

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER

Adopted: August 15, 2016

Released: August 15, 2016

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. In this Order, we find that Optical Telecommunications, Inc. (“OpticalTel”) violated 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 signals of television broadcast station WXCW(TV) (“WXCW”) without “the express authority” of the originating station for its Sail Harbour Property but not its Glades Country Club property. In addition, we do not find that OpticalTel violated the obligation to negotiate retransmission consent in good faith.

II. BACKGROUND

2. SUN Broadcasting, Inc. (“SUN”) is the licensee of full-power television station WXCW, located in Naples, Florida. SUN states that it learned in January 2014 that OpticalTel was retransmitting WXCW’s signal to two of its residential properties. OpticalTel is a service company located in South Florida that provides back office operational functions and assistance to direct broadcast satellite resellers. It resells DISH Network (“DISH”) video programming, including local broadcast signals to residential communities in South Florida. The two OpticalTel properties at issue, Sail Harbour and Glades Country Club (“Glades”), are located in the Ft. Myers/Naples Designated Market Area (“DMA”). WXCW is also located in the Fort Myers/Naples DMA. In January 2014, SUN contacted both OpticalTel and DISH to inquire about the retransmission of WXCW’s signal. OpticalTel’s representative stated that they were a reseller of DISH. DISH informed SUN that it provides only transport services to OpticalTel’s Sail Harbour and Glades properties which does not include the right to retransmit WXCW’s signal. SUN states that OpticalTel did not respond to its subsequent efforts to discuss retransmission

1 47 U.S.C. § 325; 47 C.F.R. §§ 76.64-65.

2 Complaint of SUN Broadcasting, Inc. against Optical Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL, MB Docket No. 14-258, at 2 (filed Dec. 4, 2014) (“SUN Complaint”).

3 HControl is a DBS reseller and resells DISH service at Sail Harbour and Glades Country Club, the residential properties at issue in this Order. HControl and OpticalTel are under common control and both will be commonly referred to as OpticalTel in this Order. Answer of Optical Telecommunications, Inc., MB Docket No. 14-258, CSR – 8895-C, at 1-2 (filed Apr. 14, 2015) (“OpticalTel Answer”).

4 SUN Complaint at 2.

5 Id.

6 Id.

consent rights.<sup>7</sup> These efforts included a September 29, 2014 letter to OpticalTel electing retransmission consent for the election cycle commencing January 1, 2015 for the Sail Harbour and Glades properties.<sup>8</sup> OpticalTel states that neither it nor HControl had ever received any must-carry/retransmission consent election or other carriage request from WXCW prior to the September 2014 letter.<sup>9</sup>

3. OpticalTel resells DISH video programming to residents of Sail Harbour and Glades and includes local broadcast signals to residents at no separate charge. OpticalTel entered into a contract with DISH to resell service at Sail Harbour in December 2005 and acquired the rights to resell to Glades in April 2013 when it assumed the service agreements between DISH and Accelerated Broadband, LLC.<sup>10</sup> According to DISH records, the bulk services contract between DISH and Accelerated Broadband was established on December 6, 2007.<sup>11</sup> OpticalTel states that when it began providing its resale service to both communities, DISH only provided one resale option for its resellers which included retransmission consent of local broadcast stations.<sup>12</sup> DISH states that it began providing two contract options to its resellers: “Local Networks” and “Local Networks Transport” in “approximately 2006.”<sup>13</sup> The Local Networks Transport option requires the reseller to acquire retransmission consent from the local broadcast stations itself. The Local Networks option includes retransmission consent in the contract. Upon receiving SUN’s complaint, OpticalTel contacted DISH, believing that its agreements for Sail Harbour and Glades included retransmission consent.

