

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	File No.: EB-TCD-13-00011384
)	
Optic Internet Protocol, Inc.)	NAL/Acct. No.: 201432170009
)	
Apparent Liability for Forfeiture)	FRN: 0017134933

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 11, 2014

Released: July 14, 2014

By the Commission:

I. INTRODUCTION

1. We propose a penalty of \$7,620,000 against Optic Internet Protocol, Inc. (Optic or Company) for switching consumers' preferred long distance carriers without their authorization (commonly known as "slamming") and placing unauthorized or "crammed" charges for its long distance service on consumers' telephone bills. Consumers insist that Optic's charges were unauthorized because they had no contact with Optic before the Company began charging them for its service. Instead, Optic relied on apparently fabricated audio recordings as purported proof that consumers had authorized the Company to switch their long distance carriers and to charge them for service, and then provided those fabricated recordings to the Commission, consumers, and state regulatory officials to try to show that the consumers had authorized its service.

2. Slamming and cramming are deceptive business practices. Companies that engage in these practices prey on the likelihood that consumers will fail to notice unauthorized charges on their multi-page telephone bills. This risk increases as more consumers are encouraged to enroll in paperless billing and to set up automatic payment plans for their telephone bills. Consumers proceed to pay the bill, often unaware that it contains unauthorized charges from an entity other than their own telephone company. Here, the harm Optic caused was even more egregious because it apparently relied on falsified evidence of consumers' authorizations and caused consumers to expend significant time and effort to attempt to return to their preferred carriers, to get the charges removed from their bills, and to file complaints with law enforcement agencies. The Commission is committed to protecting consumers against slamming and cramming and will take aggressive action against carriers that perpetrate such unjust, unreasonable, and deceptive acts. Based on the evidence before us, including over 150 consumer complaints that demonstrate that Optic's misconduct was widespread and intentional, we propose a \$7,620,000 forfeiture.

II. BACKGROUND

3. Optic is an interexchange carrier¹ that is authorized to provide telecommunications

¹ Optic's offices are located at 3050 Royal Blvd., S., #175, Alpharetta, GA 30022. Optic's President is Gregory Allpow. See Letter from Michael S. Welsh, Counsel for Optic Internet Protocol, Inc., to Kimberly A. Wild, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau at 13 (Nov. 30, 2013) (on file in EB-TCD-13-00011384) (LOI Response).

service in 12 states,² and in 2013 it billed between 41,000 and 68,000 consumers each month for that service.³ Optic hires a telemarketing company, Nexophone, to market its service to new customers,⁴ and contends that it contracts with All Verified to verify and record a consumer's authorization to "switch long distance service providers to Optic."⁵ Optic stated that it sends new customer orders to its underlying carrier Qwest,⁶ which submits the carrier change request to the consumer's local exchange carrier (LEC). Generally, a reseller such as Optic does not provide proof of consumer authorization when it submits a carrier change request or any other charge to be billed to the consumer, and the LECs do not require it.⁷

4. The Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) reviewed more than 150 complaints against Optic that consumers filed with the Commission, the Federal Trade Commission (FTC), various state regulatory agencies,⁸ and the Better Business Bureau (BBB).⁹ All complainants contend that Optic charged them for long distance service without their authorization. No complainant indicated that he or she had contact with Optic or a Company agent before being charged for Optic's service; most affirmatively assert that they had never heard of or spoken to the Company before discovering Optic's charges on their local telephone bills.¹⁰ Many consumers also state that they attempted to have the charges removed, only to see them reappear month after month. In some cases, Optic agreed to refund only a portion of the fees it charged to the consumers. Still others claim that when they contacted Optic, they were told that they or someone in their household had authorized Optic's service, and that Optic possessed an audio recording evidencing the authorization. Consumer complainants who heard these recordings contend that they are fabricated.

5. Based on complaints alleging that Optic had fraudulently charged consumers for long distance service, the Bureau initiated an investigation of Optic and issued a letter of inquiry (LOI) to the Company on September 26, 2013.¹¹ The LOI sought information about Optic's practices and instructed

² See *Streamlined International Applications Accepted for Filing*, Report No. TEL-01211S, Public Notice, 2007 WL 4225067, at *2 (Nov. 20, 2007); see also LOI Response at 3. According to Optic's 499 filing, however, the Company offers domestic and international long distance service in all 50 states, the District of Columbia and certain U.S. territories.

³ LOI Response at Exhibit A.

⁴ *Id.* at 7. Optic provides its telemarketers with sales scripts to sell one of three different long distance calling plans. For each plan, Optic charges consumers a \$3.95 or \$4.95 one-time set up fee and a second monthly service fee of \$4.95, \$8.95, or \$29.95. *Id.* at 4, 7.

⁵ LOI Response at 7.

⁶ Although Optic identified Qwest as its underlying carrier, some consumer telephone bills identified WorldCom as the underlying carrier from which Optic purchased the service.

⁷ See *Main Street Telephone Company*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8853, 8854, para. 4 (2011) (*Main Street NAL*).

