

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Matter of )  
 )  
Optical Telecommunications, Inc. ) MB Docket No. 14-258  
 )  
 ) CSR-8895-C  
Complaint Concerning Retransmission of )  
WXCW(TV), Naples, FL )

To: The Secretary, Federal Communications Commission

Attn: Chief, Media Bureau

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Sun Broadcasting, Inc. (“Sun”), licensee of full-power television station WXCW(TV), Naples, Florida, by its attorneys, and pursuant to Section 1.106(g) of the Commission’s rules , 47 C.F.R. § 1.106(g), hereby submits this opposition to the petition for reconsideration (the “Petition”) filed by OpticalTel Telecommunications, Inc. and HControl Corporation (collectively “OpticalTel”) in connection with the Order of the Media Bureau in the above-referenced proceeding.<sup>1</sup>

In the Order, the Commission concluded that OpticalTel violated the retransmission consent requirements of Section 325 of the Communications Act of 1934, as amended (the “Act”), and Sections 76.64 and 76.65 of the Commission’s rules by retransmitting the signal of

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<sup>1</sup> *In the Matter of Optical Telecommunications, Inc., Complaint Concerning Retransmission of WXCW(TV), Naples, FL, MB Docket No. 14-258, CSR-8895-C, Order, DA 16-928 (MB, rel. Aug. 15, 2016) (the “Order”).*

WXCW(TV) without “the express authority” of Sun.<sup>2</sup> In its Petition, OpticalTel once again seeks to shift the blame for its retransmission of WXCW without the express written authorization required by the Act and the Commission’s rules. As will be demonstrated more fully below, however, the record in this proceeding fully supports the Commission’s conclusion that OpticalTel did not have any authority to retransmit the signal of WXCW on its Sail Harbour Property.

There is no dispute that a multichannel video programming distributor cannot retransmit the signal of a commercial television broadcast station without the express authority of the originating station.<sup>3</sup> Moreover, the rules require that any consent be in writing and specify the extent of the consent being granted.<sup>4</sup> Here, the record shows that OpticalTel had no such authority until after Sun was forced to file its complaint with the Commission.

To recap the record evidence, Sun first learned that OpticalTel was retransmitting WXCW in early 2014. Because Sun had not provided its consent for OpticalTel to retransmit the station, Sun immediately contacted OpticalTel and was told that OpticalTel obtained its authority from DISH. DISH, however, informed Sun that, while DISH delivered broadcast programming to OpticalTel pursuant to a “transport” agreement, DISH did not provide OpticalTel with any authority to retransmit WXCW. After confirming with DISH that OpticalTel did not have the requisite authority to retransmit WXCW, Sun made numerous attempts to engage with OpticalTel in order to negotiate the terms of a retransmission consent agreement. Rather than negotiating, however, OpticalTel repeatedly failed to return phone calls, or simply hung up on

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<sup>2</sup> *Order* at ¶ 1.

<sup>3</sup> 47 U.S.C. § 325(b).

<sup>4</sup> 47 CFR § 76.64(j).

Sun representatives. After several months of unresponsiveness, Sun's counsel sent a letter advising OpticalTel that its retransmission of WXCW was in violation of the Act. OpticalTel did not respond to that letter, or to a subsequent letter sent by counsel. Accordingly, Sun was forced to file its complaint in early December 2014.<sup>5</sup>

It was only after the retransmission consent complaint was filed that OpticalTel took action, obtaining authorization from DISH to retransmit the signals of WXCW effective December 12, 2014.<sup>6</sup> OpticalTel has acknowledged that, prior to that date, it was not paying DISH the "applicable fee" for retransmission consent authority.<sup>7</sup> DISH confirmed in its responses to inquiries from Commission staff that, prior to December 12, 2014, its agreement with OpticalTel did not grant OpticalTel the authority to retransmit WXCW on its Sail Harbour system.<sup>8</sup> Rather, under OpticalTel's agreement with DISH, it was OpticalTel's responsibility to secure "any necessary rights to provide the local broadcast station(s) to its end user customers."<sup>9</sup>

In the face of the facts and the Commission's findings, OpticalTel's petition for reconsideration relies on two main arguments. The first, that "DBS resellers" may rely on the retransmission consent authorizations obtained by the DBS operator.<sup>10</sup> While Sun does not

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<sup>5</sup> Except as otherwise noted, the foregoing facts are set out in Sun's Complaint and, with regard to the events leading up to the filing of the Complaint, Sun believes that they are not in dispute.

