

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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. | DOCKET NO. 110027-TI
ORDER NO. PSC-11-0153-PAA-TI
ISSUED: March 7, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING PENALTIES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

Case Background

On November 9, 2007, Optic Internet Protocol, Inc. (OIP) registered¹ as an intrastate interexchange company (IXC).

Customers began filing complaints of unauthorized carrier changes (a process known as “slamming”) against OIP in September 2008. By July 2009, 36 slamming complaints were filed against OIP. During our investigation, we determined that the third party verification (TPV) recordings provided by the company did not meet the statutory requirements for a TPV. On September 14, 2009, a letter was sent to the company detailing our concerns. The letter instructed OIP to investigate its verification practices, devise a plan to bring its practices in compliance with our rules, and provide copies of its marketing and verification scripts.

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

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The company responded on September 29, 2009, with what appeared to be an appropriate corrective plan and adequate marketing and verification scripts. A follow-up letter was sent to OIP on November 3, 2009, stating that the plan and documents OIP submitted appeared to comply with our rules. The letter further advised OIP that it would be monitored for possible additional slamming violations and that continued violations may result in the imposition of penalties as authorized by Section 364.285, Florida Statutes (F.S.).

Thereafter, customers filed several more slamming complaints against OIP during the fourth quarter of 2009. During the first quarter of 2010, there was a sharp increase in customers' slamming complaints against OIP. Yet, our analysts reviewing the TPVs for the 2010 complaints consistently determined that the recordings seem to meet the statutory requirements.² Certain information is required on a TPV to ensure that the prospective customer understands and agrees to the provider change. Additionally, Rule 25-4.118(10) F.A.C. prohibits deceptive or misleading references during marketing and verification.³ The TPVs provided by OIP following our 2009 correspondence appeared to comply with the statutory requirements, but there continued to be a sharp increase in the number of customers' slamming complaints filed against OIP.

To ascertain the reason for the increase in complaints, surveys were mailed on May 21, 2010, to the 47 most recent complainants from January 1, 2010, to March 31, 2010. The surveys requested information on the marketing calls customers received from OIP's representatives prior to the switching of their services. Of the 47 customers contacted, 26 responded by returning the survey, contacting us telephonically, or by contacting us telephonically and following up with a written response. The customers 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; however, some customers stated that no one in their household spoke or understood Spanish. Only one customer had listened to the TPV prior to receiving our survey. We sent a copy of the TPVs via electronic mail to customers willing to review them. None of the customers recognized the voices on the recordings or knew anyone with the names given on the TPVs. A summary of the survey responses is attached hereto as Attachment 1.

Given the serious implications of our findings, we began to scrutinize the company more closely. On July 1, 2010, OIP's counsel, Mr. Thomas K. Crowe, was advised of the customers' slamming complaints received after September 2009. Mr. Crowe responded in writing on July 21, 2010, stating that OIP had suspended sales activities in Florida as of July 1, 2010, and would not resume marketing in Florida without notification. However, from August 2010 to January 2011, we received approximately one complaint per month, with some of the switches occurring after July 1, 2010.

On July 26, 2010, a meeting was held with Mr. Gregory Allpow, president of OIP, and Mr. Crowe, OIP's attorney, 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,

² Rule 25-4.118(3)(a)1 through 5, F.A.C. outlines the TPV requirements.

³ Rule 25-4.118(10), F.A.C. states, "[d]uring telemarketing and verification, no misleading or deceptive references shall be made while soliciting for subscribers."

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.

On September 1, 2010, a data request was issued to OIP for information and documents pertaining to its underlying carrier(s), billing agent, vendors, and other company resources. OIP responded on September 21, 2010, claiming confidentiality for the requested documents.

A thorough review of all slamming complaints filed 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.

We are vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285, and 364.603, F.S.

Discussion

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 appeared to meet the statutory guidelines for TPVs. However, based on the consumers' responses to the 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. OIP also issued credits to consumers after being notified of the slamming complaints. OIP also advised that it would discontinue marketing in Florida. Yet customers continued to file slamming complaints against OIP. This pattern suggests a willful intent to violate the slamming rules as OIP asserted that it was no longer marketing in Florida; however, customers continued to file slamming complaints against OIP.

Other States' Commissions in which OIP reportedly was operating, when contacted, disclosed that OIP was penalized for slamming violations. California Public Utilities Commission, for example, issued twelve slamming citations to OIP on September 18, 2009, one on September 19, 2009, and one on May 5, 2010. Each citation was for \$1,000, which OIP paid. However, Mr. Allpow failed to disclose this information during the July 26, 2010 meeting. Our questions to Mr. Allpow regarding any slamming activity by OIP, or any utility commission action against OIP for slamming, were not misleading or incoherent.

Pursuant to Section 364.285(1), F.S., penalties and fines maybe imposed upon any entity subject to our jurisdiction for a maximum of \$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 of our rules or orders, 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. 1st 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. 1st 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. 3rd 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, it has displayed a pattern of disregard for the slamming rules and the customers' wishes. Slamming complaints were received against OIP after OIP advised that it would suspend activities in Florida as of July 1, 2010. There was a statement from the bench that OIP's continued violation after it had indicated it would suspend activities in Florida as of July 1, 2010 and its "unresponsiveness and forthcomingness" were quite egregious and justify the imposition of the penalty.⁴ Therefore, OIP shall be fined \$10,000 per 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. The penalty of \$10,000 per slamming incident is consistent with prior decisions.⁵

Ruling

We find it appropriate to penalize OIP \$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 OIP does not request a hearing pursuant to Section 120.57, F.S., within the 21-day response period, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. If the company does not pay the amount of the penalty within fourteen calendar days after issuance of the Consummating Order, registration number TK171 shall be removed from the register, the company's tariff shall be cancelled, and the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services within Florida. If the company's registration is cancelled, Optic Internet Protocol, Inc.'s underlying carrier shall be notified to discontinue providing wholesale services to Optic Internet Protocol, Inc. in Florida.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Optic Internet Protocol, Inc. shall 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. It is further

ORDERED that if Optic Internet Protocol, Inc. does not request a hearing pursuant to Section 120.57, F.S., within the 21-day response period, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that if Optic Internet Protocol, Inc. does not pay the amount of the penalty within fourteen calendar days after issuance of the Consummating Order, registration number TK171 shall be removed from the register, the company's tariff shall be cancelled, and the company shall be required to immediately cease and desist from providing intrastate interexchange telecommunications services within Florida. It is further

⁴ February 22, 2011 Commission Agenda Conference, Item 5, TR at 2-3.

⁵ See Order No. PSC-04-1036-PAA-TI, issued October 25, 2004, in Docket No. 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 Toll Provider Selection; and Order No. PSC-04-0645-PAA-TI, issued July 6, 2004, in Docket No. 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.

ORDERED that the Order will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by our decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. The protest must be filed in the form provided by Rule 28-106.201, Florida Administrative Code and received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if the Order is not protested, the docket shall 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, Optic Internet Protocol, Inc.'s underlying carrier shall be notified to discontinue providing wholesale services to Optic Internet Protocol, Inc. in Florida.

By ORDER of the Florida Public Service Commission this 7th day of March, 2011.



ANN COLE
Commission Clerk

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 28, 2011.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

	Name	CATS#	Notes
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.

	Name	CATS#	Notes
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.