⁸ With its LOI Response, Optic provided complaints that consumers had filed against Optic with the Public Utility Commission of Texas (TX PUC) and the Public Utilities Commission of Nevada. The Bureau obtained additional complaints from the TX PUC that Optic failed to provide; the Company stated that it was its practice "to delete records of TX PUC complaints once those were resolved to the satisfaction of the PUC." See E-mail from Michael S. Welsh, Counsel for Optic Internet Protocol, Inc., to Erica H. McMahon, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Jan. 9, 2014, 15:27 EDT) (on file in EB-TCD-13-00011384) (Second Supplemental LOI Response).

⁹ See consumer complaints on file in EB-TCD-13-00011384.

¹⁰ Optic contracts with a billing aggregator, ILD Teleservices, Inc. (ILD), to bill consumers' local exchange carriers for Optic's service. LOI Response at 4. ILD's name generally appears on the bills, along with Optic's.

¹¹ See Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Optic Internet Protocol, Inc., Attn: Greg Allpow (Sept. 26, 2013) (on file in EB-TCD-13-00011384)

(continued...)

the Company to produce various documents and records. Optic initially responded to the LOI on December 2, 2013, and it later supplemented that response.¹²

III. DISCUSSION

6. We find that Optic apparently willfully and repeatedly violated Sections 201(b) and 258 of the Communications Act of 1934, as amended (Act),¹³ and Section 64.1120 of the Commission's rules.¹⁴ Specifically, we find that Optic apparently violated Section 201(b) of the Act by placing unauthorized charges on consumers' local telephone bills. In some of those cases, Optic also violated Section 258 by switching consumers' preferred long distance carrier without authorization verified in compliance with the Commission's verification procedures. In addition, we find that Optic apparently violated Section 201(b) when it submitted fabricated audio "verification" recordings to the Commission, consumers, and state regulatory authorities as evidence of consumers' authorization to switch their carriers and to be charged for service when, in fact, consumers had never spoken to Optic or agreed to its service. Accordingly, we propose a forfeiture of \$7,620,000 for the apparent violations that occurred within the twelve months prior to the release date of this Notice of Apparent Liability for Forfeiture (NAL).¹⁵

A. Apparent Violations

1. Optic Placed Unauthorized Charges on Consumers' Telephone Bills in Apparent Violation of Section 201(b) ("Cramming")

7. Section 201(b) of the Act states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service [by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful"¹⁶ The Commission has found that the inclusion of unauthorized charges and fees on consumers' telephone bills—known as "cramming"—is an "unjust and unreasonable" practice under Section 201(b).¹⁷ Cramming can occur either when third

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(LOI); *see also* E-mail from Erica H. McMahon, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau, to Michael Welsh, Counsel to Optic Internet Protocol, Inc. (Dec. 17, 2013, 16:04 EDT).

¹² *See* LOI Response, *supra* note 1. Optic requested, and the Bureau granted, an extension of time until November 15, 2013, to respond to the LOI. The Bureau granted a second request for an extension until December 2, 2013. *See also* E-mail from Michael S. Welsh, Counsel for Optic Internet Protocol, Inc., to Erica H. McMahon, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Dec. 9, 2013, 12:56 EDT) (on file in EB-TCD-13-00011384) (Supplemental LOI Response); Second Supplemental LOI Response, *supra* note 8.

¹³ 47 U.S.C. §§ 201(b), 258.

¹⁴ 47 C.F.R. § 64.1120.

¹⁵ The Appendix identifies the 71 complaints, evidencing 81 apparent violations of the Act occurring in the last year that underlie the proposed forfeiture.

¹⁶ 47 U.S.C. § 201(b).

¹⁷ Indeed, any assessment of an unauthorized charge on a telephone bill or for a telecommunications service is an "unjust and unreasonable" practice under Section 201(b) of the Act. *See, e.g., Central Telecom Long Distance, Inc.*, File No. EB-TCD-13-00011651, Notice of Apparent Liability for Forfeiture, FCC 14-58, 2014 WL 1778549, at *5, para. 14 (May 5, 2014) (*Central NAL*); *U.S. Telecom Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 823, para. 14 (2014) (*USTLD NAL*); *Consumer Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17196, para. 15 (2013) (*CTI NAL*); *Advantage Telecomms., Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 6843, 6850, para. 17 (2013) (*Advantage NAL*); *see also Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3302, para. 14 (2000) (*LDDI MO&O*) (finding that the company's practice of cramming membership and other unauthorized fees on consumer telephone bills was an unjust and unreasonable practice in connection with communication services).

parties place unauthorized charges on consumers' local telephone bills or when carriers place unauthorized charges on the telephone bills of their own customers. In either case, any assessment of an unauthorized charge on a telephone bill or for a telecommunications service is an "unjust and unreasonable" practice under Section 201(b) of the Act.¹⁸ We find that Optic apparently violated Section 201(b) by placing unauthorized charges on the telephone bills of 71 consumers, in some cases multiple times.

8. Optic provides 1+ dialing long distance service.¹⁹ For a consumer to use Optic's service, the consumer's long distance service provider must be switched to Optic so that calls are carried over Optic's network and billed to Optic.²⁰ If there is no switch, any long distance calls the consumer makes (by dialing 1 plus the desired ten-digit number) are carried over the consumer's existing provider's network; the consumer would receive no service from Optic. Based on the evidence, Optic switched complainants' long distance carrier (e.g., AT&T, Verizon, or CenturyLink) to Optic in some cases and in others it did not.²¹ Either way, Optic billed the consumers for long distance service by placing charges for its set-up fee and recurring monthly fee on their local telephone bills.

