D.T.E. 03-04-21-A June 15, 2005

Complaint filed by Subhendu Roy, pursuant to G.L. c. 93, §§ 108 et seq., with the Department of Telecommunications and Energy claiming that his long distance service was switched to Optical Telephone Corporation without authorization.

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ORDER ON MOTION TO REOPEN THE RECORD
OF OPTICAL TELEPHONE CORPORATION

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Respondent

# ORDER ON MOTION TO REOPEN THE RECORD OF OPTICAL TELEPHONE CORPORATION

## I. INTRODUCTION

On October 29, 2003, the Department of Telecommunications and Energy ("Department") issued a final Order in Subhendu Roy v. Optical Telephone Corporation, D.T.E. 03-04-21 (2003) ("Order"). In the Order, the Department determined that Optical Telephone Corporation ("Optical") had performed an unauthorized switch of Subhendu Roy's ("Complainant") long distance telephone service because Optical provided neither a letter of authorization ("LOA") nor a recorded third party verification ("TPV") confirming the change in the Complainant's services. Order at 6-7.[1]

On November 17, 2003, Optical filed a motion to reconsider the Order and reopen the proceeding to enter additional evidence ("November 17 Motion"). Along with the November 17 Motion, Optical included a TPV recording which, Optical argued, confirmed the Complainant's authorization of the switch in his long distance service provider. The Complainant filed a response to Optical's November 17 Motion on December 15, 2003 ("Complainant's Response"). On February 11, 2003, the Hearing Officer notified Optical that its November 17 Motion did not conform to Department filing requirements because Optical

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[1] Any unauthorized change to a customer's primary interexchange carrier ("IXC") or local exchange carrier ("LEC") is known as "slamming." 220 C.M.R. § 13.02. Pursuant to G.L. c. 93, § 109(a), authorization for a change in service provider must be demonstrated by either a TPV or LOA.

did not make its filing through counsel.[2] The Hearing Officer allowed Optical the opportunity to re-submit its motion using legal counsel, and on February 25, 2004, Optical re-filed its motion ("February 25 Motion"). The Complainant did not file a response to Optical's February 25 Motion.[3]

## II. STANDARD OF REVIEW

The Department's procedural rule on reopening hearings, 220 C.M.R. § 1.11(8), states, in pertinent part: "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67-Phase II, at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986). We expect parties to call to our attention and to offer to correct significant mistakes of record in the presentation of their cases. See Fitchburg Gas and Electric Light

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[2] Pursuant to Western Massachusetts Electric Company, D.T.E. 01-36/02-20, at 9-10, Interlocutory Order on Appeal of Hearing Officer Ruling Denying Alternative Power Source, Inc.'s Petition to Intervene (January 31, 2003), businesses appearing as parties in Department proceedings must be represented by counsel. But see, Commonwealth Learning Center, D.T.E. 03-04-31, at 8-10 (2004) (holding that business complainants in slamming cases may petition to appear without counsel).

[3] Optical's November 17 Motion and February 25 Motion are identical except that the February 25 Motion was filed and signed by Optical's legal representative, Attorney Kristina Enberg. Because Optical's motions are otherwise identical, the Complainant's December 15, 2003 response is also applicable to Optical's February 25 Motion.

Co., D.T.E. 02-84-A at 5 n.5 (2005), citing Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy, 440 Mass. 625, 641 (2004). This expectation is consonant with G.L. c. 268, § 6.

## III. POSITIONS OF THE PARTIES

### A. Optical

In its motion, Optical argues that the Department should reconsider its October 29, 2003 Order and reopen the evidentiary record in this proceeding (February 25 Motion at 1). Optical asserts that it failed to attend the evidentiary hearing scheduled for October 16, 2003 in this case because Optical was under the mistaken impression that the Department had continued this case to a later date (id. at 3-4). Optical argues that its mistaken impression was caused by the fact that Optical was a party to two other slamming matters before the Department that had been scheduled for evidentiary hearings in October 2003, both of which were continued to a later date, and Optical mistakenly assumed that this case had been continued as well (id. at 3).

In addition, Optical argues that the TPV recording included with its motion constitutes previously unknown or undisclosed facts that would have a significant impact on the Department's October 29, 2003 Order (id. at 4). Therefore, Optical argues that the Department should reconsider its Order, reopen the evidentiary record, and enter the TPV recording as evidence (id.).

