

State of Florida



# Public Service Commission

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COMMISSION  
CLERK**-M-E-M-O-R-A-N-D-U-M-****DATE:** February 10, 2011**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Analysis (M. Watts) *WA*  
Office of the General Counsel (P. Evans, M. Brown) *PE MEB*

**RE:** Docket No. 110027-TI – Compliance investigation of Optic Internet Protocol, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

**AGENDA:** 02/22/11 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners**PREHEARING OFFICER:** Administrative**CRITICAL DATES:** None**SPECIAL INSTRUCTIONS:** None**FILE NAME AND LOCATION:** S:\PSC\RAD\WP\110027.RCM.DOC

## Case Background

On November 9, 2007, Optic Internet Protocol, Inc. (OIP) registered<sup>1</sup> as an intrastate interexchange company (IXC) with the Florida Public Service Commission (Commission).

The Commission began receiving complaints of unauthorized carrier changes (a process known as “slamming”) against OIP in September 2008. By July 2009, the Commission had received 36 slamming complaints against OIP. During its investigation, staff found that the third party verification (TPV) recordings provided by the company did not appear to comply with the

<sup>1</sup> Docket No. 070684-TI – in Re: Acknowledgment of registration as intrastate interexchange telecommunications company, effective November 9, 2007, by Optic Internet Protocol, Inc.

Commission's rules. On September 14, 2009, staff sent the company a letter detailing its concerns. Staff's letter instructed OIP to investigate its verification practices, devise a plan to bring its practices in compliance with Commission rules, and to provide copies of its marketing and verification scripts.

The company responded on September 29, 2009, with what appeared to be an appropriate corrective plan and adequate marketing and verification scripts. Staff sent a follow-up letter to OIP on November 3, 2009, stating that the plan and documents OIP submitted appeared to be in compliance with the Commission's rules. Staff's letter further advised OIP that staff would continue to monitor the company for possible slamming violations, noting that continued violations may result in the Commission imposing a penalty as authorized by Section 364.285, Florida Statutes (F.S.).

Customers filed several more slamming complaints against OIP during the fourth quarter of 2009. During the first quarter of 2010, the number of slamming complaints filed by customers rose sharply. Even so, staff analysts reviewing the TPVs for the 2010 complaints consistently stated that the recordings met the requirements of the Commission's rules.<sup>2</sup> The purpose for requiring certain information on a TPV is to ensure that the prospective customer understands and agrees to the provider change. Additionally, Rule 25-4.118(10) Florida Administrative Code (F.A.C.), prohibits deceptive or misleading references during marketing and verification, but the Commission has no requirement that marketing calls be recorded for future reference. The TPVs provided by OIP following staff's 2009 correspondence appeared to be in compliance with Commission rules, yet the number of complaints continued to rise.

To understand what was causing complaints, staff mailed surveys on May 21, 2010, to the most recent complainants (47 complaints that were received from January 1, 2010, to March 31, 2010). The surveys asked the complainants several questions regarding the marketing call they received from representatives of OIP. Of the 47 complainants contacted, 26 responded by returning the survey, calling staff, or by calling staff and following up with a written response. The complainants consistently stated they were never contacted by OIP in any way prior to their services being switched. Moreover, all of the TPVs were in Spanish, yet some of the complainants stated that no one in their household speaks or understands Spanish. Only one complainant had listened to their TPV prior to receiving staff's survey. Staff sent a copy of the respective TPV via electronic mail to complainants who were willing to review them. None of the complainants recognized the voice on the recording or knew anyone with the name given on the TPV. Staff's summary of the survey responses is provided as Attachment 1.

Given the serious implications of staff's findings, staff began to scrutinize the company more closely. On July 1, 2010, staff communicated with OIP's counsel, Mr. Thomas K. Crowe, to discuss staff's concern about the number of slamming complaints that the Commission continued to receive after September 2009. Mr. Crowe responded in writing on July 21, 2010, addressing staff's concerns and providing other information requested during the July 1 telephone call with staff. Mr. Crowe stated in his July 21, 2010 letter that OIP had suspended sales activities in Florida as of July 1, 2010, and would not resume marketing in Florida without first notifying the Commission. However, from August 2010 to January 2011, the Commission

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<sup>2</sup> Rule 25-4.118(3)(a)1 through 5, F.A.C.

has received approximately one complaint per month, with some of the switches occurring after July 1, 2010.