9. All of the consumers whose complaints the Bureau reviewed maintain that whether or not Optic switched their carrier, they neither requested nor agreed to Optic's service.²² In fact, most contend that they had never heard of Optic before discovering the charges on their phone bills, and had taken no action to change their telephone service.²³ Not one complainant describes having had *any* contact with an Optic representative prior to being billed by the Company. For example, Complainant Hernandez, who identified a \$4.95 charge from Optic that appeared on his monthly telephone bill for ten months stated:

I have no knowledge of what this company does, but we certainly are receiving no benefit from them. I know that neither my wife nor I authorized it and we have no idea who they are. We only answer the phone when we recognize the telephone number as being from family and friends so we know we did not respond to any solicitation.²⁴

Complainant De Leon, whose service Optic switched, also complained: "I can confirm that no one from Optic (a company I had never heard of before this fiasco) or a 3rd party verifier had contacted me, spoke with me or recorded me authorizing any long distance switch."²⁵ She added, "I am the only person living in this household; no other person (adult or child) could have authorized a long distance switch. There

¹⁸ See, e.g., *Central NAL*, 2014 WL 1778549, at *5, para. 14.

¹⁹ Such service allows a consumer to make long distance calls by dialing "1" plus the area code and local telephone number of the person the consumer wishes to call. Using "1+" dialing is also referred to as "direct-dialing" because once a customer chooses to presubscribe to an interexchange carrier (IXC), the consumer's calls are directly routed to and billed by that IXC.

²⁰ In the case of a switchless reseller such as Optic, the calls would actually be carried over the network of Optic's underlying carrier, Qwest or Worldcom, which would then charge Optic for the service.

²¹ In some cases, there is no evidence that Optic submitted a request to the LEC to change the consumer's carrier, and in other cases it appears the LEC did not switch the consumer's carrier because he or she had a preferred or presubscribed interexchange carrier (PIC) freeze. A PIC freeze "prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express consent." 47 C.F.R. § 64.1190(a).

²² See, e.g., Complaints from R. Duran; C. Castro; M. Chavez; C. Caballero; M. Lopez; C. Lara-Arreola; R. Godines; J. Rosas; A. Ramirez; J. Alcazar.

²³ See, e.g., Complaints from R. Espinosa; P. Bianchi; T. Guzman.

²⁴ Complaint from J. Hernandez.

²⁵ Complaint from C. De Leon.

were also no handymen, visitors, friends or other persons in my home during this time who could have provided authorization” Moreover, a significant number of complainants stated that they do not have or need long distance service on their landline telephone. They opted instead to have basic local service, wireless, or internet service only.²⁶ Complainant Mendez, for example, explained that “[t]he only reason why I have a number is for the internet. There is no handset connected to the phone jack.”²⁷ Complainant Ochoa stated that he uses his cell phone for all long distance calls and needs AT&T for his local service only.²⁸

10. Optic admits that it has received complaints from consumers alleging that Optic never contacted them before the Company charged them for its service.²⁹ In response to such complaints, Optic apparently did nothing to ensure that its telemarketers and verification company were appropriately marketing Optic’s service and obtaining consumers’ authorization before signing them up for the Company’s service. Rather, Optic stated that when it received such complaints, it simply closed the customers’ accounts and refunded the fees billed to the customers in full. Specifically, it said that “no further services were provided or billed to that customer Everyone who has complained has immediately been cancelled out of Optic’s system and given a full refund with no questions asked and no additional action needed.”³⁰

11. Consumers, however, state otherwise. Upon discovering the unauthorized charges from Optic on their telephone bills, many complainants contacted the LEC that issued the bill (in most cases AT&T) to dispute the charges. Although the charges were reversed in some cases, many consumers contend that they continued to be charged for one or more months after they complained. Other complainants state that they contacted Optic or its billing aggregator, ILD Teleservices, Inc. (ILD), numerous times to try to stop the charges.³¹ Complainant Anaya complained:

I have never authorized ILD Teleservices [on behalf of Optic] to provide long distance service for me, yet I continue to have recurring charges of \$4.95/month for services. I have spoken to ILD . . . on numerous occasions, and have questioned their unauthorized billing . . . It seems like a never-ending cycle, every month I receive my telephone bill and there again appear these unauthorized charges from ILD.³²

Complainant Dominguez similarly explained:

²⁶ See, e.g., Complaints from L. Von Elling; M. Ruiz; L. Ochoa; R. Vieto; J. Garcia (stating “[s]ince we started with AT&T of Texas back in 2007, we only apply for local service only period!”); Complaint from A. Gardea (explaining “I am the legal representative for A. Gardea . . . I set her up on an unlimited LOCAL phone plan with AT&T. Beginning the next month Optic Internet Protocol-LD started charging her account for long distance service, which was never authorized. She doesn’t make long distance calls—that’s why I set her up on a local plan.”); Complaint from J. Molinar (stating “[i]t’s not possible that I have long distance telephone service of any type because I only contracted basic service with AT&T company with only local calls or service, without long distance service, without long distance calls.”).