### B. Complainant

In his response, the Complainant requests that the Department deny Optical's motion because the Department's October 29, 2003 Order was based on the facts of the case

(Complainant's Response at 1). In addition, the Complainant urges the Department to deny Optical's motion because Optical is pursuing an unfair advantage against the Complainant who has limited resources (id. at 2).

## IV. ANALYSIS AND FINDINGS

As explained below, we grant Optical's motion to reopen the record and allow the TPV recording to enter the record. However, after evaluation of the TPV recording, we conclude that it does not support a reversal of our prior determination that Optical performed an unauthorized switch of the Complainant's long distance service.

We begin by noting that neither Optical nor the Complainant attended the evidentiary hearing scheduled for October 16, 2003. Order at 3 and n.2, 6. Both parties received certified notices of the hearing and neither party requested a postponement or informed the presiding officer that they would be unable to appear on the scheduled date. Id. at 3 n.2, 5. At the hearing, the presiding officer convened the hearing, noted the absence of the parties, and moved nine exhibits into the record on his own motion. Id. at 3, citing Tr. at 3.[4] However, because the parties did not have an opportunity to rebut the evidence that the presiding officer placed in the record, we determine that procedural fairness compels us to grant Optical's motion to reopen the proceeding to include and evaluate evidence that Optical asserts supports its position that the switch of the Complainant's long distance service provider was authorized.

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[4] The exhibits consisted of the following: certified mail receipts regarding the hearing notices (Exh. DTE-1); signature copies of the receipts (Exh. DTE-2); the hearing notices (Exhs. DTE-3, 4); correspondence between the Consumer Division and the parties (Exhs. DTE-5, 6, 7, 8); and the Customer Complaint Form submitted by the Complainant to the Consumer Division (Exh. DTE-9).

Therefore, we grant Optical's motion to reopen the record and enter the TPV recording into the evidentiary record.

We now turn to an evaluation of the TPV recording to determine whether it provides a basis for reversal of our prior determination that Optical performed an unauthorized switch of the Complainant's long distance service. For the following reasons, we determine that it does not. G.L. c. 93, § 109(c)(2) states that in a TPV, the following information must be confirmed:

(i) the identity of the person spoken to as well as the appropriate verification data;

(ii) the authority of the person spoken to in order to authorize a change in the primary IXC or LEC for a particular line identified;

(iii) that the authorization has been given to change the primary IXC or LEC for a particular telephone line identified; and

(iv) the identity of the IXC or LEC which the customer has authorized to be the new primary IXC or LEC service provider.

The TPV recording provided by Optical fails to confirm that the individual responding to the verification questions had the authority to make changes in the Complainant's service and fails to identify the particular telephone number affected by the change of provider.[5] Therefore, the Department determines that the TPV does not provide confirmation of an authorized switch in the Complainant's long distance service.

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[5] The individual responding to the verification questions on the TPV recording was not Subhendu Roy, the Complainant, but rather an individual who identified herself as Urmi Bhaumik. A transcript of the TPV recording is included as Attachment A.

## V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motion of Optical Telephone Corporation to reopen the record filed with the Department on February 25, 2004 is hereby granted; and it is further

ORDERED: That the Department's Order dated October 29, 2003 is hereby affirmed.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Judith F. Judson, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by any aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such a petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.

**ATTACHMENT A**

Transcript of TPV Recording
Subhendu Roy v. Optical Telephone Corporation,
D.T.E. 03-04-21

TPV Recording: Thank you for holding. For security purposes, your answers to these questions will be recorded. After the tone, clearly state your first and last name, mailing address, and telephone number including the area code.

Urmi Bhaumik: Urmi U-R-M-I. And last name B-H-A-U-M-I-K. And the address is 2 Linmoor Terrace, Lexington, MA, 02040.

TPV Recording: If you understand that you have chosen Optical Telephone Corporation to be your long distance and international service provider, please say yes at the tone.

Urmi Bhaumik: Well, yes. . .

TPV Recording: After the tone, please state your previous long distance carrier and one of the following: your date of birth or your mother's maiden name.

Urmi Bhaumik: [Garbled].

[End of recording].