On July 26, 2010, Mr. Gregory Allpow, president of OIP, and Mr. Crowe met with staff at the Commission. At the meeting, Mr. Allpow stated the following: 1) he is the sole owner and only direct employee of OIP; 2) billing, customer service, marketing, verification, accounting, and all other functions of the company are handled by independent contractors; 3) he spends the majority of his time working for an Atlanta, Georgia, company as an environmental consultant; 4) he is unaware of any problem with slamming complaints against OIP in any other state; and 5) he affirmed that OIP had ceased adding new customers by any means in Florida.

To further its investigation of OIP, staff issued a data request to the company on September 1, 2010, for information and documents pertaining to its underlying carrier(s), billing agent, vendors, and other company resources. The company responded on September 21, 2010. The documents were provided under confidential cover.

A thorough review of all slamming complaints filed with the Commission against OIP since it registered as an IXC reveals that the company had 146 apparent slamming violations between September 5, 2008, and January 20, 2011. This recommendation addresses OIP's apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, F.S. Accordingly, staff believes the following recommendations are appropriate.

### **Discussion of Issues**

**Issue 1:** Should the Commission penalize Optic Internet Protocol, Inc. \$10,000 per apparent violation, for a total of \$1,460,000 for 146 apparent violations of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection?

**Recommendation:** Yes, Optic Internet Protocol, Inc. should be penalized \$10,000 per apparent violation, for a total of \$1,460,000 for 146 apparent violations of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection. If Optic Internet Protocol, Inc. fails to request a hearing pursuant to Section 120.57, F.S., within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If the company fails to pay the amount of the penalty within fourteen calendar days after issuance of the Consummating Order, registration number TK171 should be removed from the register, the company's tariff should be cancelled, and the company should also be required to immediately cease and desist from providing intrastate interexchange telecommunications services within Florida. **(M. Watts/Evans/M. Brown)**

**Staff Analysis:** Rule 25-4.118(2)(c)2, F.A.C., defines the minimum content of TPV audio recording that must be maintained as proof that a carrier change was authorized by a prospective consumer. It incorporates by reference Rule 25-4.118(3)(a)1 through 5, F.A.C., which states:

1. Customer's billing name, address, and each telephone number to be changed;
2. Statement clearly identifying the certificated name of the provider and the service to which the customer wishes to subscribe, whether or not it uses the facilities of another company;
3. Statement that the person requesting the change is authorized to request the change;
4. Statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number;
5. Statement that the LEC may charge a fee for each provider change;

The TPVs that OIP provided the Commission, after staff's initial contact with the company, appeared to be in compliance with Commission Rules. Based on the consumers' responses to staff's May 21, 2010 survey, it appears that OIP never contacted the consumers and that the TPV recordings were of people other than the customers or anyone in their household. After the Commission contacted OIP, it would then issue credits to consumers who had complained to the Commission. This pattern suggests a willful intent to violate the Commission's slamming rules.

As part of its investigation, staff contacted other states in which OIP reportedly was operating. Staff discovered that the California Public Utilities Commission issued twelve slamming citations to OIP on September 18, 2009, one on September 19, 2009, and one on May 5, 2010. Each citation was in the amount of \$1,000, which OIP paid. Staff notes that Mr.

Allpow failed to disclose this information during the meeting with staff on July 26, 2010. Staff does not believe that its questions to Mr. Allpow regarding any slamming activity by OIP, or any utility commission action against OIP for slamming were misleading or could have been misunderstood.

Pursuant to Section 364.285(1), F.S., the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364, F.S.

Section 364.285(1), F.S., however, does not define what it is to "willfully violate" a rule or order. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1<sup>st</sup> DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)].

Thus, it is commonly understood that a "willful violation of law" is an act of purposefulness. As the First District Court of Appeal stated, relying on Black's Law Dictionary:

An act or omission is 'willfully' done, if done voluntarily and intentionally and within the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1<sup>st</sup> DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

Thus, the failure of OIP to comply with Rule 25-4.118, F.A.C., meets the standard for a "willful violation" as contemplated by the Legislature when enacting section 364.285, Florida Statutes. "It is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833); see, Perez v. Marti, 770 So.2d 284, 289 (Fla. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all intrastate interexchange companies, like OIP, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Although this is the first compliance docket opened against OIP, staff believes that OIP has displayed a pattern of disregard for the Commission's Rules and the customers' wishes. Therefore, staff recommends that OIP be fined \$10,000 per violation, for a total of \$1,460,000. The proposed penalty in this recommendation of \$10,000 per slamming incident is consistent with previous decisions in Docket Nos. 040289-TI, in Re: Compliance investigation of Optical Telephone Corporation for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or