²⁷ Complaint from A. Mendez. See also Complaint from P. McNallen (stating that his DSL line was charged by Optic even though he used it only for internet service).

²⁸ Complaint from L. Ochoa.

²⁹ LOI Response at 10.

³⁰ *Id.*

³¹ See, e.g., Complaints from A. Ariza; R. Duran; C. Giron; D. Cross; O. Lopez; M. Lopez; C. Lara-Arreola; R. Gutierrez; U. Hernandez; J. Hernandez; J. Castillo; R. Vieto.

³² Complaint from A. Anaya.

[Optic] has been cramming a charge on my AT&T bill since March 2013. I do not have long distance service on my landline. This is definitely unauthorized, so every month I have to call them, and call AT&T to reverse the charges. AT&T even volunteered several times to block access to my account by this company. Apparently that hasn't worked. AT&T just keeps adding on the charges³³

12. Although complainants disputed Optic's charges, some paid them fearing that their telephone service would be disconnected or their credit affected.³⁴ Complainant Garcia, who initially refused to pay the monthly charges from Optic said, "I receive[d] a notice from AT&T of Texas [about] disconnecting the phone service if I didn't pay \$62.66 [so] I did pay that amount plus the \$37.75 for local service which I have only with AT&T of Texas."³⁵ Complainants spent considerable time and effort trying to stop Optic from billing them.³⁶ Some were further harmed when they learned they could not return to the calling plans they previously had with their preferred carriers before Optic switched them. Complainant D. Castello, for instance, tried to reestablish long distance service with Verizon but was advised that the Verizon Freedom Price Guarantee Plan was no longer offered and that she had to choose a different plan, which was 50 percent more expensive.³⁷

13. Based on this evidence, we conclude that Optic failed to obtain complainants' authorization to charge them for its service. Therefore, we find that Optic, in apparent violation of Section 201(b) of the Act, repeatedly placed charges on consumers' telephone bills without their authorization.

2. Optic Provided Fabricated Audio Recordings to the Commission, Consumers, and States in Apparent Violation of Section 201(b)

14. We find that Optic apparently violated Section 201(b) by engaging in deceptive practices when signing up and charging consumers for its service. Specifically, Optic relied on fabricated audio recordings associated with its "customers" and submitted them to the Commission, consumers, and states to make it appear as if the consumers had authorized Optic to be their preferred carrier and thus, to charge them for service—when in fact they had not. The Commission has found that such deceptive, fraudulent practices are unjust and unreasonable practices that apparently violate Section 201(b) of the Act.³⁸

³³ Complaint from D. Dominguez.

³⁴ See, e.g., Complaint from M. Chavez; Complaint from C. Acosta (stating that AT&T agreed to place her account "in dispute" while it attempted to seek reimbursement from Optic for the charges).

³⁵ Complaint from J. Garcia. See also Complaint from R. Duran (explaining "I want to have my money back since I have been paying to have my credit protected but enough is enough. I want my money back, the cancellation of that fraudulent charge and for the FCC to check on the business practices of this company.").

³⁶ See, e.g., Complaint from U. Hernandez (stating that "[f]or at least a year AT&T has allowed [Optic] to bill me for a service that I did not request. When I call them they credit my bill on the next bill but then charge me again. I am so tired of this and am seriously considering canceling all business with AT&T"); Complaint from T. Guzman (complaining "When you call the number provided (800 433-4518) you get a recorded message to try back some other time."); Complaint from A. Ramirez (stating "I tried in vain to acquire a contact number for this company but could not find any information on them and they did not put a contact number on my AT&T statement.").

³⁷ Complaint from D. Castello. See also Complaint from N. Homedes (explaining that she had an AT&T plan that allowed her to make unlimited calls to Spain on weekends for \$19.95. After Optic switched her long distance carrier without her authorization, she was later reinstated with AT&T; however, "[AT&T] did not grandfather me under my old program, so [AT&T] charged me over \$5 per each minute I called Spain ... for a total of \$2,147.25... so ILD has caused me quite a bit of financial harm....").

³⁸ See *United Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 16499, 16503, para. 11 (2012) (*United NAL*) (finding a carrier in apparent violation of Section 201(b) for fabricating TPV recordings).

15. Several consumers who filed complaints with the Public Utility Commission of Texas listened to the recordings that Optic had provided to the agency as proof of consumer authorization, and stated that the voice they heard on the recordings was not their own, and that they did not otherwise have any conversation with Optic's third-party verifier.³⁹

16. Following up on the consumers' allegations, Bureau staff contacted a dozen additional complainants about the recordings Optic had provided to the Public Utility Commission of Texas as evidence that consumers had authorized Optic to switch their long distance carrier and to charge them for service. Eleven complainants listened to the recordings, and *each one adamantly denied* that the voice on the recording was that of the subscriber to the number.⁴⁰ In fact, none of the complainants recognized the voice on the recording or indicated that they had authorized any other person to switch their long distance carrier. Complainant Ramirez emailed the Bureau after listening to the recording:

Please be informed that this audio is bogus[.] First I never speak to anyone on the phone that I do not know and I do not have conversations in Spanish . . . This company created this alleged conversation illegally. No telling who is responding to these questions, probably one of their own employees.⁴¹