<sup>6</sup> See OpticalTel Answer, MB Docket No. 14-258 (filed Apr. 14, 2015) ("OpticalTel Answer") at 9.

<sup>7</sup> OpticalTel Answer at 9.

<sup>8</sup> See Letter from Alison Minea, Director & Senior Counsel, Regulatory Affairs, DISH Network L.L.C. dated March 3, 2016, MB Docket No. 14-258 (the "March 3 DISH Response").

<sup>9</sup> March 3 DISH Response at Exhibit A, Declaration of Lee Hirsch. In the Declaration, Lee Hirsch confirmed, among other things, that, distributors obtaining programming pursuant to a Transport Option were required to obtain the consent of the local broadcaster (at ¶ 4), and that, prior to December 14, 2014, OpticalTel's retransmission of broadcast stations fell under the Transport Option (at ¶ 9).

<sup>10</sup> OpticalTel Answer at 10-12.

dispute that an “authorized” reseller may rely on the retransmission consent obtained by the DBS provider (indeed, that is why Sun contacted DISH to confirm whether OpticalTel was authorized), the distributor must be able to demonstrate that it is so authorized. Indeed, in citing the Commission decision discussing the retransmission consent authority of DBS resellers, OpticalTel fails to note that, in the course of its discussion, the Commission also confirmed that, where a cable operator obtains broadcast signals from a satellite distributor, the cable operator continues to be responsible for obtaining the consent of the local broadcaster to retransmit the programming.<sup>11</sup> Here, DISH has stated that OpticalTel did not have that authority to retransmit WXCW as a reseller.

Despite DISH’s statements that it did not provide OpticalTel with retransmission consent authority, OpticalTel also argues that its agreement with DISH did, in fact, provide it with such authority.<sup>12</sup> However, the “evidence” that OpticalTel uses to purport to demonstrate this assertion falls far short of the “express” written retransmission consent authority that is required under the Act and the Commission’s rules. Specifically, OpticalTel points to a “Neighborhood Value Program Amendment” (the “Amendment”), and its failure to include a statement that it is the responsibility of OpticalTel to obtain the authority of the local broadcast stations, as evidence that it had the authority it needs. First, of course, the lack of a written restriction falls far short of the “express” authorization required. In addition, the Amendment is, on its face, incomplete, as it references at least two websites that must be reviewed in order to obtain additional information

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<sup>11</sup> *Must Carry and Retransmission Consent Requirements*, 8 FCC Rcd 2965, at note 367 (1993) (“Satellite carriers generally also retransmit television signals to cable systems. With respect to cable subscribers, it is the cable operator rather than the satellite carrier that is the multichannel distributor.”).

<sup>12</sup> Optical Petition for Reconsideration, MB Docket No. 14-258 (filed Sep. 14, 2016) (the “Petition” or “OpticalTel Petition”) at 2-9.

regarding “prices, packages and programming information” and whether the “property may qualify for local networks programming.”<sup>13</sup>

Lacking evidence that it had the express written consent required, OpticalTel has indicated that it should not be held at fault for a violation because it has failed to maintain complete documentation.<sup>14</sup> The rules, however, require that OpticalTel have a written agreement that demonstrates its authority to retransmit broadcast programming. Its inability to produce one or to maintain adequate records cannot serve as an excuse to violate the Act or the rules.

