CARL E. KANDUTSCH, Ph.D., J.D.
Attorney at Law
2520 Avenue K, Suite 700-760
Plano, Texas 75074
Tel: (207) 659-6247
Fax: (214) 291-5724
carl@kandutsch.com

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MAY 04 2012
FCC Mail Room

May 1, 2012

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via Federal Express Overnight Delivery

Re: **Response of TV Max to Complaint of Fox Television Holdings, Inc. and Petition for Order Requiring TV Max, Inc. to Show Cause, MB Docket No. 12-113, CSR No. 8623-C**

Dear Ms. Dortch:

Enclosed for filing please find an original and two copies of the Response of TV Max to Complaint and Petition for Order Requiring TV Max, Inc. to Show Cause in the above-captioned matter.

Additional copies have been sent to the individuals identified on the Certificate of Service attached to the Response of TV Max.

Thank you for your assistance.

Sincerely,

Carl Kandutsch

Carl E. Kandutsch
Attorney for TV Max

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Retransmission Consent Complaint	)	MB Docket No. 12-113
And Petition of Fox Television Holdings, Inc.	)	CSR No. 8623
	)	
To: Office of the Secretary	)	
Attn: Media Bureau	)	

RESPONSE OF TV MAX, INC. TO COMPLAINT AND PETITION FOR ORDER REQUIRING TV MAX, INC. TO SHOW CAUSE

TV Max, Inc. (dba Wavevision, referred to as "TV Max") by and through its counsel, files this response, pursuant to Section 76.7 of the Commission's rules, to the Complaint and Petition of Fox Television Holdings, Inc. ("Fox") concerning TV Max's alleged violation of Section 325(b) of the Communications Act of 1934 (the "Act") and Section 76.64 of the Commission's rules.

Fox's Complaint alleges that since January 1, 2012 to the present, TV Max has retransmitted signals (referred to herein as the "Signals") of television broadcast stations KTXH(TV) and KRIV(TV), both Fox affiliates, without Fox's consent in violation of Section 325(a) of the Act, and refused to negotiate a retransmission consent agreement with Fox regarding the Signals in good faith, thus violating Section 76.65[1] of the Commission's Rules. Fox requests that the Commission require TV Max to show cause why a cease and desist order should not be issued and that the Commission initiate a forfeiture proceeding against TV Max under Section 503 of the Act[2].

Statement of Facts

As stated in the Declaration of Thomas Balun[3], June 2010, TV Max was acquired by a Broadband Ventures IV. TV Max currently holds a cable television franchise with the City of Houston, Texas, and serves about 10,000 subscribers in the Houston Texas Designated Market Area ("DMA"). TV Max is unique among franchised cable operators in that all of its subscribers reside in multi-dwelling unit ("MDU") buildings. TV Max serves approximately 200 MDU buildings in the Houston DMA pursuant to right-of-entry agreements with the building owners.

[1] 47 C.F.R. § 76.65.
[2] 47 U.S.C. § 503; 47 C.F.R. § 1.80.
[3] Attachment 1.

At the time of the acquisition, TV Max was in poor condition financially and operationally. Consequently, the company's new management decided that in order to make the company profitable, while at the same time maintaining subscription rates at competitive levels, they needed to substantially reduce the costs of operation.

One component of reducible costs identified by TV Max's management were costs stemming from retransmission consent fees being demanded by broadcast networks, including Fox, for off-air programming. In order to reduce these costs – rather than pass them on to subscribers in the form of higher rates – during the second half of year 2011, management formulated a plan to qualify for exemption from the retransmission consent regime according to Section 76.64(e) of the Commission's rules (47 C.F.R. § 76.64(e)), relating to broadcast signals received by master antenna television ("MATV") facilities. TV Max was and is well-positioned to qualify for this exemption because all of its subscribers reside in MDU buildings.

TV Max moved to implement the MATV plan beginning in November 2011 as quickly and efficiently as possible. Implementation of the plan involved several components, including:

(a) Notification of the owners of MDU buildings served by TV Max that TV Max would, at its sole expense, install master antennas on the rooftops of MDU buildings, which facilities would (along with existing in-building distribution wiring) be owned and controlled by the owner of the MDU building. In November 2011, letters were sent to each building owner informing the owner of this plan and seeking the owner's consent to the installation of master antennas. Attachment 2 is a photocopy of a sample letter sent to each owner of an MDU building served by TV Max. Since delivering the letter to MDU owners, TV Max has been working diligently and in good faith to complete the installation of property-owned MATV systems at each MDU building served by the company. While conversion of the MDU buildings to MATV systems has in some cases been delayed due to installation-related negotiations with building owners, the project is nearing completion. As of January 1, 2012, about 50% of the MDU buildings served by TV Max had been fully converted to MATV systems. Currently, about 50% of the MDU buildings have been fully converted to MATV systems, and the remaining MDU buildings will be fully converted by the end of May 2012; and,