Complainant De Leon, after listening to Optic's recording also confirmed, "[t]he voice is definitely not mine . . . I never had such a conversation with anyone regarding switching my long distance service."⁴² In addition, De Leon said the person who claimed to be Ms. De Leon on the recording provided a maiden name that was incorrect. Similarly, Complainants Mr. and Mrs. Salinas maintained that the recording had been fabricated, that the voice on the recording was not Mr. Salinas's, and that the birthdate the person provided was not his.⁴³ Further supporting her contention that she did not speak with an Optic representative, Mrs. Salinas told Bureau staff that she and her husband are in their 70s, retired, and never answer the phone if they do not recognize the number on the Caller ID. They also stated that their Spanish is not good, and if they had spoken with Optic's verifier, they would not have been able to understand the questions he was asking in Spanish. All of the complainants whom Bureau staff contacted and who listened to the recordings that Optic had provided as purported "proof" of their authorization to switch carriers insisted that Optic's recordings had been falsified, and that they had not spoken with Optic. There is simply no evidence that Optic contacted complainants or anyone else the complainants knew and recorded their authorization to switch the complainant's carrier.⁴⁴ Nevertheless, Optic relied on

³⁹ The Illinois Attorney General filed a lawsuit against Optic alleging that the Company billed Illinois residents for service by falsifying their authorization. Specifically, the suit alleged the Company made fraudulent audio recordings in which the voice on the recording was not the consumer's or the name on the recording did not match the consumer's name. See Illinois Attorney General Press Release, *Madigan Sues Company for Long Distance Phone Scam*, (Aug. 30, 2013), available at http://www.illinoisattorneygeneral.gov/pressroom/2013_08/20130830.html. In March 2014, Illinois and Optic agreed to settle the matter. See *Illinois v. Optic Internet Protocol, Inc.*, Final Judgment & Consent Decree, No. 2013-CH-843 (Ill. Cir. Ct. Mar. 11, 2014).

⁴⁰ In two of the 11 cases, the complainants filed complaints on behalf of their elderly mothers, and those complainants confirmed that the voice on the recordings was not that of their mother's. The twelfth consumer contacted by the Bureau elected not to listen to the recording.

⁴¹ See E-mail from A. Ramirez to Erica McMahan, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 11, 2014, 13:08 EDT).

⁴² E-mail from C. De Leon to Erica McMahan, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 10, 2014; 23:08 EDT).

⁴³ Complaint from A. Salinas.

⁴⁴ Optic indicated that it has used an independent third party verification company, All Verified, to verify and record each customer's authorization. LOI Response at 7. While it is unclear whether All Verified or Optic itself falsified the audio recordings, Optic affirmatively relied on these recordings to show that it had authorization to charge consumers for service. Optic continued to do so even after it had received numerous complaints over the course of

(continued...)

apparently fabricated audio recordings and presented them to consumers and regulatory authorities as evidence that the Company did not slam or cram consumers.⁴⁵

17. Based on this evidence, we conclude that Optic or its agent,⁴⁶ in apparent violation of Section 201(b) of the Act, falsified audio “verification” recordings in order to provide the façade of genuine consumer authorization for Optic’s service.

3. Optic Switched Consumers’ Long Distance Carriers Unlawfully in Apparent Violation of Section 258 (“Slamming”)

18. Optic apparently violated Section 258 of the Act and Section 64.1120 of the Commission’s rules by switching 10 consumers’ long distance carriers without authorization. Section 258 of the Act makes it unlawful for any telecommunications carrier to “submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.”⁴⁷ Section 64.1120 of the Commission’s rules prohibits carriers from submitting a request to change a consumer’s preferred provider of telecommunications services before obtaining authorization from the consumer; carriers can verify that authorization in one of three specified ways, including third party verification (TPV).⁴⁸ If a carrier relies on TPV, the independent verifiers must, among other things, confirm that the consumers with whom they are speaking: (i) have the authority to change the carrier associated with their telephone number; (ii) in fact wish to change carriers; and (iii) understand that they are authorizing a carrier change.⁴⁹

19. The Commission has made clear that a carrier that engages in an initial “slam” that leads to a subsequent cram violates Section 201(b) of the Act for the cram, and Section 258 of the Act for the slam.⁵⁰ Under the circumstances here, we charge Optic with both apparent violations.⁵¹ As the evidence discussed above shows, Optic apparently failed to speak with the complainants, obtain their authorization

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more than a year from consumers who alleged they had no contact with Optic, had never heard of Optic, and had not authorized the Company’s service. Optic was therefore on notice that an ongoing problem existed, yet it took no action to correct the fraudulent behavior or terminate its relationship with its third party verifier. *See, e.g., Silv Commc’n Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 5178, 5181–5182, paras. 6–7 (*Silv NAL*) (finding that the carrier was on notice of a problem with its third party telemarketers based on complaints it received from consumers). Instead, Optic continued to rely on fabricated recordings.

⁴⁵ We warn carriers that we may also pursue apparent violations of Section 1.17 of the Commission’s rules where a carrier provides falsified audio recordings, or otherwise misleads or provides false information, to the Commission in any investigatory or adjudicatory matter within its jurisdiction. *See* 47 C.F.R. § 1.17.

