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August 27, 2012

By Hand Delivery

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

FILED/ACCEPTED

AUG 27 2012

**Federal Communications Commission
Office of the Secretary**

Attn: Media Bureau

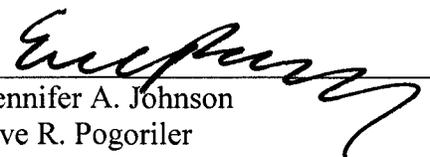
Re: Enforcement Complaint Concerning KPRC-TV, Houston, Texas,
MB Docket No. 12-222, CSR-8694-C

Dear Ms. Dortch:

Enclosed, please find an original and one copy of the Reply of Post-Newsweek Stations, Houston, Inc. (Post-Newsweek) to the Answer of TVMax, Inc., d/b/a Wavevision, in the above-captioned proceeding. Because the above-referenced docket is not yet available in the Commission's Electronic Comment Filing System, Post-Newsweek is filing this document electronically in the Cable Special Relief holding docket, MB Docket No. 12-1, as well as by hand. Courtesy copies of this filing also will be distributed by e-mail to counsel for TVMax and to Media Bureau staff.

Respectfully submitted,

POST-NEWSWEEK STATIONS, HOUSTON, INC.

By: 

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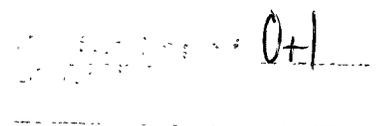
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Enclosure



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

In the Matter of)
)
TVMax, Inc., d/b/a Wavevision)
)
Enforcement Complaint Concerning)
KPRC-TV, Houston, Texas)
)
)

MB Docket No. 12-222
CSR-8694-C FILED/ACCEPTED

AUG 27 2012

Federal Communications Commission
Office of the Secretary

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

REPLY TO ANSWER OF TVMAX TO ENFORCEMENT COMPLAINT

Post-Newsweek Stations, Houston, Inc. ("Post-Newsweek"), licensee of the above-captioned commercial television broadcast station ("KPRC" or "the Station"), files this Reply to TVMax's Answer regarding Post-Newsweek's Enforcement Complaint against TVMax, Inc., d/b/a/ Wavevision ("TVMax"), pursuant to Section 76.7 of the Commission's rules.¹ In its Answer, TVMax concedes that it was in blatant and continuing violation of the Communications Act and the Commission's retransmission consent rules for nearly eight months.² TVMax spends an inordinate portion of its Answer challenging the wisdom of the retransmission consent requirements, but the Commission has made clear that such arguments have no place in these proceedings and provide no justification for disregarding federal law. Moreover, despite TVMax's assertions to the contrary, TVMax continues to retransmit KPRC without Post-Newsweek's consent or any other legal authorization.

¹ 47 C.F.R. § 76.7.

² See Answer at 9 (conceding that TVMax did not qualify for the exemption that it claims on all of the buildings that it serves until late July 2012).

The Commission should not heed TVMax's argument that sanctions would be unwarranted based on TVMax's asserted "good faith." To the contrary, TVMax deliberately and repeatedly chose to violate federal law for months on end, and it continues to do so. Its conduct in this matter — and especially its lack of candor in its dealings with affected broadcasters — demonstrates anything but "good faith." Accordingly, the Commission should order TVMax to cease its illegal retransmission of KPRC's signal immediately and impose such sanctions as the Commission deems appropriate in light of TVMax's willful, repeated, and continuing violations of the law.

I. TVMAX ADMITS TO BEING IN CONTINUOUS VIOLATION OF FEDERAL LAW FOR NEARLY EIGHT MONTHS.

A cable system's retransmission of a television station's signal without the station's consent, when the station has elected retransmission consent, violates federal law and the Commission's rules and is grounds for imposition of a forfeiture and other appropriate Commission intervention.³ TVMax does not dispute that Post-Newsweek's consent to TVMax's retransmission of KPRC's signal expired on December 31, 2011.⁴ Nonetheless, TVMax has continued to retransmit the Station's signal without KPRC's consent.⁵ TVMax contends it now is entitled to engage in this retransmission pursuant to the exemption for master antenna television (MATV) systems under the Commission's rules.⁶ Yet TVMax concedes that it "failed to fully qualify for the MATV exemption at a small number of [multi-dwelling unit] buildings

³ See 47 U.S.C. § 325(b); 47 C.F.R. § 76.64(a); *Bailey Cable TV Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2631, 2633 (MB 2012) (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005, ¶ 175 (1993)) ("*Bailey Cable*").

⁴ Answer at 2-3.

⁵ Answer at 3, 6 (acknowledging that TVMax continues to distribute broadcast signals).

⁶ Answer at 6 (citing 47 C.F.R. § 76.64(e)).

between January 1 and July 26, 2012.”⁷ In fact, as of January 1, 2012, TVMax had not installed MATV systems at about half of its buildings.⁸ TVMax does not claim to have come into compliance with the retransmission consent rules until July 26, 2012.⁹ Thus, even if TVMax’s converted systems qualified for the MATV exemption — and they do not — TVMax admits to retransmitting KPRC’s signal illegally for nearly eight months.