4. On December 4, 2014, SUN filed a complaint with the Commission, alleging that OpticalTel was retransmitting the signal of WXCW to its subscribers in Sail Harbour and Glades without SUN’s express written consent.<sup>14</sup> SUN further claimed that OpticalTel violated the Commission’s good faith negotiation rules when it did not respond to SUN’s requests to negotiate a retransmission consent agreement.<sup>15</sup> OpticalTel filed an Answer to SUN’s complaint on April 14, 2015 and argued that it had not been retransmitting without consent and SUN’s complaint was without merit.<sup>16</sup> In its reply, SUN reiterated that OpticalTel has been retransmitting WXCW’s signal without consent and OpticalTel did not provide any supporting documentation of retransmission consent from DISH in its Answer.<sup>17</sup>

5. On October 5, 2015, the Media Bureau sent an email to OpticalTel and SUN posing questions

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<sup>7</sup> SUN made phone calls to OpticalTel representatives and sent two letters, dated October 1, 2014 and November 11, 2014 in which SUN requested that OpticalTel terminate its retransmission of the signal of WXCW. SUN Complaint at 2-3.

<sup>8</sup> Optical Telecommunications, Inc., Answer, MB Docket No. 14-258, CSR – 8895-C at 2 (filed Apr. 14, 2015) (“OpticalTel Answer”).

<sup>9</sup> *Id.*

<sup>10</sup> Neither OpticalTel nor DISH has been able to locate the paperwork associated with that transfer. Letter from Alison Minea, DISH Network L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3-4 (Jan. 5, 2016) (on file in MB Docket No. 14-258) (redacted version filed Mar. 3, 2016) (“DISH January 2016 filing”); OpticalTel Answer at 9, n.10..

<sup>11</sup> DISH January 2016 filing at 4; Exhibit A, Hirsch Declaration at para. 7.

<sup>12</sup> OpticalTel Answer at 9.

<sup>13</sup> DISH January 2016 filing at 2; Exhibit B, Declaration of Milena Grigorova-Bontcheva at paras. 4-6.

<sup>14</sup> SUN Complaint at 1.

<sup>15</sup> *Id.*

<sup>16</sup> Optical Answer at 1.

<sup>17</sup> Reply of SUN Broadcasting, Inc. against Optical Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL, MB Docket No. 14-258, at 3 (filed Apr. 29, 2015).

to aid in its resolution of SUN's complaint.<sup>18</sup> The Media Bureau requested additional information from OpticalTel to ascertain whether it was an authorized DISH reseller prior to December 12, 2014 for the Sail Harbour and Glades communities.<sup>19</sup> OpticalTel and SUN provided their responses on October 15, 2015.<sup>20</sup> The Media Bureau followed up with an additional request for information submitted to DISH on November 16, 2015.<sup>21</sup> Specifically, the Media Bureau sought information about OpticalTel's status as an authorized DISH video programming reseller and information regarding DISH's video programming reseller program. DISH provided a response to the Commission with a request for confidentiality on January 5, 2016. On March 3, 2016, DISH later filed a redacted version of its response at OpticalTel's request.<sup>22</sup> SUN filed a Supplemental Response stating that DISH's filing supported SUN's position that OpticalTel had been retransmitting WXCW without SUN's consent.<sup>23</sup> OpticalTel filed a letter objecting to DISH's request for confidential treatment and requesting access to a copy of the current retransmission consent agreement between SUN and DISH.<sup>24</sup>

### III. DISCUSSION

6. Resolution of this Complaint has been hampered by multiple failures of communication and inadequate recordkeeping leading to an incomplete record and conflicting statements of fact. Repeated attempts to clarify the relevant facts by Commission staff met with minimal success. As described below, we find that, based on the totality of the evidence, we believe that OpticalTel retransmitted the signal of WXCW to Sail Harbour without retransmission consent. However, due to the lack of documentation for Glades, we cannot conclude with certainty that OpticalTel retransmitted the signal of WXCW without retransmission consent. We also find that OpticalTel did not violate the requirement to negotiate retransmission consent in good faith. Because of the protracted pleading cycle necessary to resolve this proceeding, the statute of limitations to impose a forfeiture has elapsed. In any event, even if the statute of limitations was still open, we would decline to issue a forfeiture because of the unique circumstances of this proceeding described herein. We also dismiss OpticalTel's request to view the un-redacted documents kept confidential in DISH's January 5, 2016 and January 25, 2016 filings as unnecessary because we are not seeking to impose sanctions on OpticalTel.