⁴⁶ *See* 47 U.S.C. § 217. Section 217 imposes liability on a carrier for the acts and omissions of its agents simply if those agents act within the scope of their employment; a carrier’s knowledge of its agents’ misdeeds is not required. *See, e.g., Preferred Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 16489, 16491, para. 6 (2012) (finding a carrier apparently liable for deceptive marketing practices of the third party telemarketers). In any event, Optic has not claimed or produced any evidence that it was unaware of its third party verifier’s actions or that the Company should not be held responsible for those actions. *See Silv NAL*, 25 FCC Rcd at 5185, para. 14.

⁴⁷ 47 U.S.C. § 258(a).

⁴⁸ 47 C.F.R. § 64.1120(c)(1)–(3) (a carrier may also verify authorization by obtaining the subscriber’s written or electronically signed authorization in a format that meets the requirements of Section 64.1130 or by obtaining confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically).

⁴⁹ 47 C.F.R. § 64.1120(c)(3)(iii).

⁵⁰ *See Advantage NAL*, 28 FCC Rcd at 6850, n.48.

⁵¹ *See USTLD NAL*, 28 FCC Rcd at 835–836, para. 24, n.93 (stating that the Commission can charge the carrier with violations for cramming and slamming); *CTI NAL*, 28 FCC Rcd at 17208, para. 26, n.78 (same).

to switch carriers, or even attempt to comply with the Commission's verification procedures; it simply fabricated audio recordings to mislead consumers and regulatory officials into believing that it had received the consumers' authorizations. We therefore find that Optic apparently violated Section 258 of the Act and Section 64.1120 of the Commission's rules by switching 10 consumers' preferred providers of telecommunications services without proper authorization verified in accordance with the Commission's rules.

B. Proposed Forfeiture

20. Section 503(b)(1) of the Act states that any person who willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.⁵² Section 503(b)(2)(B) of the Act empowers the Commission to assess a forfeiture of up to \$150,000 for any violation by Optic occurring before September 13, 2013, and \$160,000 for any violations occurring on or after that date.⁵³ In exercising our forfeiture authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁵⁴ In addition, the Commission has established forfeiture guidelines, which set forth base penalties for certain violations and identify criteria that we consider in exercising our discretion in determining the penalties to apply in any given case.⁵⁵ Under the guidelines, we may adjust a forfeiture upward for violations that are egregious, intentional, or repeated, or that cause substantial harm or generate substantial economic gain for the violator.⁵⁶

21. The Commission's forfeiture guidelines currently establish a base forfeiture amount of \$40,000 for violations of our slamming rules and orders.⁵⁷ Although the guidelines provide no base forfeiture for cramming, the Commission has established through case law a base forfeiture of \$40,000 for cramming violations.⁵⁸ Applying the \$40,000 base forfeiture to each of the 10 slamming violations⁵⁹

⁵² See 47 U.S.C. § 503(b)(1).

⁵³ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2). These amounts reflect inflation adjustments to the forfeitures specified in Section 503(b)(2)(B) of the Act (\$100,000 per violation or per day of a continuing violation and \$1,000,000 per any single act or failure to act). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321 (DCIA), requires the Commission to adjust its forfeiture penalties periodically for inflation. See 28 U.S.C. § 2461 note (4). The Commission most recently adjusted its penalties to account for inflation in 2013. See *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, 28 FCC Rcd 10785 (Enf. Bur. 2013); see also *Inflation Adjustment of Monetary Penalties*, 78 Fed. Reg. 49370-01 (2013) (setting Sept. 13, 2013, as the effective date for the increases). Because the DCIA specifies that any inflationary adjustment "shall apply only to violations which occur after the date the increase takes effect," however, we apply the forfeiture penalties in effect at the time the violation took place. 28 U.S.C. § 2461 note (6).

⁵⁴ See 47 U.S.C. § 503(b)(2)(E); see also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17100-01, para. 27 (1997).

⁵⁵ 47 C.F.R. § 1.80(b)(8), Note to paragraph (b)(8).

⁵⁶ *Id.*

⁵⁷ See 47 C.F.R. § 1.80, Appendix A, Section I.

⁵⁸ See *LDDI MO&O*, 15 FCC Rcd at 3304, para. 19 (affirming the \$40,000 penalty for cramming imposed by the Commission in the forfeiture order).

⁵⁹ A slamming violation occurs whenever a carrier submits an unlawful request to change service providers regardless of whether the change actually takes place. See 47 U.S.C. § 258(a) ("[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with [the Commission's] verification procedures. . . .") (emphasis added).

and each of the 71 cramming violations⁶⁰ that occurred within the last twelve months would result in a forfeiture of \$3,240,000.

22. Consistent with prior cramming and slamming enforcement actions that have involved evidence of deceptive marketing or fabricated recordings of consumer authorization,⁶¹ we upwardly adjust the penalty for the apparent slamming and cramming violations at issue here that are coupled with direct evidence of such misconduct. Specifically, we propose an additional \$80,000 penalty for each of the 11 apparent slamming or cramming violations that occurred in the past 12 months and for which Optic or its agent apparently fabricated an authorization recording. The subtotal for this adjustment is \$880,000.

