D.T.E. 02-29-3

Adjudicatory proceeding regarding the complaint of Roman & Yevgeniya Libkhen concerning the services provided by Qwest Communications.

APPEARANCES: Roman Libkhen
6 Pratt Street
Worcester, MA 01609
pro se
Petitioner

Damian R. LaPlaca, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
260 Franklin Street
Boston, MA 02110
For: QWEST COMMUNICATIONS CORP.
Respondent

I. INTRODUCTION

On December 12, 2001, Roman Libkhen ("Complainant"), pursuant to G.L. c. 93, § 108 et seq., filed a complaint with the Department of Telecommunications and Energy ("Department") alleging that Qwest Communications Corporation ("Qwest" or "Company") switched his long-distance telephone service without authorization.[1] Qwest submitted a letter stating that the switch in the Complainant's service was authorized. On May 15, 2002, the Complainant challenged the veracity of the authorization as provided by Qwest.

On June 11, 2002, pursuant to notice duly issued, the Department conducted an evidentiary hearing. Mr. Libkhen testified on his own behalf. The Company sponsored the testimony of Jonathan Mann from Qwest's government affairs office.

II. WAS THE SWITCH OF MR. LIBKHEN'S LONG DISTANCE TELEPHONE SERVICE AUTHORIZED?

A. Positions of the Parties

1. Complainant

The Complainant submitted his invoice from Qwest for long-distance charges incurred from August 18, 2001 through November 19, 2001 (Exh. Consumer-1). Mr. Libkhen testified that during the summer of 2001, he had established long-distance service with Essentials.com ("Essentials") (Tr. at 10). The Complainant testified that he discovered the alleged slam on November 19, 2001 when he received a monthly bill from Qwest with service charges dating

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[1] Pursuant to 220 C.M.R. § 13.02, any unauthorized change to a customer's primary interexchange carrier or local exchange carrier is known as "slamming."

back to August 18, 2001 (id. at 11). Following this, the Complainant contacted Qwest to inquire as to the switch in service, but he did not contact Essentials, his long-distance service provider, until June 7, 2002, four days prior to the hearing (id. at 14, 15, 28). During Mr. Libkhen's conversations with Qwest and the Department's Consumer Division, he was informed that his long-distance telephone service had been switched to Qwest on August 15, 2001 (Exh. Qwest-3; Tr. at 14). Mr. Libkhen denied authorizing the switch in service (Exh. Qwest-3; Tr. at 13). Mr. Libkhen's long-distance service was transferred to Verizon on January 17, 2002 (Exh. Consumer-1; Tr. at 23).

2. Qwest

At the hearing on June 11, 2002, Qwest stated that confusion between Essentials and Verizon led to the switch in Mr. Libkhen's service, not any incidences of slamming on the part of Qwest (Tr. at 28). Qwest contends that it did nothing to initiate a change in Mr. Libkhen's long-distance service, and that no interexchange carrier ("IXC") has been harmed because of this confusion (id. at 29, 36). Qwest contended that following the deactivation of Mr. Libkhen's Essentials account on August 15, 2001, he continued to receive service from Qwest as a nonsubscriber (Exhs. Qwest-1; Qwest-2; Tr. at 31-32, 33). Qwest testified that Essentials is a reseller of Qwest services, and as such Qwest does not typically interact with the end user of those services (Tr. at 32). Qwest indicated that it has provided several credits to Mr. Libkhen's account totaling $382.12. This amount represents the total amount charged by

Qwest to Mr. Libkhen during the period in question (Exh. Consumer-1; Tr. at 18-22, 50).[2]

III. STANDARD OF REVIEW

Pursuant to G.L. c. 93, § 109(a), a change in a customer's primary IXC shall be considered to have been authorized only if the IXC or local exchange carrier ("LEC") that initiated that change provides confirmation that the customer did authorize such change either through a signed Letter of Authorization ("LOA") or oral confirmation of authorization through Third Party Verification ("TPV") obtained by a company registered with the Department to provide TPV services in the Commonwealth.

Pursuant to G.L. c. 93, § 110 (i), the Department shall hold a hearing to determine, based on our review of the LOA or TPV and any other information relevant to the change in telephone service, whether the customer did authorize the carrier change.

In addition to the Massachusetts slamming law set forth above, the Federal Communications Commission ("FCC") implemented new slamming liability rules in May 2000. Corrected Version First Order on Reconsideration, CC Docket No. 94-129 (May 3, 2000) ("Corrected Order"). In accordance with those rules the company that switches a customer's telephone service without authorization must pay the customer's authorized company a penalty equal to 150 percent of the charges received from the customer. The authorized company is then required to return one third of that amount, or 50 percent of what the customer paid to the unauthorized carrier, to the customer. See 47 C.F.R. § 64.1140. In

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[2] The total amount of the credit varies throughout the transcript from $381.88 to $382.36 (Tr. at 13, 50). However, the total amount of the credits supplied in the billing information provided by Mr. Libkhen equals $382.12 (Exh. Consumer-1).

the Corrected Order, the FCC concluded that states should have primary responsibility for administering its slamming liability rules (See ¶¶ 22-28, 33-37, 52, 84). On November 3, 2000, pursuant to 47 C.F.R. § 64.1110, the Department provided to the FCC its State Notification of Election to Administer FCC Rules (See Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, November 3, 2000).

IV. ANALYSIS AND FINDINGS

In accordance with G.L. c. 93, § 110(i) the Department conducted a hearing to determine whether the change in the Complainant's long-distance carrier was authorized. Qwest stated that it had not switched the Complainant's long-distance telecommunications services, and that through no initiative of its own, Qwest had become the Complainant's carrier as a result of a miscommunication between Essentials and Verizon (Tr. at 28).[3] Thus, the Department finds that while Qwest provided long-distance service to Mr. Libkhen without his authorization, it did not initiate a slam as provided by statute. Rather, Qwest appears to have become Mr. Libkhen's long-distance provider through no action taken on its part.

The Department finds that Qwest did not initiate this unauthorized switch in Mr.

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[3] Mr. Libkhen testified that he contacted Essentials on July 1, 2001 to notify Essentials that he was moving and that he wanted to keep it as his long-distance service provider (Tr. at 16). At that time, Essentials was in the middle of bankruptcy proceedings, and was eventually taken over by USA Telecom ("USA") on August 10, 2001 (Tr. at 34-35). Mr. Libkhen's move coincided with USA's takeover of Essentials, and during the transfer of ownership, USA Telecom processed the disconnect of the old account but failed to establish the new account for Mr. Libkhen's new telephone line (Tr. at 35). Consequently, Mr. Libkhen became a default nonsubscriber receiving Qwest services (Tr. at 36).

Libkhen's long-distance service. Further, the Department recognizes that Qwest has credited the Complainant's account in full for those charges incurred during the period of Qwest's provisioning of long-distance service to the Complainant. Therefore, the Department need not address the penalty provisions as presented in G.L. c. 93, § 112 and 47 C.F.R. § 64.1140.

V. ORDER

Accordingly, after notice, hearing, consideration, and determination the Department finds that Qwest Communications Corporation did not violate the provisions of Massachusetts G.L. c. 93, § 109(a) in its provision of long-distance service to Mr. Roman Libkhen.

By Order of the Department,

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Paul B. Vasington, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

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 an 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 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. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).