Finally, OpticalTel’s argument that it did not need retransmission consent because it did not receive a retransmission consent “election” from Sun for periods prior to the filing of the complaint is also wholly unsupported by the rules.<sup>15</sup> In this proceeding, OpticalTel has made a number of arguments, many of which contradict others. With regard to whether it is a cable operator, OpticalTel registered as a cable system operator in 2015, long after the complaint was filed with the Commission.<sup>16</sup> Under the Commission’s rules, a cable system commencing operation is required to notify local broadcast stations of its intent to commence service, and it is only after receipt of this notice that a broadcast station is required to notify the cable operator of its election.<sup>17</sup> Here, OpticalTel never sent the required notice that triggers the obligation to make an election (either at the time it commenced operation or when it belatedly registered its cable

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<sup>13</sup> See OpticalTel Petition for Reconsideration at Exhibit 1. Sun has been unable to gain access to the sites referenced in the agreement.

<sup>14</sup> See, e.g., OpticalTel Petition for Reconsideration at note 4. OpticalTel has objected to the fact that DISH has filed its agreement under a request for confidentiality. Sun submits that no credence should be given to OpticalTel’s complaints that it is disadvantaged in this proceeding because it has failed to maintain copies of its own agreements.

<sup>15</sup> Optical Petition for Reconsideration at note 1.

<sup>16</sup> See OpticalTel Answer at 4 (noting that OpticalTel “has taken prophylactic steps to register these communities at the FCC (FL 1410 and FL14111)”).

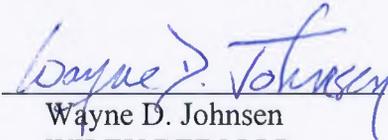
<sup>17</sup> 47 CFR § 76.64(k).

system). At other times, OpticalTel has also claimed that it is not a cable operator. If that is true, then no “election” was required, as non-cable MVPDs, while subject to retransmission consent obligations, are not required to carry local broadcast signals upon request. Accordingly, there is no merit to any argument that its system had somehow “defaulted” to must carry status for prior periods.<sup>18</sup>

In sum, the record in this proceeding fully supports the finding that OpticalTel violated the retransmission consent provisions of the Act and the rules. Moreover, given the extreme length of time it took for the initial Order to be released, Sun respectfully requests that the Commission issue a decision upholding its Order on an expedited basis.

Respectfully submitted,

SUN BROADCASTING, INC.

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September 26, 2016

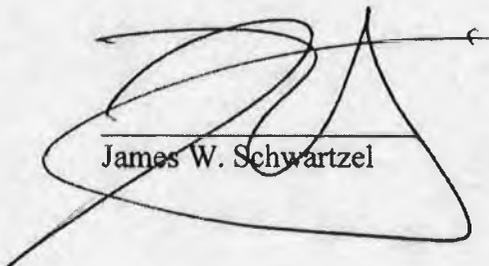
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<sup>18</sup> Nor is there any merit to OpticalTel’s argument that the fact that the statute of limitations for the Commission to fine OpticalTel for its violation had elapsed also service as a basis to rescind an adverse finding that OpticalTel violated the rules. *See* OpticalTel Petition at note 1. The statute of limitations relates to the Commission’s ability to issue a forfeiture for a violation. It does not precludes the agency from finding that a party has violated the Act or the rules.

**DECLARATION**

I, James W. Schwartzel, hereby declare under penalty of perjury under the laws of the United States of America as follows:

1. I am President of Sun Broadcasting, Inc., licensee of Television Station WXCW(TV), Naples, Florida.
2. I have read the foregoing Opposition to Petition for Reconsideration of Sun Broadcasting, Inc.
3. The facts contained therein are true and correct to the best of my knowledge, information, and belief.
4. The Opposition is grounded in fact, and is not interposed for any improper purpose.



James W. Schwartzel

September 26 2016

**CERTIFICATE OF SERVICE**

I, Jacquelyn Martin, hereby certify that on this 26th day of September, 2016, a copy of the foregoing Opposition to Petition for Reconsideration of Sun Broadcasting, Inc. has been served by first-class mail and electronic deliver on the following:

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Garvey Schubert Barer  
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Jacquelyn Martin