

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6188

Petition of On Target for a determination of)
liability for damage to a utility's property and)
third party damages)

Order entered: 2/16/99

PREHEARING CONFERENCE MEMORANDUM

A prehearing conference was held in this docket for the purpose of determining the issues of fact and law that must be heard. The case concerns an incident that occurred in August of 1998 during construction next to U.S. Route 2 near Waterbury, Vermont. It seems undisputed that a dig-safe call was made by the excavation contractor, J. A. McDonald, Inc. ("McDonald"), and that the location of underground equipment was marked by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont's ("Bell Atlantic") locating and marking contractor, On Target. Heavy rains after the marking caused a landslide and flooding of the area that had been marked. Efforts by McDonald to clear a blocked culvert resulted in damage to Bell Atlantic's buried plant, a fiber-optic cable. On Target filed a petition asking the Board to sort out liability between itself, the contractor, and Bell Atlantic. Issues of fact seem to center around whether On Target properly marked the correct location, whether McDonald should have made an emergency call to Dig-Safe, and whether McDonald should have realized that damage had occurred to Bell Atlantic's plant. Additional damage is alleged by customers of Bell Atlantic who were without phone service because of the break in the cable resulting from the dig-in.

Legal issues that were identified concerned the Board's jurisdiction to adjudicate the various claims of the parties amongst themselves and with regard to third party claims, as well as the effect of the revisions to P.S.B. Rule 3.800 that will become effective 3/1/99. It seems inescapable that the Board has authority to make determinations under 30 V.S.A. § 7008¹ that will establish fault, if any, that led to the damaged plant. It is much less clear exactly what is

1. The Board's jurisdiction in this case comes from Chapter 86 of Title 30, Sections 7001 – 7008.

included in the language of § 7008 (d), which provides that "(t)he Board shall have jurisdiction over all actions brought pursuant to this chapter." Damage claims by customers of Bell Atlantic may well be outside of any action under Chapter 86, and the concept of pendant jurisdiction has no application to an administrative tribunal like the Board; see *Trybulski v. Bellows Falls Hydro-Electric Corporation*, 112 Vt. 1, 20 A2d. 117 (1941). Judicial economy, at least, would suggest that the Board ought to clearly determine the scope of this case before spending a great deal of time hearing evidence.

To that end I directed the parties to brief the question of the extent of the Board's jurisdiction, at least, by March 1, 1999. Once the scope of the proceeding has been determined, I will set a schedule for hearings. However, the subject of briefing brings me to another important subject. The February 3 prehearing conference was unusual in that I was the only attorney in the room. Bell Atlantic's attorney has filed a notice of appearance but was held on the ground in Boston by bad weather; no other party has yet had an appearance filed by counsel. As I suggested at the prehearing, parties have the right to represent themselves rather than hiring attorneys. However, Bell Atlantic indicated that the damage to its plant would exceed \$75,000, and third party damages are unknown. This seems to be sufficiently serious money that parties would prefer professional representation, especially since this is the first such case brought before the Board, so there are no guiding precedents nor a history of prior proceedings. At the very least, each party must make an appearance in accordance with P.S.B. Rule 2.201 (A) and (B). A party who has not made an appearance within that Rule may (and should) be precluded from filing documents or being heard at future hearings.

DATED at Montpelier, Vermont, this 16th day of February, 1999.

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

OFFICE OF THE CLERK

FILED: February 16, 1999

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 of any technical errors, in order that any necessary corrections may be made.