(b) Elimination of off-air broadcast signals, including the Signals of Fox affiliates KTXH(TV) and KRIV(TV), from the Basic Tier of programming that is offered to TV Max subscribers for a monthly fee. The Signals were fully de-linked from any tier of pay-television programming as of January 1, 2012 and since that date, reception of the Signals has been available to any resident of an

MDU building served by TV Max at no charge, and at the resident's option, regardless of whether the resident subscribes to any TV Max pay service.[4]

Argument

The Commission is well aware of the difficulties facing small cable operators in competing with larger operators due to (a) the ever-rising retransmission consent fees being charged by affiliates of the "Big 4" (i.e., ABC, NBC, CBS and Fox), and the (b) vast disparity in fees charged by broadcasters to small and large multi-channel video programming distributors ("MVPDs"), respectively.

Regarding (a), the Commission's recent price survey states that on average, cable rates for the "broadcast basic" tier rose at more than double the rate of inflation in 2009, and the situation is surely worse today.[5] Regarding (b), data provided to the Commission in MB Docket No. 10-71[6] shows that on average, smaller MVPDs pay retransmission consent fees more than double the transmission consent fees paid by large operators. For example, a study by Professor William Rogerson found that large cable operators pay average retransmission consent fees of $.14 per subscriber per month, while small and mid-sized cable companies pay, on average, at least $.30 per subscriber per month to Big 4 stations for the same programming content.[7]

The disparate fees charged to small and large cable operators have no basis in broadcaster's costs of delivering the signal. Therefore, according to the Rogerson study, the difference can only be explained by the vastly superior bargaining power possessed by large versus small operators vis-à-vis the Big 4 broadcast networks.[8] The higher fees are passed on to subscribers in the form of increased cable rates, positioning smaller operators at a significant, unfair and often devastating competitive disadvantage with regard to their larger MVPD rivals. When smaller operators such as TV Max are unable to compete due to price discrimination in retransmission consent fees for "must have" programming content, it is their subscribers – that is, the public at large – that are ultimately victimized.

While TV Max does not expect that its dispute with Fox will be disposed of based on comments filed in a rulemaking proceeding now before the Commission, the issues raised in Docket No. 10-71

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[4] See www.wavevision.com.

[5] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 (rel. Feb. 14, 2011).

[6] "Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent," MB Docket No. 10-71, *Public Notice,* DA 10-474 (rel. March 19, 2010) (the "*RTC Public Notice*").

[7] *RTC Public Notice*, Comments of American Cable Association, Appendix A, "The Economic Effects of Price Discrimination in Retransmission Consent Agreements" (filed May 18, 2010) at 11-12.

[8] *Id.* at 5 – 9.

provide the relevant context for understanding TV Max's legitimate efforts to secure exemption from the retransmission consent requirements according to the Commission's existing rules.

I. Duty to Negotiate in Good Faith

Section 76.65 of the Commission's rules requires that broadcast stations and [MVPDs] "negotiate in good faith the terms and conditions of retransmission consent agreements" as required under Section 325 of the Act.[9] However, where the broadcaster's consent is not required, there can be no duty to negotiate, in good faith or otherwise. To the extent that the facilities used to receive and distribute the Signals meet the criteria for the MATV exemption set forth in Section 76.64(e) of the rules, TV Max has no duty to negotiate retransmission consent fees with Fox.

Fox points out that TV Max did sign a retransmission consent agreement with Fox for the period between January 1, 2009 and December 31, 2011, and suggests that this fact constitutes an admission that Fox's consent was required beyond expiration of the prior agreement.[10] This suggestion begs the question of whether Fox's consent for distribution of the Signals to MDU residents is required.

TV Max does not claim that Fox's consent was not required during the time period covered by the expired agreement. As stated in Mr. Balun's Declaration, it was exactly that consent requirement – specifically, the exorbitant prices demanded by Fox in exchange for its consent – that caused TV Max to invest in resources in re-engineering its MDU systems so as to qualify for exemption from the consent requirement according to the Commission's rules. Therefore, the fact that TV Max had signed a prior retransmission consent agreement with Fox does not imply that TV Max was required to sign a new retransmission consent agreement under the onerous terms proposed by Fox. On the contrary, TV Max was required, as a practical matter, to find a way to continue providing its customers with quality programming at competitive rates – and *that* meant qualifying its MDU systems for exemption from the existing retransmission consent regime altogether in accordance with the Commission's rules. TV Max has been diligently re-configuring its MDU systems to qualify exemption under 47 C.F.R. § 76.64(e) since November 2011, and is actively participating in good faith negotiations with Fox to resolve all remaining issues raised in the Complaint.

