

DT 03-153

VERIZON NEW HAMPSHIRE

Complaint of Michael Harris

Order Dismissing Complaint

ORDER NO. 24,440

March 4, 2005

APPEARANCES: Michael Harris, pro se; Kevin Shea on behalf of Verizon; and Amy Ignatius on behalf of Commission Staff.

I. BACKGROUND

On July 25, 2003, Mr. Michael L. Harris filed a request that the New Hampshire Public Utilities Commission (Commission) hold a hearing regarding a dispute with Verizon New England d/b/a Verizon New Hampshire (Verizon.) Mr. Harris asserted that Verizon, after replacing an underground service, had failed to restore his driveway to its original condition, as promised, and that the cost for the work was \$2,500. On August 8, 2003, the Commission notified Verizon that a complaint had been filed by Mr. Harris and directed Verizon, pursuant to RSA 365:2, to respond to the charges set forth by Mr. Harris. The Commission also noted at that time that correspondence had been forwarded by the New Hampshire Insurance Department regarding its investigation of a related claim by Mr. Harris and that the correspondence would be placed in the Commission's docket file.

On September 11, 2003, Verizon responded that it had complied, on May 11, 2000, with the request to restore the driveway to its original condition. Verizon also contended that the Manchester District Court and the Concord District Court had already denied claims by Mr. Harris that his driveway had not been restored to its original condition. On September 24,

2003, Mr. Harris argued that Verizon's response was "contrary to the facts" and that the issue of restoring the driveway had "never been adjudicated in any court."

On December 14, 2004, the Commission notified Mr. Harris that, "because efforts to resolve the matter have not been successful," a hearing was scheduled for January 13, 2005. The December 14, 2004 Secretarial Letter also described the nature of the hearing and advised Mr. Harris of procedural expectations and evidentiary requirements.

II. POSITIONS OF THE PARTIES

A. Michael Harris

An evidentiary hearing was held, as scheduled, on January 13, 2005. Mr. Harris provided direct testimony and was examined by Commission Staff and the Commission. Verizon, through its representative, Mr. Kevin Shea, introduced a number of exhibits. Ms. Mary Anne Lutz, a member of the Commission's Consumer Affairs Division, provided direct testimony and was examined by Mr. Shea and the Commission. Finally, Mr. Shea and Mr. Harris made closing statements.

Mr. Harris' position is that Verizon promised that, after it installed a new service to his home, which required digging a trench to accommodate an underground line, it would return his driveway to its original compacted gravel condition. He contends that Verizon did not fulfill its promise and that as a result the driveway was washed out by rainfall. He further contends that he paid a contractor to fix the driveway. Finally, he seeks \$3,000 in damages from Verizon.

B. Verizon

Verizon contends that it “has done what they were asked to do in this scenario.” Tr., p. 87. It also submitted a number of exhibits, including portions of various Commission orders and copies of documents related to other court proceedings initiated by Mr. Harris regarding the installation of telephone facilities on his property. The thrust of the citations to Commission orders concerns Verizon’s position that the Commission lacks the authority to award damages to Mr. Harris in this case. As for the other court proceedings, the thrust is that the issues have already been adjudicated and dismissed.

Michael Harris v. Verizon was heard in Manchester District Court, Docket No. 00-SC-01388, regarding Mr. Harris’ allegations of “damages and losses by not timely and properly repairing his telephone line and fixing a telephone pole.” The Court rendered judgment for Verizon because “[t]here was not competent testimony as to any damages the plaintiff may have suffered.” (Decision issued October 9, 2001.) Michael Harris v. Jeff Melcher/On Target and DBU Construction, Inc. was heard in Concord District Court, Docket No. 02-SC-00113, regarding Mr. Harris’ allegations of property damage resulting from spray painting as part of the Dig Safe process under RSA 374:48 et seq., which is the Underground Utility Damage Prevention System. The Court dismissed the case as to DBU Construction and, as to On Target, the Court found “that there is absolutely not one single shred of credible evidence submitted by the Plaintiff that anything done or not done by On Target on the Plaintiff’s property was done either negligently or recklessly or anything done on that property which resulted in any compensable damage.” (Order entered November 21, 2002.)

C. Staff

The Staff Witness, Ms. Mary Anne Lutz testified that she was present for most but not all of the day the work was done, May 11, 2000, and took some photographs before leaving that afternoon. She testified that the lower portion of the driveway “had been smoothed out” and “had been taken care of pretty good.” Tr., p. 67. She also testified that when she left at the end of the day that the only recollection she had about further restoration work pertained to “grass seed that was supposed to be in the part down the bottom, that goes between the pole at the bottom of the driveway.” Tr., p. 68. Ms. Lutz also testified that later Mr. Harris complained that “where the driveway comes down the slope, it was not restored.” Tr., p. 71. She further testified that the next time she was at the Harris property, May 25, 2000, “it was pouring rain” and that she had no recollection of what the driveway looked like at the time. Tr., p. 72. Finally, she testified that she was not aware whether Verizon later returned to do any additional work. Tr., p. 73.