TVMax attempts to justify its illegal activity by criticizing the retransmission consent fees broadcasters charge for their admittedly valuable, “‘must have’ programming content.”¹⁰ However, the Commission has been clear that such arguments do not excuse violation of the retransmission consent regime established by Congress. “[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.”¹¹ In the absence of a retransmission consent agreement with Post-Newsweek, TVMax was required to stop retransmitting KPRC’s signal to TVMax’s subscribers.

Congress enacted the retransmission consent regime after concluding that “[t]here is a substantial governmental interest in promoting the continued availability of ... free television

⁷ Answer at 9.

⁸ Answer at 2-3 (admitting that “when the Post-Newsweek retransmission consent agreement expired, TV Max had only completed MATV installations on about 50% of the 245 MDU buildings served”).

⁹ Answer at 3 (stating that “as of July 26, 2012, master antennas have been fully installed and are currently operational” at all buildings served by TVMax).

¹⁰ See Answer at 4-5, 9.

¹¹ See *Bailey Cable* 27 FCC Rcd at 2633-34.

programming,” that cable systems “obtain great benefits from local broadcast signals,” but that cable systems’ previous ability to retransmit broadcast signals for free without broadcasters’ consent “resulted in an effective subsidy of the development of cable systems by local broadcasters” and caused an inappropriate “competitive imbalance” between those industries.¹²

TVMax’s evident disagreement with Congress’ judgment does not empower TVMax to disregard federal law.

II. TVMAX REMAINS IN VIOLATION OF FEDERAL LAW TODAY BECAUSE IT CONTINUES TO ENGAGE IN NON-EXEMPT RETRANSMISSIONS OF KPRC’S SIGNAL TO WHICH POST-NEWSWEEK HAS NOT CONSENTED.

TVMax asserts that all of its buildings now qualify for the retransmission consent exemption for MATV systems set forth at Section 76.64(e) of the Commission’s rules. However, TVMax’s description of its operations demonstrates that TVMax continues to violate the retransmission consent rules. An MVPD such as TVMax cannot claim eligibility for the exemption unless it satisfies *all* of the rule’s conditions. TVMax’s systems do not.

TVMax continues to retransmit signals not received by master antennas. TVMax states that residents in its buildings can receive either “the off-air signal directly through the building’s MATV facilities” or “an analog duplication of the off-air signal that has been inserted into the on-site MATV system for delivery to the subscriber’s television set.”¹³ Moreover, in response to a staff interrogatory issued in parallel proceedings, TVMax admits that even in its

¹² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12), (19), 106 Stat. 1460.

¹³ Answer at 6.

converted buildings, “[b]roadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems.”¹⁴

Only signals actually received by a master antenna facility may be redistributed without consent pursuant to the MATV exemption. The rule specifies that 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 and available for purchase.¹⁵ The exception is designed simply to protect customers who receive broadcast signals in a way that is analogous to that of “an individual purchasing and installing a roof top antenna to receive broadcast signals.”¹⁶ Thus, this exemption does not allow TVMax to continue distributing the signal through its fiber ring or to create and distribute a duplicate signal.

TVMax analogizes its combined MATV-cable service to the type of combined MATV-SMATV service the Commission found to be exempt from the retransmission consent requirement when the Commission adopted the MATV exemption.¹⁷ TVMax omits the Commission’s accompanying warning that “SMATV systems are, of course, multichannel distributors under the Act” and “must, therefore ... obtain retransmission consent for any local or distant television broadcast signals (other than superstations) that they deliver via satellite or

¹⁴ 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 (filed July 27, 2012).

¹⁵ 47 C.F.R. § 76.64(e).

¹⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6740 (1994).

¹⁷ Answer at 8-9.

microwave channels.”¹⁸ In other words, only the signals captured by a combined system’s master antenna facilities may be distributed under the MATV exemption; signals delivered by other means remain subject to the retransmission consent requirement. The fact that one part of TVMax’s system might qualify for an exemption does not give TVMax the additional right to engage in parallel, non-exempt forms of retransmission.¹⁹

In sum, the record shows that TVMax continues to engage in the non-exempt retransmission of KPRC’s signal without the Station’s consent.

III. A FORFEITURE IS APPROPRIATE AND NECESSARY, GIVEN TVMAX’S WILLFUL AND REPEATED VIOLATION OF THE RETRANSMISSION CONSENT RULES AND ITS DEMONSTRATED LACK OF GOOD FAITH.

Contrary to TVMax’s assertion, the evidence in this proceeding is more than sufficient to “justify the imposition of punitive sanctions.”²⁰ Forfeitures are appropriate in response to willful and repeated violations. 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.²¹ The Commission also may assess forfeitures for violations that

¹⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 et al.*, Report and Order, 8 FCC Rcd 2965, 2998 (1993).

