCUSSION

On August 5, 2004, in its comments on the proposal for decision, the Department informed the Board that it had agreed with Adelpia to revise the letter that will be sent to customers, as required by the stipulation. The Department also requested two small corrections to my findings, which I have made. Adelpia supported the Department's recommendations.

The Department also withdrew its request to expunge the record, and asked that the discussion of that request be deleted from the proposed decision. That discussion has no bearing on the outcome of this case; however, I decline to delete it.

V. CONCLUSION

I conclude that, since Mr. Yankowski's rental payments have been fully refunded by Adelpia, his individual complaint should be dismissed. I also conclude that the stipulation between the Department and Adelpia is an appropriate remedy, and the Board ought to approve it.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811. The changes noted in the Further Discussion section are not adverse to the interests of any party, and they have not been circulated.

Dated at Montpelier, Vermont, this 20th day of September, 2004.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and conclusions of the Hearing Officer are adopted.
2. The individual complaint of Mr. J. Peter Yankowski is dismissed.
3. The stipulation entered into between Adelpia and the Department is approved.
4. Adelpia shall fulfill its commitments set forth in the stipulation.

Dated at Montpelier, Vermont, this 8th day of September, 2004.

s/Michael H. Dworkin)	PUBLIC SERVICE
)	
)	
s/David C. Coen)	BOARD
)	
)	OF VERMONT
s/John D. Burke)	

OFFICE OF THE CLERK

FILED: September 8, 2004

ATTEST: s/Susan M. Hudson
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 (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

CONCURRENCE

While I concur with my colleagues as to the result in this matter, I would have agreed with Mr. Yankowski that the consumer should be entitled to a greater refund than our Order allows.

After the converter was no longer necessary for normal cable service to occur, it served only three purposes: (1) to act as a remote control for the TV; (2) to provide an accurate clock; and (3) to allow for certain pay channels to be received. Most TVs today have a remote control, most households have other clocks and there is no evidence as to any volume of pay TV use necessitating the employment of the converter.

After the hearing in this matter, Adelphia raised the monthly fee for this generally unnecessary piece of equipment from \$3.25 to \$4.50 per month, an increase of 38 %, an ill-timed increase from my point of view.

For the reasons set forth above, I would have allowed the consumer a refund of 2/3 of the fees paid from the date when the converter was no longer needed to receive normal cable service until removed by the Company.

Dated at Montpelier, Vermont, this 8th day of September, 2004.

s/John D. Burke

John D. Burke, Board Member