

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

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

ORDER ON RECONSIDERATION

Adopted: March 20, 2017

Released: March 20, 2017

By the Acting Chief, Media Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we grant the Petition for Reconsideration of Optical Telecommunications, Inc. and HControl Corporation (collectively OpticalTel) in the above-captioned proceeding. OpticalTel, a reseller of DISH Network (DISH) video programming, sought reconsideration of the Media Bureau's finding that OpticalTel violated section 325 of the Communications Act of 1934, as amended (the Act), and section 76.64 of the Commission's rules, by retransmitting the signal of full-power television broadcast station WXCW(TV) to viewers in Sail Harbour, Florida, without the express authority of the originating station. For the reasons set forth below, we grant the Petition for Reconsideration based upon our finding that direct broadcast satellite (DBS) provider DISH bears sole responsibility under the Act and rules for satisfying the retransmission consent requirements with regard to the signal of WXCW. Accordingly, we dismiss WXCW's complaint against OpticalTel with prejudice.

II. BACKGROUND

2. Sun Broadcasting, Inc. (Sun), licensee of WXCW, filed a complaint against OpticalTel alleging that OpticalTel violated the Act and the Commission's rules by retransmitting the signal of WXCW to subscribers in Sail Harbour and Glades Country Club, Florida without the express written consent of Sun, and by refusing to respond to Sun's requests to negotiate a retransmission consent agreement. According to Sun, when it inquired about retransmission of WXCW's signal, OpticalTel's representative stated that it was a reseller of DISH's video service, whereas DISH informed Sun that it provided OpticalTel only with transport services and not with the right to retransmit WXCW's signal. In response, OpticalTel explained that it is a DBS reseller and not a multichannel video programming

1 See Optical Telecommunications, Inc. and HControl Corporation, Petition for Reconsideration (filed Sept. 14, 2016) (Petition for Reconsideration).

2 See Optical Telecommunications, Inc. Complaint Concerning Retransmission of WXCW(TV), Naples, FL, Order, 31 FCC Rcd 8952 (MB, Aug. 15, 2016) (Order); 47 U.S.C. § 325; 47 CFR § 76.64.

3 See Complaint of Sun Broadcasting, Inc. against Optical Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL, at 1 (filed Dec. 4, 2014) (Complaint).

4 See id. at 2. A more detailed discussion of the background of this proceeding is set forth in the Order. See Order, 31 FCC Rcd at 8952-54, paras. 2-5.

distributor (MVPD), and thus it is DISH rather than OpticalTel that bears full responsibility for compliance with the retransmission consent requirements.<sup>5</sup>

3. In its Order, the Media Bureau concluded that, prior to December 12, 2014, OpticalTel retransmitted the signal of WXCW to Sail Harbour without retransmission consent.<sup>6</sup> The Media Bureau was persuaded by the 2005 bulk services agreement between DISH and OpticalTel for Sail Harbour, which stated that “[c]arriage of Local channels requires that the Operator obtains retransmission consent from the local broadcaster.”<sup>7</sup> The Bureau determined that the alleged retransmission without consent ceased as of December 12, 2014, because DISH confirmed that as of that date it provided OpticalTel with transport services that included the right to retransmit WXCW’s signal to subscribers in both Sail Harbour and Glades.<sup>8</sup> The Media Bureau directed OpticalTel and Sun to complete their good faith retransmission consent negotiations reasonably and expeditiously,<sup>9</sup> but it did not issue a forfeiture due to the expiration of the statute of limitations.<sup>10</sup>

4. OpticalTel subsequently filed its Petition for Reconsideration of the Order, requesting that the Media Bureau reverse its conclusion that OpticalTel had violated the Commission’s retransmission consent rules.<sup>11</sup> Sun filed an opposition<sup>12</sup> to which OpticalTel filed a reply.<sup>13</sup>

### III. DISCUSSION

5. Section 325(b)(1)(A) of the Act provides that no MVPD shall retransmit a broadcast signal without the broadcast station’s consent.<sup>14</sup> In addition, the Act and the Commission’s implementing rules require MVPDs and broadcast television stations to negotiate in good faith for retransmission consent.<sup>15</sup> Commission precedent is clear that DBS resellers like OpticalTel are not MVPDs and thus are

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<sup>5</sup> See Answer of Optical Telecommunications, Inc. at 3 (filed Apr. 14, 2015) (Answer).

<sup>6</sup> Order, 31 FCC Rcd at 8954, para. 6. See also *id.* at 8958, para. 16. The Complaint also addressed retransmission of the signal of WXCW to Glades, but the Order concluded that there was insufficient documentation to make a finding of retransmission without consent to Glades and that issue is not part of the Petition for Reconsideration. See *id.* at 8954, para. 6.