23. Given the facts presented here, we believe that a further upward adjustment is warranted. Optic apparently engaged in cramming repeatedly: we have reviewed more than 150 complaints, including the 71 identified in the Appendix, by consumers alleging that Optic charged them for its service without authorization, and in many cases did so over the course of several months.⁶² Moreover, the record shows that Optic's conduct was egregious. The Company apparently fabricated verification recordings and submitted them to the Commission, consumers, and state regulatory authorities in response to complaints from consumers alleging that Optic had either slammed or crammed them. Indeed, there is no evidence in the record to show that Optic completed a single authentic verification recording for any of the complainants. Optic also caused substantial and continuing harm to consumers. As discussed above, for example, Optic's misconduct caused some consumers thousands of dollars of harm.⁶³

24. Under Section 503 and our forfeiture guidelines, we must take into account the egregious and repeated nature of Optic's actions, as well as the substantial harm that the Company caused consumers. Given the circumstances here and the extent of Optic's improper conduct, all in the face of the repeated warnings of the Commission that slamming and cramming would not be tolerated,⁶⁴ an additional upward adjustment of \$3,500,000 is appropriate.⁶⁵ We thus propose a total forfeiture of \$7,620,000.

⁶⁰ The Commission has made clear that each unauthorized charge a carrier places on a consumer's bill—or "cram"—constitutes a separate and distinct violation of Section 201(b). See *CTI NAL*, 28 FCC Rcd at 17208, para. 26 (citing *NOS Commc 'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1833 (2001)). Based on the record in the instant case, we decline to exercise our discretion in that way at this time, but we caution other carriers that the Commission is committed to aggressive enforcement of its rules, especially in addressing the protections afforded consumers.

⁶¹ See *Central NAL*, 2014 WL 1778549, at *10, para. 26 (proposing an additional \$80,000 penalty for violations that involved deceptive marketing); *USTLD NAL*, 29 FCC Rcd at 836, para. 25 (same); *United NAL*, 27 FCC Rcd at 16506, para. 18 (proposing an additional \$80,000 penalty for violations that involved fabricated authorization recordings).

⁶² Although the Bureau's investigation uncovered no direct evidence that Optic targeted any particular group of consumers, we note that the overwhelming majority of the complainants have Spanish surnames and many of the apparently fabricated consumer authorizations were in Spanish.

⁶³ See *supra* note 37.

⁶⁴ See, e.g., *Central NAL*, 2014 WL 1778549, at *11, para. 28; *USTLD NAL*, 29 FCC Rcd at 837, para. 27; *Advantage NAL*, 28 FCC Rcd at 6855–56, para. 30; *Main Street NAL*, 26 FCC Rcd at 8861, para. 24 (stating "we may propose more significant forfeitures in the future as high as is necessary, within the range of our statutory authority, to ensure that such companies do not charge consumers for unauthorized services.").

⁶⁵ The Commission has proposed similar upward adjustments for egregious behavior in recent slamming and cramming cases. See *Central NAL*, 2014 WL 1778549, at *11, para. 28 (proposing an upward adjustment of \$1,500,000 to the base forfeiture of \$1,960,000); *USTLD NAL*, 29 FCC Rcd at 837, para. 27 (proposing an upward adjustment of \$2,000,000 to the base forfeiture of \$2,480,000); *CTI NAL*, 28 FCC Rcd at 17209, para. 29 (proposing

(continued...)

IV. CONCLUSION

25. Based on the facts and record before us, we have determined that Optic has apparently willfully and repeatedly violated Sections 201(b) and 258 of the Act and Section 64.1120 of the Commission's rules.

V. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Optic Internet Protocol, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of seven million, six hundred twenty thousand dollars (\$7,620,000), for willful and repeated violations of Sections 201(b) and 258 of the Communications Act of 1934, as amended,⁶⁶ and Section 64.1120 of the Commission's rules.⁶⁷

27. **IT IS FURTHER ORDERED THAT**, pursuant to Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Optic Internet Protocol, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

28. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Optic shall send electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁶⁸ When completing the FCC Form 159, Optic should enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions Optic should follow based on the form of payment it selects:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO

(Continued from previous page) _____

an upward adjustment of \$1,500,000 to the base forfeiture of \$1,560,000). These prior NALs also included additional upward adjustments of \$500,000 or \$750,000 for targeting elderly consumers.

⁶⁶ 47 U.S.C. §§ 201(b), 258.

⁶⁷ 47 C.F.R. § 64.1120.

⁶⁸ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer — Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.⁶⁹ If Optic Internet Protocol, Inc. has questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

29. The response, if any, must be mailed both to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and to Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption.

30. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

31. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail Return Receipt Requested and First Class Mail to Gregory Allpow, Optic Internet Protocol, Inc., 3050 Royal Blvd. S., #175, Alpharetta, GA 30028 and 900 Arnold Mill Road, Roswell, GA 30075, and to Michael S. Welsh, Esquire, 3212 Northlake Parkway, P.O. Box 450586, Atlanta, GA 31145.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁹ See 47 C.F.R. § 1.1914.