II. Exemption under 47 C.F.R. § 76.64(e)

The Commission's rules provide an exemption from retransmission consent requirements for signals received by a master antenna television system under certain circumstances:

[9] 47 C.F.R. § 76.65.
[10] Fox Complaint at 8-9.

> The retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities or by direct over-the-air reception in conjunction with the provision of service by a multichannel video program distributor provided that the multichannel video program distributor makes reception of such signals available without charge and at the subscribers option and provided further that the antenna facility used for the reception of such signals is either owned by the subscriber or the building owner; or under the control and available for purchase by the subscriber or the building owner upon termination of service.[11]

Parsed into its constituent parts, this provision means that retransmission consent is not required if: (A) the broadcast signal is received by a master antenna television facility; and (B) reception of the signal is made available to subscribers without charge, and at the subscriber's option; and (C) the antenna facility used to receive the signal is either (1) owned by the subscriber or the building owner, or (2) under the control of and available for purchase by the subscriber or the building owner upon termination of service.

To the extent that TV Max's reception and distribution of the Signals meet each of the criteria set forth in Section 76.64(e) of the Commission's rules, TV Max is not required to obtain Fox's consent with respect to the Signals.

A. The Signals are received by master antenna television facilities.

A master antenna television facility consists of a rooftop antenna which captures the available UHF and VHF signals and distributes them by wire to individual dwelling units in an MDU building or complex.[12]

Beginning in November 2011, TV Max began the process of converting all MDU buildings with which the company had a right-of-entry agreement to MATV systems, such that off-air broadcast signals, including the Signals of Fox affiliates KTXH(TV) and KRIV(TV), could be received by means of master antennas installed on the building rooftops and distributed to residents by means of existing in-building coaxial wiring at no charge. According to Mr. Balun's Declaration, this plan was formulated and implemented for the specific purpose of qualifying TV Max's MDU operations for exemption from retransmission consent fees according to the Commission's rules.

A letter was delivered to each building owner informing the owner of TV Max's plan and requesting consent to complete the MATV installation and at TV Max's sole expense.[13] TV Max has pursued the MATV conversion project diligently and as efficiently as practically possible, given the occasional difficulties surrounding securing each owner's consent to a rooftop installation and agreement

[11] 47 C.F.R. § 76.64(e).
[12] *See* Federal Communications Commission et al. vs. Beach Communications, Inc., 508 U.S. 307, 311 (1993).
[13] Attachment 2.

on construction scheduling. Currently, about 50% of the MDU buildings have been fully converted to functioning MATV systems, and the remaining buildings will be completed within the next 30 days.

B. Reception of the Signals is made available at no charge and at the subscriber's option.

Since January 1, 2012, off-air broadcast signals have been de-linked from the TV Max's Basic tier of pay-programming. The off-air signals are inserted into MATV systems that are owned and controlled by the owner of the MDU building, and not into TV Max's cable system. Since that date, *reception of the Signals has been available to any resident of an MDU building served by TV Max at no charge, and at the resident's option, regardless of whether the resident subscribes to any TV Max pay service.*

Thus, it is not correct that the Signals may only be received by "subscribers via set-top boxes" as asserted in the Fox Complaint.[14] First, the Signals may be received not only MDU residents who subscribe to TV Max's pay services, but by *any resident* of an MDU building served by TV Max -- regardless of whether or not the resident subscribes to any TV Max pay service. Second, because the off-air signals are received and distributed to MDU residents by means of the on-site MATV systems, reception of the Signals does not require a set-top box.

C. The antenna facilities used to receive the Signals are owned and controlled by the building owners.

Finally, as stated in TV Max's November 2011 letter to the owners of all MDU buildings served by the company, the MATV systems used to receive and distribute the Signals were and are being installed by TV Max at its sole expense and are owned and controlled by the building owner.

III. Conclusion

The facts as stated in Mr. Balun's Declaration do not support Fox's allegations that TV Max has willfully and repeatedly refused to comply with the Act and the Commission's rules relating to retransmission consent. Rather, those facts demonstrate a diligent, ongoing, good faith effort by TV Max to maintain competitive cable rates for its subscribers to escape an onerous retransmission consent regime by reconfiguring its signal reception and delivery systems at MDU buildings so as to qualify for the MATV exemption in accordance with the Commission's rules. To the extent that TV Max is out of compliance with applicable rules, that non-compliance is minor and TV Max's best efforts and limited resources are being committed to bringing the company into full compliance, to be achieved within 30

[14] Fox Complaint, p. 11.

days after filing of this Response. Meanwhile, good faith negotiations with Fox to resolve all remaining issues are being vigorously pursued by TV Max. For all of these reasons, the facts do not support Fox's claim of willful or repeated non-compliance so as to justify imposition of a forfeiture remedy, which would only succeed in dissipating the company's resources.

Respectfully submitted,

TV Max, Inc., d.b.a. Wavevision

By: Carl Kandutsch

Carl E. Kandutsch
Attorney at Law
2520 Avenue K, Ste. 700-760
Plano, Texas 75074
(207) 659-6247

Dated: May 1, 2012

ATTACHMENT 1

DECLARATION OF THOMAS BALUN

I, Thomas Balun, hereby state as follows:

1. I am CEO of TV Max, Inc. (dba Wavevision, referred to herein as "TV Max"). I submit this Declaration in connection with the Response of TV Max to Retransmission Consent Complaint and Petition for Order Requiring TV Max to Show Cause (the "Complaint") filed by Fox Television Holdings, Inc. ("Fox").

2. In June 2010, TV Max was acquired by a Broadband Ventures IV. TV Max holds a cable television franchise with the City of Houston, Texas, and serves about 10,000 subscribers in the Houston Texas Designated Market Area ("DMA"). TV Max is, to the best of my knowledge, unique among franchised cable operators in that all of its subscribers reside in multi-dwelling unit ("MDU") buildings. TV Max serves approximately 200 MDU buildings in the DMA pursuant to right-of-entry agreements with their owners.

3. At the time of the acquisition, TV Max was in poor condition financially and operationally. Consequently, the company's new management decided that in order to make the company profitable, while at the same time maintaining subscription rates at competitive levels, we needed to substantially reduce the costs of operation.

4. One component of reducible costs management identified were costs stemming from retransmission consent fees being demanded by broadcast networks, including Fox, for off-air programming. In order to reduce these costs rather than pass them on to our subscribers in the form of high rates, management formulated a plan to qualify for exemption from the retransmission consent regime according to Section 76.64(e) of the Commission's rules (47 C.F.R. § 76.64(e), relating to broadcast signals received by master antenna television ("MATV") facilities. TV Max was and is well-positioned to qualify for this exemption because its subscribers reside in MDU buildings.

5. TV Max moved to implement the MATV plan beginning in November 2011 as quickly and efficiently as possible. Implementation of the plan involved several components, including:

   (a) Notification of the owners of MDU buildings served by TV Max that TV Max would, at its sole expense, install master antennas on the rooftops of MDU buildings, which facilities would be owned and controlled by the owner of the MDU building. In November 2011, letters were sent to each owner informing the owner of this plan and seeking the owner's consent to the antenna installation. Attachment 2 is a photocopy of a sample letter sent to each owner of an MDU building served by TV Max. TV Max has been working diligently and in good faith to complete the installation of property-owned MATV systems at each MDU building served by TV Max. As of January 1, 2012, about 50% of the MDU buildings served by TV Max had been fully converted to MATV systems. Currently, about 50% of the MDU buildings have been fully converted to MATV systems, and upon information and belief, 100% of the MDU buildings will be fully converted within 30 days of today's date; and,

   (b) Elimination of off-air broadcast signals, including signals of Fox affiliates KTXH(TV) and KRIV(TV) (referred to as the "Signals"), from the Basic Tier offered at a monthly fee to TV Max subscribers. The Signals were fully de-linked from any tier of pay-television programming as of January 1, 2012 and since that date, reception of the

Signals has been available to any resident of an MDU building served by TV Max at no charge, and at the resident's option, regardless of whether the resident subscribes to any TV Max service. The availability of free off-air channels to MDU residents is announced on our company's website: www.wavevision.com

6. In its Complaint (page 11), Fox asserts that the Signals are made available "to its subscribers via set-top boxes" that integrate the signals into the cable channel line-up. Neither of these assertions is correct. The off-air signals are not inserted into TV Max's cable system; rather, they are inserted into the MATV systems owned by the owner of the MDU building. Residents of any of the MDU buildings served by TV Max may receive the Signals at no charge without a set-top-box, either by means of an MATV facility at the building or by means of a simple indoor digital antenna available from our company or from an electronics store.

7. TV Max is a small cable operator and our mission is to be a high-quality, low-cost internet and television provider. We value our customers in the Houston area and work hard to retain their loyalty in an extremely challenging competitive market. TV Max cannot afford to raise its cable rates due to the ever-increasing cost of obtaining retransmission consent from huge broadcast networks such as Fox – particularly when retransmission consent fees charged to smaller operators are significantly higher than the fees charged to our larger competitors such as Comcast. That is why we have diligently and in good faith devoted substantial resources to qualifying all of our MDU buildings for the MATV exemption according to the Commission's rules.

I declare under penalty of perjury that I have read the Response of TV Max to the Complaint filed by Fox, that the facts described in the Response and in this Declaration are true and correct to the best of my knowledge, information and belief, that the Response of TV Max is well grounded in fact, warranted under current law or good faith argument for the extension, modification or reversal of current law.

Executed on 4/30/2012

Thomas Balun
CEO, TV Max

ATTACHMENT 2

WAVEVISION
Looking Toward Tomorrow

IMPORTANT MESSAGE FROM WAVEVISION

Dear Manager,

We would like to inform you that Wavevision will be installing a small antenna on a south facing location in your complex within the next few weeks at no cost to you.

The installation of this antenna enables free access to local off air channels for your tenants within the subject complex. This means that these channels will be available within your complex even in the event that cable services are interrupted by storms and/or other conditions outside of our control.

The antenna is small, about 24" X 24" and because of its sleek and stealth construction will be hardly distinguishable. We will make every effort to install it in a non conspicuous location. The installation will be completed in a quality workmanship manor by our experienced installation team.

This is a free installation for you to allow local channels for your residents and it will remain in your complex as your property for your future use.

Please notify your local managers that our personnel will try to contact them, in person over the next week or so to coordinate the installation.

If you have any questions please don't hesitate to contact me.

Best regards,

Richard Gomez
Operations Manager
Wavevision

10300 Westoffice Drive, Suite 200 Houston, Texas (713) 587-1200

CERTIFICATE OF SERVICE

I certify that on this 1st day of May 2012, I caused the foregoing Response of TV Max to Complaint and Petition for Order Requiring TV Max, Inc. to Show Cause to be served by registered U.S. mail, overnight delivery, return receipt requested, except where email is indicated, on the following:

Antoinette Cook Bush, Esq.
Jared Sher, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William T. Lake*
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

P. Michele Ellison*
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey*
Deputy Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Nancy Murphy*
Associate Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary Beth Murphy*
Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Steven A. Broeckaert*
Senior Deputy Chief, Policy Division
Media Bureau

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

*via email

Carl Kandutsch

Carl E. Kandutsch

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	MB Docket No. 12-113
Retransmission Consent Complaint	)	CSR No. 8623-C
And Petition of Fox Television Holdings, Inc.	)	
	)	

To: Office of the Secretary
Attn: Media Bureau

RETRANSMISSION CONSENT COMPLAINT AND PETITION FOR ORDER REQUIRING TV MAX, INC. TO SHOW CAUSE WHY IT SHOULD NOT CEASE AND DESIST FROM VIOLATING SECTION 325(B) OF THE COMMUNICATIONS ACT

Fox Television Holdings, Inc. ("FOX"), by and through its undersigned counsel, hereby files this Complaint, pursuant to Section 76.7 of the Commission's rules,[1] against TV Max, Inc. (d/b/a Wavevision) ("TV Max") for TV Max's continuing and willful violation of Section 325(b) of the Communications Act of 1934 (the "Act") and Section 76.64 of the Commission's rules.[2] FOX hereby also petitions the Commission to issue an order compelling TV Max to show cause why it should not be required to immediately cease and desist from retransmitting the signals of television broadcast stations KTXH(TV) and KRIV(TV), Houston, Texas (the "Stations") in violation of the Act and the rules. TV Max does not have FOX's consent or authorization to retransmit the Stations, and it is not (as it claims to be) operating a master antenna television facility (nor is it otherwise exempt from the retransmission consent

[1] *See* 47 C.F.R. § 76.7

[2] *See* 47 U.S.C. § 325(b); 47 C.F.R. § 76.64.

regime). For all of these transgressions, and because TV Max has refused to negotiate in good faith with FOX as required by Section 76.65 of the Commission's rules,[3] FOX requests that the FCC initiate a forfeiture proceeding against TV Max pursuant to Section 503 of the Act and Section 1.80 of the rules.[4]

Statement of Facts

FOX is the parent of the licensee of the Stations, and TV Max operates one or more cable television systems in the Houston, Texas Designated Market Area (the "DMA"). FOX and TV Max entered into that certain "Fox Television Holdings Retransmission Consent Agreement," for a term running January 1, 2009 through December 31, 2011 (the "Agreement"), which, among other things, provided FOX's consent to TV Max's retransmission of the Stations on TV Max cable systems in the DMA.[5] The Agreement remained in force through December 31, 2011, at which time it expired in accordance with its terms.

FOX diligently and in good faith attempted to negotiate with TV Max prior to expiration of the Agreement.[6] Specifically, in August 2011, FOX made its initial phone calls to TV Max to begin conversations about extending the contract.[7] On September 7, 2011, FOX sent TV Max a written proposal with terms for TV Max's continued carriage of the Stations beyond

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[3] *See* 47 C.F.R § 76.65.

[4] *See* 47 U.S.C. § 503; 47 C.F.R. § 1.80.

[5] *See* Declaration of Joseph M. Di Scipio, Vice President, Fox Television Stations, Inc. (the "Di Scipio Declaration"), attached hereto as Attachment 1. FOX has elected retransmission consent for the Stations for the 2012-2014 election cycle. A copy of FOX's valid retransmission consent election for this cycle is attached as Exhibit A to the Di Scipio Declaration.

[6] *See* Declaration of Steven W. Hunt, Regional Vice President, Affiliate Sales and Marketing, Fox Cable Networks Group (the "Hunt Declaration"), attached hereto as Attachment 2.

[7] *See* Hunt Declaration.

the end of 2011.[8] Unfortunately, despite FOX's repeated attempts to contact TV Max by telephone, mail and email, TV Max failed to provide any substantive response.[9]

In fact, in clear violation of the Commission's good faith bargaining rules,[10] TV Max utterly refused to engage in negotiations, consistently neglecting to return phone calls and, on several occasions, breaking its promises that a response to FOX's proposal would be forthcoming. Steven Hunt, the Regional Vice President for Affiliate Sales and Marketing in charge of negotiating FOX's retransmission consent in the DMA, kept detailed records of his attempts to communicate with TV Max.[11] Given how hard FOX tried in good faith to resolve this matter prior to December 31, 2011, those details bear noting here:

- Aug. 22, 2011 – Mr. Hunt left a voicemail for Richard Gomez, TV Max's Vice President, Operations.
- Aug. 25 and 29, and Sept. 6, 2011 – Mr. Hunt left additional voicemails for Mr. Gomez.
- Sept. 7, 2011 – Mr. Hunt sent a letter, accompanied by a written retransmission consent proposal, asking Mr. Gomez to contact him,
- Sept. 9, 2011 – Mr. Gomez left a voicemail for Mr. Hunt, acknowledging receipt of prior messages and receipt of FOX's written proposal. Mr. Gomez promised that he would review and contact FOX the following week.
- Sept. 14, 2011 – Mr. Hunt left another voicemail for Mr. Gomez.
- Sept. 19, 2011 – Mr. Hunt reached Mr. Gomez by phone; Mr. Gomez said that he was not prepared to discuss FOX's proposal; Mr. Gomez asked to have a further call to discuss at 10 a.m. on Sept. 23, 2011.

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[8] *See id.*

[9] *See id.*

[10] *See* 47 C.F.R § 76.65.

[11] *See* Hunt Declaration.

- Sept. 23, 2011 – Mr. Gomez did not call at the agreed-upon specified time; Mr. Hunt left another voicemail for Mr. Gomez.

- Sept. 27 and 29, and Oct. 3, 2011 – Mr. Hunt left additional voicemails for Mr. Gomez.

- Oct. 11, 2011 – Mr. Hunt reached Mr. Gomez by phone; at Mr. Gomez's request, Mr. Hunt re-sent FOX's proposal by email, at which point Mr. Gomez promised to review and call back by the end of the week.

- Oct. 14 and 19, 2011 – Mr. Hunt left additional voicemails for Mr. Gomez.

- Oct. 24, 2011 – Mr. Hunt again sent FOX's proposal to Mr. Gomez by email, accompanied by a request for a meeting.

- Oct. 31 and Nov. 2, 4, and 8, 2011 –Mr. Hunt left additional voicemails for Mr. Gomez.

- Nov. 9, 2011 – Mr. Hunt sent a letter to Mr. Gomez, accompanied by another copy of FOX's proposal; the letter requested a reply by Nov. 16, 2011.

- Nov. 17, 2011 – Mr. Hunt left another voicemail for Mr. Gomez, specifically warning that in the absence of an agreement, TV Max's retransmission consent authority would expire on Dec. 31, 2011.

- Nov. 17, 2011 – Mr. Gomez left a voicemail for Mr. Hunt, claiming that Mr. Gomez had passed along FOX's written proposal to the President and CEO of TV Max, who would contact Mr. Hunt shortly.

- Nov. 17, 2011 – Mr. Hunt attempted to return Mr. Gomez's call, but had to leave another voicemail; in his message, Mr. Hunt asked for contact information for TV Max's President and CEO.

- Nov. 28, 2011 – Mr. Hunt left Mr. Gomez another voicemail and sent him another email, in each case requesting contact information for TV Max's President and CEO.

- Dec. 1, 2011 – Mr. Hunt sent Mr. Gomez another letter, again accompanied by a copy of FOX's proposal, and requested a meeting to discuss.

- Dec. 6, 9 and 13, 2011 – Mr. Hunt left additional voicemails for Mr. Gomez, specifically reminding him of the Dec. 31, 2011 expiration of the Agreement.

- Dec. 14, 2011 – Mr. Hunt reached Mr. Gomez's assistant by phone; she acknowledged receipt of Mr. Hunt's voicemail of Dec. 13, 2011 and told Mr.

Hunt that she personally gave the message to Mr. Gomez. When Mr. Hunt asked her how to reach Mr. Gomez, she responded: "good luck."[12]

Finally, on December 20, 2011, FOX sent TV Max a letter reminding it that the Agreement was set to expire on December 31, 2011, and alerting it that carriage of the Stations after the expiration of the Agreement would constitute a violation of the Communications Act and the FCC's rules (as well as copyright infringement).[13] Notwithstanding this letter, TV Max failed to cease carrying the Stations on its cable systems upon expiration of the Agreement, and TV Max has continuously carried the Stations on its cable systems without FOX's authorization since January 1, 2012.[14] FOX reiterated to TV Max in a subsequent letter, dated March 13, 2012, that the cable operator's continuing carriage of the Stations without consent violates Federal law.[15] FOX demanded that TV Max cease and desist from its unauthorized retransmissions.[16] Still TV Max continues to engage in retransmitting the Stations' signals without FOX's authorization or consent.

TV Max's carriage of the Stations on its cable systems, in direct contravention of FOX's instructions, constitutes a brazen, willful and ongoing violation of Section 325(b) of the Act and Section 76.64 of the Commission's rules.

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[12] *See id.*

[13] *See* Letter from Joseph M. Di Scipio, Vice President, Fox Television Stations, Inc., to Richard Gomez, Vice President Operations, TV Max, Inc. (dated Dec. 20, 2011), a copy of which is attached hereto as Attachment 3. Mr. Hunt followed up with additional voicemails to Mr. Gomez on Dec. 27 and 28, 2011. *See* Hunt Declaration.

[14] *See* Di Scipio Declaration.

[15] *See* Letter from Catherine Robb, counsel to FOX, to Richard Gomez, Vice President Operations, TV Max, Inc. (dated Mar. 13, 2012), a copy of which is attached hereto as Attachment 4.

[16] *See id.*

Argument

Section 325(b) of the Act provides that, with respect to stations that have elected retransmission consent, no cable system or other multichannel video programming distributor ("MVPD") "shall retransmit the signal of a broadcasting station" without the express authority of the station.[17] Section 76.64 of the Commission's rules codifies this statutory mandate, and states that any retransmission consent agreement must be in writing and "specify the extent of the consent being granted."[18] Section 76.65 of the rules makes clear that "broadcast stations and [MVPDs] shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325 . . . ."[19] Because TV Max refused to negotiate with FOX and continues to retransmit the signals of the Stations without FOX's express authority – in fact in contravention of FOX's clear and unequivocal request that it stop retransmitting the signals – TV Max is willfully refusing to comply with the Act and the Commission's rules. FOX therefore respectfully requests that the Commission find TV Max in violation of the Act and the rules and move expeditiously to direct TV Max to show cause why a cease and desist order should not be issued. FOX also urges the Commission to call for

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[17] 47 U.S.C. § 325(b). Section 325(b) sets forth certain limited exceptions, none of which are applicable here.

[18] 47 C.F.R. § 76.64(a), (j).

[19] 47 C.F.R. § 76.65.

expedited hearing proceedings on the show cause order and, in the meantime, to order TV Max to terminate its retransmission of the Stations' signals.[20]

The legislative history of Section 325(b) of the Act makes clear that Congress designed the retransmission consent regime to "allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means."[21] Congress enacted the law to ensure the continued viability of over-the-air television and to protect the public interest benefits of broadcast television.[22] Congress concluded that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals" and public policy should not support a system "under which broadcasters in effect subsidize the establishment of their chief competitors."[23] Congress further explained that "[c]able operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should

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[20] The Commission has authority to issue an order directing TV Max to terminate its carriage of the Stations' signals even in the absence of a show cause order. If it does so, and if TV Max immediately were to come into compliance with this directive, the Commission would not need to proceed to issue a show cause order. *See In re Complaint of North Texas Broadcasting Corp.*, 10 FCC Rcd 8343, 8344 (1995) (holding that "carriage of the signal of [a broadcast station] without its retransmission consent having been obtain[ed] is in violation" of the Act and ordering cable system to "inform the Commission that it has ceased carriage of the signal . . . or received the necessary retransmission consent" within 30 days); *see also In re Board of Water, Light & Sinking Fund Commissioners of the City of Dalton, Georgia*, 19 FCC Rcd 19534, 19538 (2004) ("[W]e do not believe that an Order to Show Cause is appropriate at this juncture. We have no reason to believe that the [cable operator] will not" cease carriage of the station in question "upon release of this order").

[21] *See* S. Rep. No. 102-92 (1991), at 34.

[22] *See id.* at 35 ("The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.").

[23] *Id.*

not be treated differently."[24] Each day that a cable company such as TV Max retransmits FOX's signals without permission, it damages FOX by effectively forcing the Stations to "subsidize . . . their chief competitors."[25] Accordingly, FOX requests that the Commission respond swiftly to TV Max's willful and continuing retransmission violations and thus maintain the competitive balance Congress sought to establish through the retransmission consent rules.

To the extent that TV Max erroneously asserted in a March 2012 letter to FOX's local Texas counsel that the "retransmission consent requirements are not applicable to [TV Max],"[26] the Commission easily can dispose of this spurious argument. TV Max now appears to claim that it is not required to obtain FOX's consent to retransmit the Stations because TV Max purportedly is "in compliance with 47 CFR 76.64(e)."[27] Curiously, TV Max failed to raise this argument prior to December 31, 2011, when FOX diligently and in good faith tried to negotiate an extension of the Agreement. Regardless of the odd timing, TV Max's argument makes no sense.

First, TV Max and FOX were parties to a *retransmission consent agreement* for a term running from January 1, 2009 through December 31, 2011. As part of the Agreement, FOX explicitly granted, and TV Max explicitly accepted, retransmission consent for carriage of the Stations. In exchange, among other things, TV Max provided to FOX commercial advertising "spots" to be telecast during available time on TV Max's cable systems. If TV Max were not

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[24] *Id.*

[25] *Id.*

[26] Letter from Richard Gomez, Vice President and General Manager, TV Max, Inc., to Catherine L. Robb, counsel to FOX (dated Mar. 16, 2012), a copy of which is attached hereto as Attachment 5.

[27] *See id.*

subject to the retransmission consent requirements, as it now erroneously claims, there would be no logical explanation for it to have signed the Agreement and provided consideration to FOX for the previous three years.[28] In any event, there can be no dispute that TV Max is a cable operator that makes available for purchase, by subscribers or customers, multiple channels of video programming – the very definition of an MVPD subject to Section 325.[29]

Second, TV Max does **not** operate a master antenna system exempt from obtaining retransmission consent under 47 C.F.R. § 76.64(e).[30] This rule states that the:

> retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities . . . in conjunction with the provision of service by [an MVPD] *provided that* the [MVPD] makes reception of such signals available *without charge* and *at the subscribers option* and *provided further* that the antenna facility used for the reception of such signals is either *owned by the subscriber or the building owner*; or under the *control and available for purchase by the subscriber or the building owner* upon termination of service.[31]

This rule is not applicable to TV Max. FOX understands that TV Max receives the signals of FOX's Stations at a central head-end in the DMA, from where TV Max's fiber ring retransmits

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[28] FOX does not believe, and TV Max has not asserted, that there has been any change in circumstances since January 1, 2012 that conceivably could result in TV Max suddenly becoming exempt from the retransmission consent requirements.

[29] *See* 47 U.S.C. § 522(13); *see also* List of Registered Texas Cable Communities, *available at* http://www.fcc.gov/mb/engineering/list/TX.xls (last visited Apr. 11, 2012) (showing TV Max systems registered as TX1777, TX7786, TX1795, TX1986, TX2219-22, TX2228 and TX2255-56 in Harris County, Texas).

[30] *See* 47 C.F.R. § 76.64(e); *see also In re Implementation of the Cable Act*, 8 FCC Rcd 2965, 2997 (1993) ("*1993 Order*") (*on reconsideration at In re Implementation of the Cable Television Consumer Protection and Competition Act*, 9 FCC Rcd 6723 (1994)).

[31] 47 C.F.R. § 76.64(e) (emphasis supplied).

those signals to various apartment buildings dispersed throughout the DMA.[32] Thus, TV Max is not operating a master antenna facility at all.

Furthermore, inasmuch as TV Max receives the Stations' signals at a central head-end controlled exclusively by TV Max, it cannot possibly be the case that any subscriber (or apartment building owner) "owns" or "controls" the "antenna facility used for the reception of such signals," nor can an antenna at a TV Max head-end be "available for purchase by" any subscriber or building owner upon termination of service.[33] FOX also understands that TV Max does not offer its subscribers in the DMA an option not to receive the Stations' signals, nor has it reduced the subscription fees paid by its retail customers since January 1, 2012, each as required by Section 76.64(e).[34] Given that TV Max indisputably was carrying the Stations pursuant to the Agreement between 2009 and 2011, and because it did not reduce its retail rates upon expiration of the Agreement, TV Max cannot now rationally claim that it is now delivering the Stations' signals to subscribers "without charge" as required by Section 76.64(e).[35]

In any event, the narrow exemption contemplated by Section 76.64(e) of the rules was intended simply to ensure that households could continue to receive broadcast signals legitimately obtained over-the-air, whether via an individual antenna or in cases where the off-air

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[32] *See* Di Scipio Declaration; *see also* About Wavevision, http://www.wavevision.com/houston/about-wavevision (last visited Apr. 11, 2012) ("The all new Houston-based Wavevision offers you highly affordable cable and internet through our fiber optic lines").

[33] 47 C.F.R. § 76.64(e). The Commission imposed this requirement to ensure that a "multichannel distributor" would be "unable to terminate or otherwise limit the availability of local broadcast signals to individual residents" following termination of cable service. *1993 Order*, 8 FCC Rcd at 2998.

[34] 47 C.F.R. § 76.64(e); *see also* Di Scipio Declaration.

[35] *Id.*