#### A. Retransmission of Broadcast Signals Without Consent

7. Section 325 of the Communications Act requires cable systems and other multichannel video programming distributors ("MVPDs") to obtain "the express authority of the originating station" to

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<sup>18</sup> Letter from Wayne D. Johnsen, Counsel for Sun Broadcasting, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 15, 2015) (on file in MB Docket No. 14-258).

<sup>19</sup> *Id.*

<sup>20</sup> Letter from Arthur H. Harding, Counsel for Optical Telecommunications, Inc. and HControl Corporation, to Lynne Montgomery, Media Bureau, Federal Communications Commission (filed Oct. 15, 2015) (on file in MB Docket No. 14-258). OpticalTel filed a request for confidentiality and redacted exhibits with their answers to the Media Bureau request. A Confidential non-redacted document was filed with the Commission.

<sup>21</sup> Letter from Steven Broeckaert, Policy Division, Media Bureau, Federal Communications Commission, to Alison Minea, DISH Network L.L.C. (Nov. 16, 2015) (on file in MB Docket No. 14-258).

<sup>22</sup> Letter from Arthur Harding, Counsel for Optical Telecommunications, Inc. and HControl Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, (filed Jan. 25, 2016) (on file in MB Docket No. 14-258).

<sup>23</sup> Supplemental Response of Sun Broadcasting, Inc., MB Docket No. 14-258 (filed Mar. 14, 2016).

<sup>24</sup> Letter from Arthur H. Harding, Counsel for Optical Telecommunications, Inc. and HControl Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed May 3, 2016) (on file in MB Docket No. 14-258).

retransmit a broadcasting station's signal.<sup>25</sup> This requirement is codified in Section 76.64 of the Commission's rules, which further requires retransmission consent agreements to be in writing and to "specify the extent of the consent being granted."<sup>26</sup>

8. SUN alleges that OpticalTel's retransmission of WXCW to Sail Harbour and Glades violates Section 325(b) of the Communications Act of 1934 and Section 76.64(a) of the Commission's rules. Upon learning of OpticalTel's retransmission of WXCW's signal to Sail Harbour and Glades, SUN contacted OpticalTel and DISH.<sup>27</sup> In its October 1, 2014 letter to OpticalTel, SUN stated that 1) according to its communications with DISH, OpticalTel's contract with DISH did not include retransmission consent, and 2) OpticalTel required a separate agreement with SUN for the right to retransmit WXCW's signals to its subscribers.<sup>28</sup> SUN sent another letter to OpticalTel on November 11, 2014 requesting that OpticalTel cease retransmitting WXCW's signal without consent.<sup>29</sup> OpticalTel did not respond to these communications.

9. DISH currently provides two options to its resellers and began doing so around 2006.<sup>30</sup> One option, Local Networks, includes retransmission consent and the other, Local Networks Transport, provides transport only which requires the reseller to obtain written retransmission consent from each local broadcaster. DISH states that the 2005 Sail Harbour Bulk Programming Services Agreement is still in effect as of the date of its January 2016 response.<sup>31</sup>