¹⁹ In addition, TVMax has not shown that it has stopped charging for access to local broadcast signals, as required by the MATV exemption. TVMax states that, starting in November 2011, broadcast signals “were de-linked from any tier of pay-television programming, and since then no TV Max subscriber has [been] billed for any off-air broadcast programming.” Answer at 3. However, TVMax does not indicate whether it reduced its subscriber rates after “de-linking” broadcast signals from its pay-TV service. Given TVMax’s claim that it had been forced to pass on “exorbitant” retransmission consent fees to subscribers, *see* Answer at 5, 7, one would expect TVMax to have reduced its rates if it truly had stopped billing subscribers “for any off-air broadcast programming.” TVMax’s submissions do not address this question, and thus do not establish that subscribers are receiving KPRC’s signal “without charge.”

²⁰ Answer at 9.

²¹ 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).

are merely repeated, even if not willful.²² “Repeated” means that the act was committed or omitted more than once or lasted more than one day.²³

TVMax’s violations are both willful and repeated. TVMax was aware that it had no legal authorization to retransmit KPRC’s signal without either the Station’s consent or authorization under a relevant exception. TVMax was aware as of January 1, 2012, that it did not have the Station’s consent. TVMax also was aware as of that date that at least half of the buildings its system served did not qualify for the MATV exemption or any other exception. At that point, TVMax had two legal alternatives: (1) obtain KPRC’s consent for continued retransmission, or (2) stop carrying KPRC’s signal until and unless its system qualified for the MATV exemption (or another relevant exception). TVMax chose neither legal option. Instead, TVMax consciously and deliberately chose to continue retransmitting KPRC’s signal without any legal authorization, and has done so continuously since January 1, 2012. That choice perfectly captures TVMax’s “willful disregard of the law” and “lack of good faith efforts to comply with applicable laws and regulations,” TVMax’s protestations to the contrary notwithstanding.²⁴

TVMax’s supposed good faith is further belied by its lack of candor with affected broadcasters. TVMax was aware that, between January 1 and July 26, 2012, TVMax was retransmitting KPRC’s signal to buildings that did not satisfy the requirements for the MATV exception.²⁵ TVMax nonetheless falsely stated in a March 16 letter to Post-Newsweek that

²² See 47 C.F.R. § 1.80(a)(2); *Bailey Cable*, 27 FCC Rcd at 2633.

²³ *Bailey Cable*, 27 FCC Rcd at 2633; 47 U.S.C. § 312(f)(2).

²⁴ See Answer at 3, 9.

²⁵ See Answer at 9.

TVMMax was in “full compliance with the requirements of” the MATV exception.²⁶ TVMMax made similar false assurances to other broadcasters.²⁷ If anything, such conduct calls for an upward adjustment to the Commission’s base forfeiture, rather than any degree of leniency.²⁸

CONCLUSION

TVMMax admits to retransmitting KPRC’s signal without any legal authority for nearly eight months. Moreover, TVMMax’s description of its current operations unambiguously demonstrates that TVMMax continues to engage in the non-exempt retransmission of KPRC’s signal without the Station’s consent. No matter how much TVMMax may disagree with federal law, such blatant, willful, and continuing violations of the Communications Act and the Commission’s rules cannot be tolerated. Accordingly, Post-Newsweek asks the Commission to order TVMMax to cease its illegal retransmission of KPRC’s signal immediately and to impose such sanctions as the Commission deems appropriate.

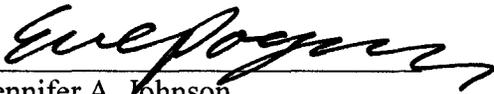
²⁶ Letter from Richard Gomez, Vice President and General Manager, TVMMax, to John J. Ronayne, III, Vice President and General Counsel, Post-Newsweek Stations, Inc. (dated March 16, 2012). A copy of this letter is attached as Exhibit 6 to Post-Newsweek’s Enforcement Complaint.

²⁷ See Retransmission Consent Complaint and Petition of Fox Television Holdings, Inc., MB Docket No. 12-113, at Attachment 5 (filed April 12, 2012) (Letter from Richard Gomez, Vice President and General Manager, TVMMax, to Catherine L. Robb, counsel to Fox Television Stations, Inc. (dated March 16, 2012)); Enforcement Complaint Concerning KXLN-DT, Rosenberg, Texas, and KFTH-DT, Alvin, Texas, MB Docket No. 12-181, at Exhibit 4 (filed June 21, 2012) (Letter from Richard Gomez, Vice President and General Manager, TVMMax, to Jason Eanes, Regional Director, Univision (dated March 16, 2012)).

²⁸ See 47 C.F.R. § 1.80(b)(6) (requiring Commission to consider, *inter alia*, violator’s “degree of culpability” when setting forfeiture amount).

Respectfully submitted,

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August 27, 2012

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CERTIFICATE OF SERVICE

I, Michael Beder, an associate with the law firm of Covington & Burling LLP, certify that on this 27th day of August, 2012, I caused copies of the foregoing "Reply to Answer of TVMax to 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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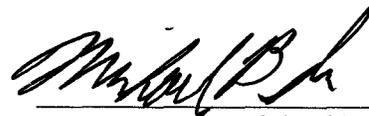
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