<sup>7</sup> *Id.* at 8955, para. 10 (quoting Letter from Alison Minea, DISH Network L.L.C., to Marlene H. Dortch, Secretary, FCC, at Ex. D (Jan. 5, 2016) (redacted version filed Mar. 3, 2016)). Neither OpticalTel nor DISH produced the Bulk Programming Services Agreement for Glades. *Id.* at 8956, para. 12.

<sup>8</sup> *Id.* at 8955-56, paras. 11-12 (citing Answer at 9 and Attach. 3).

<sup>9</sup> *Id.* at 8956, para. 13.

<sup>10</sup> *Id.* at 8954, para. 6. The statute of limitations bars the Commission from issuing forfeitures for conduct that occurred more than one year prior to the issuance of the notice of apparent liability. See 47 U.S.C. § 503(b)(6). Even if the statute of limitations has expired, the Commission may still issue orders indicating that a party violated Commission rules, as it did in the Order.

<sup>11</sup> Petition for Reconsideration at 1. Because we are granting OpticalTel’s Petition for Reconsideration and dismissing the Complaint with prejudice, we need not address the separate question about how OpticalTel could respond to “any adverse findings against it in the Bureau Order” without having access to DISH’s “confidential” documents on which the Bureau relied (*e.g.*, Exhibit D to DISH’s updated January 5, 2016 response). See Petition for Reconsideration at 2 & n. 4; Order, 31 FCC Rcd at 8954, para. 6. *But see Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24867 Appendix C (1998) (Model Protective Order for disclosing confidential information).

<sup>12</sup> Sun Broadcasting, Inc., Opposition to Petition for Reconsideration (filed Sept. 26, 2016) (Opposition).

<sup>13</sup> Optical Telecommunications, Inc. and HControl Corporation, Reply to Opposition (filed Oct. 3, 2016) (Reply).

<sup>14</sup> 47 U.S.C. § 325(b)(1)(A). See also 47 CFR § 76.64(a).

<sup>15</sup> 47 U.S.C. § 325(b)(3)(C). See also 47 CFR § 76.65.

not subject to the obligation to obtain retransmission consent.<sup>16</sup> Given the Commission precedent discussed below, the factual question of whether OpticalTel's agreement with DISH obligated OpticalTel to obtain retransmission consent<sup>17</sup> is irrelevant for purposes of Commission enforcement of section 325 and its implementing rules. A DBS operator that provides a broadcast television station signal for distribution by a DBS reseller cannot shift its obligation to obtain retransmission consent by contractually delegating that obligation to the reseller. We agree with OpticalTel that the Media Bureau's Order erroneously focused on the factual question of whether DISH provided OpticalTel only with transport services and not with the right to retransmit WXCW's signal.<sup>18</sup> The Media Bureau should have considered applicable Commission precedent that the obligation to obtain retransmission consent rests with the DBS operator, DISH, rather than the DBS reseller, OpticalTel. Having now fully considered the applicable precedent discussed below, we grant OpticalTel's Petition for Reconsideration.

6. The parties agree that during all relevant times, DISH has authorized OpticalTel to resell the DISH service to customers in Sail Harbour, including the signal of WXCW.<sup>19</sup> In its implementation of the Cable Television Consumer Protection and Competition Act of 1992, the Commission explained that DBS resellers are not MVPDs subject to retransmission consent obligations and that sole responsibility for obtaining retransmission consent rests with the MVPD:

A satellite carrier, as defined in the Satellite Home Viewer Act of 1988, is an entity that uplinks a broadcast signal and retransmits it over satellite facilities that the carrier may own or lease. *See* 17 U.S.C. § 119(d). Satellite carriers' customers are home satellite dish (HSD) households. The carriers themselves sell retransmitted broadcast signals directly to HSD households, but they also license a variety of agents (*e.g.*, program packagers, equipment distributors, and satellite equipment retailers) to sell the signals on their behalf. As noted above, the definition [of MVPD] applies to a 'television receive-only satellite program distributor.' In order to resolve any potential ambiguity regarding responsibility for securing retransmission consent, and in view of the fact that the satellite carrier is the entity entitled to the compulsory license granted by 17 U.S.C. § 119, we find that, with respect to HSD sales, the satellite carrier is the multichannel distributor and must secure retransmission consent.<sup>20</sup>

Sun focuses on the footnote that follows the above-quoted text, which states that where satellite carriers retransmit television signals to cable systems, the cable operator (and not the satellite carrier) is the MVPD with respect to cable subscribers.<sup>21</sup> We agree with OpticalTel that the footnote is an exception to the general rule that the DBS operator remains responsible for obtaining retransmission consent, and that the exception for cable operators is logical given that cable operators (unlike DBS resellers) are themselves MVPDs and thus subject to the retransmission consent requirements and eligible for the compulsory copyright license.<sup>22</sup> Accordingly, the footnote does not alter the Commission's conclusion that a satellite carrier must obtain retransmission consent where it authorizes a reseller to distribute its

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<sup>16</sup> *See infra* paras. 6-7.