10. OpticalTel asserts that it only resells DISH's satellite signals and is not required to obtain retransmission consent with local broadcasters under those resale agreements. OpticalTel entered into an agreement to resell DISH's signals for Sail Harbour in 2005 and acquired the resale agreement for Glades in April 2013. OpticalTel attached a page from a Bulk Programming Services Agreement which shows only a Local Networks programming option as evidence that it did not select a Local Networks Transport option for Sail Harbour.<sup>32</sup> OpticalTel states that it has no record of electing the Local Networks Transport option for Glades. Neither DISH nor OpticalTel has a copy of the original resale agreement for Glades.<sup>33</sup> OpticalTel argues that its selection of Local Networks in the November 2013 agreement it entered into with DISH for Cypress Trails -- a property in the same DMA as Sail Harbour and Glades -- demonstrates that OpticalTel "never intended to elect the purely transport option for any of its properties in the Ft. Myers/Naples DMA."<sup>34</sup> However, in its confidential filing, DISH included the entire signed 2005 Bulk Services Agreement between DISH and OpticalTel for Sail Harbour which states that "[c]arriage of Local channels requires that the Operator obtains retransmission consent from the local broadcaster."<sup>35</sup>

11. When it received SUN's complaint, OpticalTel contacted DISH to find out the status of these properties. OpticalTel was advised by DISH that it had the Local Networks Transport option for Glades and Sail Harbour. OpticalTel worked with DISH so that it would pay the higher rate so that

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<sup>25</sup> 47 U.S.C. § 325(b)(1)(A). Although there are certain exceptions to this requirement, no exceptions apply to the present situation.

<sup>26</sup> 47 C.F.R. § 76.64(a), (j).

<sup>27</sup> See *supra* para. 2; SUN Complaint at 2-3.

<sup>28</sup> SUN Complaint at 3.

<sup>29</sup> *Id.*

<sup>30</sup> DISH January 2016 filing at 2; Exhibit B, Declaration of Milena Grigorova-Bontcheva at paras. 4-6.

<sup>31</sup> DISH January 2016 filing at 4, Exhibit A, Hirsch Declaration at para. 6.

<sup>32</sup> OpticalTel Answer at 9, Attachment 2.

<sup>33</sup> *Id.* at 9, n.10; DISH January 2016 filing at 4.

<sup>34</sup> OpticalTel Answer at 8-9, Attachment 1.

<sup>35</sup> DISH January 2016 filing Exhibit D (filed under confidential request).

retransmission consent would be included in its agreements for all of its properties.<sup>36</sup> On January 22, 2015, DISH sent a letter to OpticalTel confirming that it had been paying for transport with retransmission consent for Cypress Trails and that OpticalTel would be authorized on a transport with retransmission consent basis for Sail Harbour and Glades effective December 12, 2014, thus covering all the period defined in WXCW's retransmission consent election which began on January 1, 2015.<sup>37</sup> OpticalTel offered to pay DISH any retroactive fees that it had unknowingly not paid under its Sail Harbour and Glades agreements.<sup>38</sup>

12. On balance, and based on a deeply flawed record, we find that OpticalTel violated Section 325 of the Act and Section 76.64 of the Commission's rules by retransmitting WXCW's signal at Sail Harbour without the required consent. We cannot make the same determination for Glades because neither OpticalTel nor DISH could produce the Bulk Programming Services Agreement for the property. At the outset, we note that the issue of retransmission without consent is limited to the period before December 12, 2014 because OpticalTel has submitted evidence sufficient to establish retransmission consent for WXCW through its selection of the Local Networks option for Sail Harbour and Glades.<sup>39</sup> OpticalTel's document for Sail Harbour demonstrating that DISH only had one option which included retransmission consent when it commenced service in 2005 does not identify the date or the property to which the agreement applies.<sup>40</sup> In contrast, DISH's Bulk Programming Services Agreement with OpticalTel, which is provided under confidentiality request, does indicate that retransmission consent is not included for Sail Harbour and is signed both by DISH and OpticalTel representatives.<sup>41</sup> Based upon the presence of signatures by both parties, we conclude that OpticalTel should have known that it did not possess retransmission consent for Sail Harbor. We note with approval OpticalTel's swift action to adopt the transport option with retransmission consent once DISH stated that its existing transport option did not include a retransmission consent component as well as its asserted willingness to pay any retransmission consent fees that were in arrears. However, because neither party was able to provide agreements for Glades, and because DISH is unable to pinpoint a date on which it began offering two resale options, we cannot come to a definite conclusion as to whether OpticalTel was retransmitting WXCW to Glades without consent.