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Toll Provider Selection, and 031031-TI, in Re: Compliance investigation of Miko Telephone Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

**Issue 2:** Should this docket be closed?

**Recommendation:** The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested, the docket should be closed administratively upon either receipt of the payment of the penalty or upon the removal of the company's registration number from the register and cancellation of the company's tariff. If the company's registration is cancelled, OIP's underlying carrier should be notified to discontinue providing wholesale services to OIP in Florida. **(Evans/M. Brown)**

**Staff Analysis:** The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested, the docket should be closed administratively upon either receipt of the payment of the penalty or upon the removal of the company's registration number from the register and cancellation of the company's tariff. If the company's registration is cancelled, OIP's underlying carrier should be notified to discontinue providing wholesale services to OIP in Florida.

	<b>Name</b>	<b>CATS#</b>	<b>Notes</b>
1	Dennis Teicher	0914961T	After review of TPV wav file, Mr. Teicher sent the following statement via email: They are talking to someone named Rodolfo Garcia. We know no one by that name and he definitely never resided or spent 10 seconds in our home. We are a retired couple living in a new home and we are the original and only owners. Requested a copy TPV from OIP when disputing bill. OIP promised but never delivered.
2	Nelson Nodarse	0915496T	Never received a call from OIP.
3	William Corredor	0915623T	Never had a conversation with OIP prior to switch. Asked OIP for TPV that was never provided.
4	Anthony Arroto	0916642T	They never had a conversation with anyone about changing their service.
5	Maria Giraldo	0920235T	No one at the home remembers having any conversation with a telemarketer or verifier.
6	Mark Bauer	0920238T	No one in the home spoke with anyone.
7	Mario Nimo	0921300T	No one in the home spoke with anyone.
8	Cynthia Bermudez	0921650T	Claims no one from OIP ever called the house.
9	Harvey & Sally Rose	0921664T	No one in the home spoke with anyone. When they complained to the company, OIP said it had a letter authorizing the change, but never produced it for them.
10	Elia Valdes	0922839T	No one ever called the house.
11	Daniel Lucas	0923873T	No one in the home spoke with anyone. The TPV is in Spanish and no one in the home speaks or understands Spanish.
12	Carilyn Abel	0923882T	Never received a call from OIP.
13	Mrs. Xiomara Sanchez	0926130T	Lives alone, never spoke to anyone from OIP.
14	Patti Gomez	0926700T	Never received a call from OIP. She called OIP to dispute the bill. She asked to hear the TPV. OIP promised but never made good on letting her listen to TPV.
15	Ricardo Santos	0927017T	Nobody called the home or made any recordings. Never listened to the TPV.
16	Elizabeth Doria	0927499T	No one from OIP ever called the house and never recorded a TPV.



	<b>Name</b>	<b>CATS#</b>	<b>Notes</b>
17	Alejandro Sierra	0927814T	Customer listened to the TPV but doesn't recognize the person on the TPV. He can tell that the person on the TPV is not Colombian, as he is.
18	Luis Bernal	0928798T	No one in the household ever received marketing or verification call from OIP. Mrs. Bernal listened to the TPV. She is a real estate agent who has lived at address for 30 yrs, had phone no. 15 yrs. TPV has Carlos Bermudez (unknown to Bernals) affirming that her phone no. & address are his. She provided copious detailed notes with her response to the survey.
19	Ralthie Pierre	0928931T	No one ever called from OIP.
20	Vidalina Gomez	0929110T	No one ever called from OIP. She didn't recognize the person's voice or the name given.
21	Christopher Tavella	0930755T	He said no one from his household participated in the conversation on the TPV and "the phone call was a total fabrication."
22	Jose Dopico	0931510T	Received a call from someone concerning his plan with AT&T. He said he didn't authorize a provider switch.
23	Ricardo Rodriguez	0932025T	No one received a call about switching service. Requested from OIP to listen to the TPV when disputing the charges. It was never provided.
24	Carmen Trujillo	0933348T	No one ever called the home.
25	Mario Barcelo	0934119T	No one ever talked to anyone about service. The customer stated none of the names/last names on the TPV are of anyone known to him, voices not familiar.
26	Nora Otero	0934424T	Nobody ever calls her, so she didn't talk to anyone.