<sup>17</sup> *See* Petition for Reconsideration at 2-9; Opposition at 3-5; Reply at 2-3.

<sup>18</sup> *See* Petition for Reconsideration at 13.

<sup>19</sup> *See id.* at 4; Order, 31 FCC Rcd at 8953, para. 3 ("OpticalTel resells DISH video programming to residents of Sail Harbour . . . 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 . . .").

<sup>20</sup> *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2997, para. 131 (1993) (*Broadcast Signal Carriage Order*) (footnote omitted).

<sup>21</sup> *See* Opposition at 4 (*citing Broadcast Signal Carriage Order*, 8 FCC Rcd at 2997, n. 367).

<sup>22</sup> *See* Reply at 4, n. 8.

service. OpticalTel is acting as a DBS reseller, not as a cable operator.<sup>23</sup>

7. This conclusion is further supported by the Commission's implementation of the "local-into-local" provisions of the Satellite Home Viewer Improvement Act of 1999 (SHVIA).<sup>24</sup> There, the Commission placed an affirmative burden on television stations to initiate carriage on a satellite carrier's system rather than require the carrier to reach out to each local television station about its intention to provide local-into-local service, based on the fact that broadcasters would only be required to deal with the two satellite carriers operating at that time, DirecTV and EchoStar.<sup>25</sup> The Commission said nothing about broadcasters also having to contact or negotiate with DBS resellers.<sup>26</sup> We also agree with OpticalTel that the fact that SHVIA added to the Act a definition of "distributor" that arguably encompasses the activities of DBS resellers does not undermine our conclusion that the obligation to obtain retransmission consent rests solely on the DBS provider.<sup>27</sup> As the Commission explained in the *SHVIA Order*, the term "distributor" is not found in any other provision of Section 338 other than the definitional subsection, and thus "appears to have no connection with the carriage requirements in Section 338."<sup>28</sup>

8. For the reasons discussed above, it is DISH and not OpticalTel that must comply with section 325 of the Act and section 76.64 of the Commission's rules with regard to obtaining consent to retransmit WXCW's signal to subscribers in Sail Harbour. Sun and DISH are party to a retransmission consent agreement. As OpticalTel states, "[i]f Sun is dissatisfied with the terms of that agreement, or the consideration it receives from DISH thereunder, that is purely a contractual matter to be addressed between Sun and DISH."<sup>29</sup>

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration of Optical Telecommunications, Inc. and HControl Corporation in the above-captioned proceeding **IS GRANTED** to the extent discussed herein.

10. **IT IS FURTHER ORDERED** that the Complaint of Sun Broadcasting, Inc. against Optical Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL is **DISMISSED WITH PREJUDICE**.

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<sup>23</sup> Sun points to the fact that OpticalTel registered as a cable system operator in 2015, after Sun filed the Complaint. *See* Opposition at 5. *See also* Answer at 4 ("[A]lthough OpticalTel has no reason to believe that the facilities located at Sail Harbour or Glades Country Club qualify as 'cable television systems' under Section 76.5(a) of the Commission's rules, it has taken prophylactic steps to register these communities at the FCC (FL1410 and FL1411) and to submit appropriate compulsory license payments to the U.S. Copyright Office."). OpticalTel seemingly thought it was protecting itself in the event that it was subject to the retransmission consent requirements, but that does not alter our conclusion that OpticalTel was acting as a DBS reseller and not as a cable operator.

<sup>24</sup> *See* Petition for Reconsideration at 10-11.

<sup>25</sup> *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Broadcast Signal Carriage Issues and Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, 1931, para. 28 (2000) (*SHVIA Order*).

<sup>26</sup> *Id.*

<sup>27</sup> Petition for Reconsideration at 11 (*citing SHVIA Order*, 16 FCC Rcd at 1976, para. 135).

<sup>28</sup> *SHVIA Order*, 16 FCC Rcd at 1976, para. 135.

<sup>29</sup> Reply at 1-2 (footnote omitted).

12. This action is take pursuant to delegated authority under section 0.283 of the Commission's rules.<sup>30</sup>

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Acting Chief, Media Bureau

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<sup>30</sup> 47 CFR § 0.283.