13. The record indicates that OpticalTel retroactively satisfied its retransmission consent obligations regarding retransmission of WXCW's signal as of December 12, 2014 through election of the Local Networks option provided by DISH, which includes retransmission consent. If WXCW believes it has not been fully compensated for the retransmission of its signal since December 12, 2014, it should pursue the matter with DISH. Because we find that, prior to December 12, 2014, OpticalTel was retransmitting WXCW's signal without its consent, we direct OpticalTel and SUN to engage in good faith negotiations to compensate SUN for retransmission of WXCW's signal for any carriage preceding December 12, 2014. We note that neither party to this proceeding is without fault. As discussed above, OpticalTel should have been aware that it did not have retransmission consent for WXCW. However, SUN was also lax in monitoring by whom and where its signal was being retransmitted and failing to affirmatively elect retransmission consent in preceding election cycles. Bearing these facts in mind, we direct the parties to complete these negotiations in good faith and reasonably and expeditiously.

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<sup>36</sup> OpticalTel Answer at 9; Attachment 3; DISH January 2016 filing Exhibit F.

<sup>37</sup> OpticalTel Answer at 9; Attachment 3; DISH January 2016 filing Exhibit F.

<sup>38</sup> OpticalTel Answer at 10.

<sup>39</sup> *Id.* at 9, Attachment 3.

<sup>40</sup> *Id.* at 9, Attachment 2.

<sup>41</sup> DISH January 2016 filing Exhibit D (filed under confidentiality request).



## B. Good Faith Retransmission Negotiations

14. Section 325(b)(3)(C) of the Communications Act of 1934, as amended, obligates broadcasters and MVPDs to negotiate retransmission consent in good faith. Specifically, Section 325(b)(3)(C)(iii) of the Act directs the Commission to establish regulations that:

prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms are based on competitive market place considerations.<sup>42</sup>

15. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.<sup>43</sup> The *Good Faith Order* adopted a two-part test for good faith.<sup>44</sup> The first part of the test consists of a brief, objective list of negotiation standards which, if violated, constitute a *per se* breach of the duty to negotiate in good faith.<sup>45</sup> The second part of the test considers the totality of the circumstances. Under this standard, a broadcast television station or MVPD may present facts to the Commission which could, even though they do not allege a violation of the objective standards, constitute a failure to negotiate in good faith.<sup>46</sup> A television broadcast station or MVPD believing itself aggrieved under the good faith rules may file a complaint pursuant to Section 76.7 of the Commission's rules.<sup>47</sup> The burden of proof in good faith complaints is on the complainant.<sup>48</sup>

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<sup>42</sup> 47 C.F.R. § 325(b)(3)(C)(iii). The good faith negotiation requirement originally was imposed only on television broadcast stations, but a reciprocal obligation was imposed on MVPDs pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004. See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005).

<sup>43</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445 (2000) (“*Good Faith Order*”), recon. granted in part, 16 FCC Rcd 15599 (2001).

<sup>44</sup> *Good Faith Order*, 15 FCC Rcd at 5457, ¶ 30.