APPENDIX

Apparent Violations of Sections 258 and 201(b) of the Act			
	Complainant	Date of Carrier Switch and/or Date Charge Placed on Consumer's Bill	Violation(s)
1.	A. Salinas	7/15/13	Section 201(b) cram; fabricated recording
2.	O. Lopez	7/15/13	Section 201(b) cram
3.	I. Juarez	7/24/13	Section 201(b) cram
4.	M. Lopez	7/25/13	Section 201(b) cram
5.	C. Lara Arreola	7/27/13	Section 201(b) cram
6.	B. Cortez	8/5/13	Section 201(b) cram
7.	D. Perez	8/7/13	Section 201(b) cram
8.	F. Herrera	8/11/13	Section 201(b) cram
9.	I. Figueroa	8/20/13; 8/11/13 ¹	Section 258 slam; Section 201(b) cram
10.	J. Hernandez	8/11/13	Section 201(b) cram
11.	M. Llanas	8/15/13	Section 201(b) cram
12.	L. Lui	8/17/13	Section 201(b) cram
13.	L. Von Elling	8/17/13	Section 201(b) cram
14.	C. Acosta	8/19/13	Section 201(b) cram
15.	P. McNallen	8/19/13	Section 201(b) cram
16.	C. Estrada	8/20/13; 11/9/13	Section 258 slam; Section 201(b) cram
17.	C. Hatem	8/21/13	Section 201(b) cram
18.	C. Leal	8/25/13	Section 201(b) cram
19.	K. Moran	8/27/13	Section 201(b) cram
20.	C. Castro	8/29/13	Section 201(b) cram
21.	D. Rodriguez	9/1/13	Section 201(b) cram
22.	A. Ramirez	9/4/13; 9/23/13	Section 258 slam; Section 201(b) cram; fabricated recording
23.	N. Mejia	9/5/13	Section 201(b) cram
24.	D. Dominguez	9/5/13	Section 201(b) cram
25.	J. Alcazar	9/9/13	Section 201(b) cram
26.	C. Chavez	9/13/13	Section 201(b) cram
27.	M. Flores	9/15/13	Section 201(b) cram
28.	R. Vieto	9/15/13; 11/15/13	Section 258 slam; Section 201(b) cram
29.	O. Coronado	9/16/13	Section 201(b) cram
30.	A. Hurtado	9/22/13	Section 201(b) cram
31.	M. Castillo	9/27/13	Section 201(b) cram
32.	R. Godines	9/29/13	Section 201(b) cram
33.	D. Castello	10/2/13; 11/16/13	Section 258 slam; Section 201(b) cram
34.	M. Chavez	10/10/13	Section 201(b) cram
35.	R. Gutierrez	10/16/13	Section 201(b) cram
36.	D. Nguyen/Eva Nail & Spa	10/19/13	Section 201(b) cram
37.	M. Munoz/Restaurant Marla	10/21/13	Section 201(b) cram

¹ The evidence shows that Optic first crammed the consumer and then unlawfully switched the consumer's preferred long distance carrier.

38.	C. Guzman	10/21/13; 11/13/13	Section 258 slam; Section 201(b) cram; fabricated recording
39.	A. Gardea	10/22/13; 11/21/13	Section 258 slam; Section 201(b) cram; fabricated recording
40.	S. Delgado	10/25/13	Section 201(b) cram
41.	F. Morales	10/27/13	Section 201(b) cram
42.	U. Hernandez	10/27/13	Section 201(b) cram
43.	M. Cantu	10/30/13; 11/25/13	Section 258 slam; Section 201(b) cram; fabricated recording
44.	A. Gonzalez	11/3/13	Section 201(b) cram
45.	J. Ramos	11/4/13	Section 201(b) cram
46.	J. Rosas	11/5/13	Section 201(b) cram
47.	E. Lara	11/7/13	Section 201(b) cram
48.	E. Gonzales	11/7/13	Section 201(b) cram
49.	J. Lara	11/7/13	Section 201(b) cram
50.	A. Mendez	11/7/13	Section 201(b) cram
51.	C. De Leon	11/11/13; 1/13/14	Section 258 slam; Section 201(b) cram; fabricated recording
52.	A. Castelan	11/15/13	Section 201(b) cram
53.	G. Campos	11/19/13	Section 201(b) cram
54.	K. Mayorga	11/21/13	Section 201(b) cram
55.	L. Ochoa	11/23/13	Section 201(b) cram
56.	J. Hernandez	11/25/13	Section 201(b) cram
57.	A. Ramirez	12/6/13; 12/11/13	Section 258 slam; Section 201(b) cram; fabricated recording
58.	B. Arcela	12/9/13	Section 201(b) cram
59.	A. Anaya	12/17/13	Section 201(b) cram; fabricated recording
60.	G. Uribarri	12/23/13	Section 201(b) cram; fabricated recording
61.	A. Reyes	1/21/14	Section 201(b) cram
62.	T. Azcarate	2/7/14	Section 201(b) cram
63.	R. Salinas	2/9/14	Section 201(b) cram
64.	E. Vazquez	2/10/14	Section 201(b) cram
65.	J. Vasquez	2/11/14	Section 201(b) cram
66.	T. Guzman	2/13/14	Section 201(b) cram; fabricated recording
67.	J. Castillo	2/15/14	Section 201(b) cram
68.	J. Gonzalez	2/17/14	Section 201(b) cram
69.	H. Gomez	2/25/14	Section 201(b) cram
70.	R. Garza	2/25/14	Section 201(b) cram; fabricated recording
71.	F. Candal	5/7/14	Section 201(b) cram