III. COMMISSION ANALYSIS

The analytical framework for resolving the issue presented in this case involves a number of steps, including the following 7 questions. Does the Commission have jurisdiction? Does Verizon have a duty or did it make a promise? Was the duty or promise breached? Were there damages resulting from the breach? Does the Commission have the authority to remedy the breach? Was the evidence credible? Has the complainant proved his case by a preponderance of the evidence? For the complainant Mr. Harris to prevail, the answer to each question must be in the affirmative. The inverse is also true, that is, if the answer to any question is in the negative then the respondent Verizon would prevail.

With respect to questions regarding whether the Commission has the jurisdiction to hear the complaint¹ and also with respect to the question whether the parties had an understanding that Mr. Harris' driveway would be returned to its pre-existing condition, the parties do not seem to be in substantial disagreement. There does appear, however, to be substantial disagreement as to: whether the driveway was returned to its pre-existing condition; what, if any, monetary damages resulted; and, whether the Commission has the authority to award such damages.

There was a good deal of confusion created by testimony provided during the hearing and by documents filed before hearing concerning discrete disputes over various areas of Mr. Harris' property. Mr. Harris had filed two separate District Court claims related to the core transaction, but not identical to the complaint that is the subject of this proceeding. The confusion was resolved by the submission of Exhibit 8, a drawing of the property, and accompanying testimony explaining the exhibit.² Based on the testimony of Mr. Harris and the testimony of Staff, including photographs taken by Staff, it appears uncontroverted that, at the end of the day on May 11, 2000, the lower portion of the driveway had been satisfactorily restored at that time.

The evidence is not conclusive, however, as to the condition of the upper portion of the driveway, which is the focus of this proceeding, nor is it conclusive as to what took place after May 11, 2000. Mr. Harris asserts that the driveway was not returned to its pre-existing

¹ RSA 363:17-a authorizes the Commission to be the arbiter between the interests of the customer and the interests of the regulated utility.

² For purposes of understanding the geography of the various disputes, Mr. Harris' property can be divided into three segments: the area around the telephone pole, which was the subject of the Manchester District Court proceeding; the lower portion of the driveway, which is not in dispute; and, the upper portion of the driveway, which is the subject of this proceeding.

condition by Verizon, that it was eventually washed out by rainfall and that he paid to have the driveway restored. Mr. Harris had earlier provided photocopies of photographs purporting to show that the driveway had not been adequately restored but the quality of the undated photocopies is so poor that it is not possible to make an assessment of the claim. Though requested to produce the original photographs within a week of the hearing, Mr. Harris made no further submission. As for Staff, Ms. Lutz testified that she had no knowledge of the condition of the driveway after May 11, 2000. Verizon did not offer any testimony on this aspect of the issue.

With respect to the question of damages, Mr. Harris seeks to recover \$3,000 from Verizon, which he asserts is what it cost him to hire a contractor to restore the driveway to its pre-existing condition, but which also seems to include some other form of damages in addition to out-of-pocket expenditures. He contends that the \$3,000 is a “fair apportionment of the costs and losses” and that the correction work was performed by a contractor as a subset of a larger project undertaken on his parents’ property. Tr., p. 20. Mr. Harris failed to provide any documentary proof of the contractor’s charges despite having been informed by a Secretarial Letter in advance of the hearing that:

The hearing before the Commission is an evidentiary hearing. Accordingly, you will need to present a clear description of the work done that was not to your satisfaction. Your presentation must be limited to the facts of the complaint filed with the Commission. You will be allowed to introduce exhibits at the hearing which may include copies of correspondence, bills, agreements, etc. (December 14, 2004)

Finally, as to the Commission’s authority to award monetary damages, Verizon contends that the Commission lacks such authority. In support of its position, Verizon points to

Order No. 23,374 (June 28, 2001) in Docket No. DE 01-023, where Verizon contends the Commission concluded it lacked the authority to award civil damages to a customer.

We find Verizon's argument as to damages to be dispositive as to Mr. Harris' claim and requires that we deny his complaint. Consistent with our finding in Order No. 23,374, our authority under the reparations statutes, RSA 365:3 and 365:29, is limited to complaints "covering any rate, fare, charge or price demanded and collected by any public utility" and an "order for reparation shall cover only payments made within 2 years before the date of filing the petition for reparation." In this case, the complaint does not pertain to a rate and the monetary relief sought does not pertain to reparations for "an illegal or unjustly discriminatory rate," therefore we lack the authority to grant the relief sought. It was not clear until the hearing exactly what Mr. Harris was alleging and, it now being apparent that the only relief requested is for monetary damages, the Commission is without authority to grant the request.

Based upon the foregoing, it is hereby

ORDERED, that the complaint of Michael Harris is dismissed.

By order of the Public Utilities Commission of New Hampshire this fourth day of
March, 2004.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary