

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
TVMax, Inc., d/b/a Wavevision)	
)	MB Docket No. 12-181
Enforcement Complaint Concerning)	CSR-8669-C
KXLN-DT, Rosenberg, Texas, and)	
KFTH-DT, Alvin, Texas)	
)	

To: The Secretary's Office
Attn: The Media Bureau

REPLY TO TVMAX'S ANSWER TO ENFORCEMENT COMPLAINT

Univision Communications, Inc. ("Univision"), the parent company of the licensees of the above-captioned commercial television broadcast stations, files this Reply to TVMax's Answer to the Enforcement Complaint brought by Univision against TVMax, Inc., d/b/a/ Wavevision ("TVMax"), pursuant to Section 76.7 of the Commission's rules.¹ TVMax's Answer admits that TVMax was in continuous violation of the retransmission consent rules for more than six months with respect to at least 19 of the buildings TVMax serves. Since at least January 1, 2012, TVMax has retransmitted the signals of KXLN-DT, Rosenberg, Texas, and KFTH-DT, Alvin, Texas (the "Stations"), without Univision's consent and without any other legal authorization. Moreover, based on information that TVMax provided subsequent to its Answer, it also appears unlikely that TV Max can meet the requirements for exemption from the retransmission consent requirement under Section 76.64(e) for *any* of the buildings it serves. Accordingly, the Commission should issue an Order compelling TVMax to cease its illegal

¹ 47 C.F.R. § 76.7.

retransmissions immediately and imposing such sanctions as the Commission deems appropriate in light of TVMax's willful, repeated, and continuing violations of the law.

I. TVMax concedes was in continuous violation of the retransmission consent rules for more than six months.

Univision entered into a retransmission consent agreement with TVMax, effective as of January 1, 2009, which granted consent for TVMax to retransmit the Stations' signals over TVMax's cable systems during the term of the agreement, subject to the terms and conditions of the agreement.² Univision terminated the agreement in December 2011 due to TVMax's failure to pay the defined monthly fees.³ In any case, the agreement was scheduled to expire on December 31, 2011.⁴ No new agreement has granted TVMax consent to carry the Stations' signals during the 2012-2014 retransmission consent election cycle.⁵

TVMax admits that it continued to carry the Stations' signals on and after January 1, 2012, even though it lacked Univision's consent.⁶ TVMax asserts that it decided in November 2011 to install MATV systems at all the multi-dwelling unit ("MDU") buildings served by TVMax, in an effort "to qualify for exemption from the retransmission consent regime under Section 76.64(e) of the Commission's rules."⁷ That exemption applies only if:

² Enforcement Complaint of Univision Communications, Inc., MB Docket No. 12-181, at 2 (filed June 21, 2012) ("Complaint").

³ *Id.* at 3.

⁴ *Id.*

⁵ Complaint at 3.

⁶ Answer of TVMax to Enforcement Complaint of Univision Communications, Inc., MB Docket No. 12-181, at 6 (filed July 19, 2012) ("Answer").

⁷ Answer at 2 (citing 47 C.F.R. § 76.64(e)).

1. Broadcast signals are received by a master antenna television facility or by direct over-the-air reception in conjunction with the provision of service by an MVPD;
2. The MVPD makes reception of the broadcast signals available without charge and at the subscribers' option; *and*
3. The subscriber or building owner owns the antenna receiving the broadcast signals (or the subscriber or building owner controls the antenna and has the right to purchase it upon termination of service).⁸

TVMMax concedes that, although it “hoped and expected to convert all MDU buildings to MATV systems by the time the Univision retransmission consent agreement expired on December 31, 2011,” no more than half of the buildings it served had operational MATV systems as of January 1, 2012.⁹ Indeed, TVMax admits that as of the date of its Answer — July 19, 2012 — at least 19 buildings “have not yet been equipped with MATV systems.”¹⁰ There is no dispute that buildings not served by MATV systems do not qualify for the exemption under Section 76.64(e).¹¹ Nor is there any exception in the retransmission consent rules allowing cable systems to retransmit broadcast signals without consent while the cable system is in the process of converting to an MATV system, and TVMax cites no such exception. Cable operators may not take advantage of the exception under § 76.64(e) until they satisfy *all* of that provision’s

⁸ 47 C.F.R. § 76.64(e).

⁹ Answer at 2.

¹⁰ Answer at 3. TVMax stated that “[f]ifteen of the properties refused to allow installation of MA TV systems, and TV Max has been unable to contact the owners of 4 properties concerning MA TV installations.” *Id.*

¹¹ Answer at 8 (admitting that TVMax “failed to fully qualify for the MATV exemption” at some of its buildings).

requirements. TVMax admits that it did not satisfy all the exception's requirements as of January 1, 2012, with respect to at least half of its buildings. TVMax nonetheless continued to retransmit the Stations' signals to all of its buildings. Because TVMax did not have Univision's consent, this retransmission is an unambiguous violation of the rules.

In response to a demand conveyed by Commission staff in a teleconference on July 25, 2012, TVMax now asserts that, as of July 26, 2012, "all MDU buildings served by TV Max have been equipped with MATV systems that are the property of the building owner."¹² TVMax does not offer any documentation to support this claim, nor does it explain how it resolved the outstanding difficulties raised by its Answer in the intervening week.

TVMax also attempts to confuse the issue by criticizing the way broadcasters seek compensation for their programming and alleging that broadcasters have demanded unreasonable retransmission consent fees.¹³ However, the Commission has been clear that such arguments are irrelevant this type of proceeding. "[A]n increase [in retransmission consent fees] does not justify an MVPD's retransmission of a broadcasting station's signal without the originating station's express authority. ... We emphasize that the cable operator has discretion to decide whether to enter into a retransmission consent agreement, but in the absence of such an agreement, the Act and the Commission's rules prohibit retransmission of the station's signal."¹⁴ Here, as in the *Bailey Cable* decision, TVMax's desire to minimize the retransmission consent fees it pays does

¹² See E-mail from Carl Kandutsch, counsel for TVMax, to Diana Sokolow, FCC Media Bureau, Policy Division, MB Docket Nos. 12-113 and 12-181 (sent to all parties July 26, 2012) ("July 26 TVMax E-mail").

¹³ Answer at 4-5.

¹⁴ See *Bailey Cable TV Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2631, 2633-34 (MB 2012).

not justify the retransmission of the Stations' signals without Univision's consent or any other legal authority.

II. TVMax willfully and repeatedly violated the Commission's rules.

TVMax characterizes its continuous rule violations as mere "technical non-compliance" as a result of unanticipated "practical difficulties" TVMax encountered in the course of its "best good faith efforts" to convert its buildings to MATV systems.¹⁵ The facts, however, show that TVMax's violations were blatant and willful, and carried out with anything but "good faith." A "willful" violation under the Communications Act consists of "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁶ Moreover, the Commission may assess forfeitures for violations that are merely repeated, even if not willful.¹⁷ "Repeated" means that the act was committed or omitted more than once or lasted more than one day.¹⁸

TVMax's violations are both willful and repeated. TVMax was aware that it had no legal authorization to retransmit the signals of Univision's stations without either (1) Univision's consent, or (2) authorization under a relevant exception. TVMax was aware as of January 1, 2012, that it did not have Univision's consent to retransmit the Stations' signals.¹⁹ TVMax was aware as of that date that at least half of the buildings its system served did not

¹⁵ Answer at 6.

¹⁶ 47 U.S.C. § 312(f)(1); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (applying same definition to forfeitures).

¹⁷ *See*, 47 C.F.R. § 1.80(a)(2); *Bailey Cable*, 27 FCC Rcd at 2633.

¹⁸ *Bailey Cable*, 27 FCC Rcd at 2633; 47 U.S.C. § 312(f)(2).

¹⁹ Answer at 6 (acknowledging retransmission consent agreement with Univision had expired as of January 1, 2012).

qualify for the MATV exception or any other exception.²⁰ TVMax nonetheless consciously and deliberately chose to continue retransmitting the Stations' signals without any legal authorization, and has done so continuously since at least January 1, 2012. Moreover, TVMax was aware that, as of March 16, 2012, a significant number of its buildings still had not satisfied the requirements for the MATV exception.²¹ TVMax nonetheless falsely represented to Univision that it was in "full compliance with the requirements of" the MATV exception.²² Contrary to the assertion in TVMax's Answer, this behavior further demonstrates that TVMax acted in "willful disregard of the law."²³

III. Even TVMax's allegedly converted systems do not satisfy the MATV exception.

Under the MATV exception, retransmission consent is not required for "broadcast signals *received by* master antenna television facilities or by direct over-the-air reception in conjunction with [MVPD service] *provided that ... reception of such signals [is] 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 their control an available for purchase.²⁴ The rule is clear that the exception only protects signals actually received by an MATV system and only applies if the signal received by the MATV antenna is the *same signal* made available without charge to subscribers. The exception does *not* protect signals transmitted over a fiber ring, even if the customer also has access to an

²⁰ *Id.*

²¹ Answer at 6 (stating that MATV systems had not been installed at 19 buildings served by TVMax as of June 30, 2012).

²² Letter from Richard Gomez, Vice President and General Manager, TVMax, to Jason Eanes, Regional Director, Univision (dated March 16, 2012), attached as Exhibit 4 to Univision's Enforcement Complaint.

²³ *See* Answer at 8.

²⁴ 47 C.F.R. § 76.64(e) (emphasis added).

MATV or over-the-air version of the signal. It also is not sufficient for a cable operator to show that it received the initial signal through an antenna, if the operator then proceeds to retransmit the signal to subscribers.²⁵ All the requirements of the exception must be satisfied.

Here, TVMax states that many subscribers in converted buildings do *not* receive the same signal captured by the MATV antenna. Instead, TVMax offers customers the option of receiving “an analog duplication of the off-air signal that has been inserted into the MATV system for delivery to the subscriber's television set.” In this situation, TVMax is processing and retransmitting the broadcast signals without authorization. Even more blatantly, TVMax admits in its response to the Commission staff that broadcast signals continue to be delivered to building residents using TVMax’s fiber ring.²⁶ This alone constitutes a retransmission of the Stations’ signals that plainly falls outside the MATV exception.

CONCLUSION

TVMax has been retransmitting the Stations’ signals without Univision’s consent or any other legal authorization since at least January 1, 2012. TVMax admits it was in continuous violation of the Communications Act and the Commission’s rules for more than six months with respect to at least some of the buildings served by TVMax’s system. Moreover, given TVMax’s demonstrated history of willful disregard for the Commission’s rules, Univision urges the Commission to carefully scrutinize TVMax’s claim to exemption with respect to buildings it allegedly has converted to MATV service. This claim is especially dubious given

²⁵ See *Bailey Cable*, 27 FCC Rcd at 2633-34 (“We also find irrelevant to this matter Bailey’s statement that it receives the signal ‘free over the air to antenna receivers.’”).

²⁶ See July 26 TVMax E-mail.

TVMax's admission that (1) it continues to retransmit the Stations' signals through its fiber ring, and (2) TVMax technicians must connect even non-subscribing residents to the MATV system.²⁷

The Commission therefore should order TVMax to cease its illegal retransmission of the Stations' signals immediately. Univision further asks the Commission to impose such sanctions on TVMax as it deems appropriate in light of TVMax's willful, repeated, and continuing violations of the Communications Act and the Commission's rules.

Respectfully submitted,

UNIVISION COMMUNICATIONS, INC.

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July 30, 2012

²⁷ See July 26 TVMax E-mail.

DECLARATION OF Jason Eanes

I, Jason Eanes, hereby declare under penalty of perjury that:

1. I am Jason Eanes at Univision Communications, Inc. ("Univision"), which is the parent company of the licensees of KXLN-DT, Rosenberg, Texas, and KFTH-DT, Alvin, Texas (the "Stations").

2. I have read the foregoing "Enforcement Complaint" together with this Declaration. To the best of my knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact, it is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.

Executed on July 30, 2012



CERTIFICATE OF SERVICE

I, Michael Beder, an associate with the law firm of Covington & Burling LLP, certify that on this 30th day of July, 2012, I caused copies of the foregoing "Enforcement Complaint" to be served by e-mail (or by certified U.S. mail, return receipt requested, where indicated) on the following:

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