<sup>45</sup> *Id.* at 5462-64, paras. 40-46. First, a broadcast television station or MVPD (“Negotiating Entity”) may not refuse to negotiate retransmission consent. Second, a Negotiating Entity must appoint a negotiating representative with authority to make binding representations on retransmission consent issues. Third, a Negotiating Entity must agree to meet at reasonable times and locations to negotiate retransmission consent and cannot act in a manner that would unreasonably delay the course of negotiations. Fourth, a Negotiating Entity may not put forth a single, unilateral proposal. Fifth, a Negotiating Entity may not fail to respond to the other party’s retransmission consent proposal, and must provide the reasons for rejecting any such proposal. Sixth, a Negotiating Entity is prohibited from executing an agreement with any party requiring the Negotiating Entity not to enter into a retransmission consent agreement with any other television broadcast station or MVPD. Seventh, a Negotiating Entity must agree to execute a written retransmission consent agreement that sets forth the full understanding of the broadcaster and the MVPD. Eighth, coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market to grant retransmission consent to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission. Finally, the imposition by a television broadcast station of limitations on the ability of a multichannel video programming distributor to carry into the local market of such station a television signal that has been deemed significantly viewed, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under 47 U.S.C. 338, 339, 340 or 534, unless such stations are directly or indirectly under common de jure control permitted by the Commission. 47 C.F.R. § 76.65(b)(1)(i)-(ix).

<sup>46</sup> *Good Faith Order*, 15 FCC Rcd at 5458, para. 32; 47 C.F.R. § 76.65(b)(2).

<sup>47</sup> 47 C.F.R. §§ 76.65(c), 76.7.

<sup>48</sup> 47 C.F.R. § 76.65(d).

16. SUN alleges in its complaint that OpticalTel violated its duty to negotiate retransmission consent in good faith by not responding to SUN's letters and phone calls.<sup>49</sup> We find that OpticalTel did not violate Section 76.65(b)(i) of the Commission's rules by not responding to SUN's attempts at communication. As discussed above, the status of OpticalTel's retransmission rights were a matter of considerable confusion and OpticalTel was in contact with DISH to clarify and correct any retransmission consent issues in its resale contracts for Sail Harbour and Glades.<sup>50</sup> Given the totality of the record in this proceeding, we find that OpticalTel had a good faith, albeit mistaken, belief that its transport agreement with DISH covered retransmission consent fees due to WXCW. Further, OpticalTel made a good faith effort in its work with DISH to correct the retransmission consent issues in its resale contracts for Sail Harbour and Glades. In such instance, we cannot conclude that OpticalTel violated its duty to negotiate retransmission consent in good faith. However, we caution OpticalTel to be more responsive in the future to retransmission consent inquiries from all broadcasters, including WXCW.

### C. OpticalTel's Request for Access to Additional Confidential Information

17. On May 3, 2016, OpticalTel filed a letter with the Commission requesting access to the 2015 retransmission consent agreement between SUN and DISH.<sup>51</sup> OpticalTel notes that DISH's Updated Request for Confidential Treatment and its revised version of its January 5, 2016 filing still withheld entire documents from public view. OpticalTel argues, because SUN's continues to request that the Commission level sanctions against OpticalTel for retransmitting without consent, that OpticalTel should be able to access DISH's un-redacted response. Because we cannot impose a monetary forfeiture, we believe that it is not necessary to require DISH to allow OpticalTel to review DISH's un-redacted response or the retransmission consent agreement between SUN and DISH.<sup>52</sup>

## IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that SUN Broadcasting, Inc.'s Complaint Concerning Retransmission of WXCW(TV), Naples, FL against Optical Telecommunications, Inc. filed pursuant to Sections 76.64, 76.65 and 76.7 of the Commission's rules **IS GRANTED** to the extent discussed herein and otherwise **DENIED**.

19. **IT IS FURTHER ORDERED** that DISH Network L.L.C.'s March 3, 2016 request for confidential treatment of its filed documents pursuant to Sections 0.457 and 0.459 of the Commission's rules **IS GRANTED**.

20. This action is take pursuant to delegated authority under Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>49</sup> SUN Complaint at 1.

<sup>50</sup> OpticalTel Answer at 9-10.

<sup>51</sup> Letter from Arthur H. Harding, Counsel for Optical Telecommunications, Inc. and HControl Corporation, to Marlene H. Dortch, Secretary, and Federal Communications Commission (filed May 3, 2016) (on file in MB Docket No. 14-258).

<sup>52</sup> OpticalTel is free to contact DISH to request any documents that were executed by DISH and OpticalTel.