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August 31, 2012

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

Via Federal Express Overnight Delivery

Re: Answer of TV Max, Inc. to Enforcement Complaint of Post-Newsweek Stations, Houston, Inc., MB Docket No. 12-222, CSR-8694C

Enclosed for filing please find an original and two copies of the Surreply of TV Max, Inc. to Reply of Post-Newsweek Stations, Houston, Inc. in the above captioned matter.

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

Thank you for your assistance.

Sincerely,



Carl E. Kandutsch
Attorney for TV Max

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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In the Matter of)	
)	
TV Max, Inc., dba Wavevision)	MB Docket No. 12-222
)	CSR- 8694-C
Enforcement Complaint Concerning)	
KPRC-TV, Houston, Texas)	
)	

To: Office of the Secretary
Attn: Media Bureau

**SURREPLY OF TV MAX TO REPLY OF POST-NEWSWEEK STATIONS, HOUSTON, INC.
TO THE ANSWER OF TV MAX**

TV Max, Inc. (dba Wavevision, referred to as “TV Max”) by and through its counsel, files this Surreply to the Reply (“Reply”) of Post-Newsweek Stations, Houston, Inc. (“Post-Newsweek”) concerning TV Max’s alleged violation of Section 325(b) of the Communications Act of 1934 (the “Act”) and the Commission’s rules. The Complaint alleges that since January 1, 2012 to the present, TV Max has retransmitted signals (“Signals”) of television broadcast station KPRC-TV in Houston, Texas, a Post-Newsweek affiliate, without Post-Newsweek’s consent in violation of Section 325(b) of the Act and Section 76.64¹ of the Commission’s rules. This Surreply is limited to addressing a legal point raised in Post-Newsweek’s Reply.

On pages 3 – 4 of its Reply, Post-Newsweek quotes selected portions from Section 2(a) of the Cable Television Consumer Protection and Competition Act of 1992², which contain Congress’ “Findings” and public policy rationale for establishing the retransmission consent regime as part of the 1992 Cable Act. Post-Newsweek asserts, “TV Max’s evident disagreement with Congress’ judgment does not empower TV Max to disregard federal law.”³

Congress was concerned that the growth of cable television distribution systems could threaten the economic viability of over-the-air broadcasting, and “there is a substantial governmental interest in promoting the continued availability of ... free television programming, *especially for viewers who are*

¹ 47 C.F.R. § 76.64.

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

³ Reply, p. 4.

unable to afford other means of receiving programming.”⁴ Post-Newsweek’s quotation from the “Findings” section of the 1992 Cable Act includes the first clause, but not the emphasized second clause.

The perceived threat stems from the fact that both broadcast television programming and cable systems are supported by revenues generated from advertising. As market share shifted from broadcast television to cable, proportionally more advertising revenue was reallocated from broadcast to cable television systems, thus threatening the future of free broadcast programming.⁵ “As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.”⁶

Congress also perceived that this economic incentive would be enhanced due to the superior technical capabilities of cable systems in delivering high-quality signals to the consumer’s television set, combined with limitations on consumers’ ability to receive broadcast signals without cable:

Consumers who subscribe to cable television often do so to obtain local broadcast signals which they would otherwise not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.⁷

While Congress recognized the nascent cable industry’s incentives for limiting consumers’ access to free off-air programming, it also recognized the benefits realized by cable operators from carrying popular broadcast programming on their systems. The result of Congress’ balancing of incentives and interests inherent in the cable/broadcaster dynamic was the must-carry/retransmission consent regime established as part of the 1992 Cable Act.

TV Max does not “disagree” with Congress’ judgment. In fact, the evidence adduced in this and related proceedings indicates that TV Max’s combined cable and MATV signal delivery systems for MDU properties affirmatively serve and actively promote Congress’ public policy purposes as described in the Findings section of the 1992 Cable Act, as well as related policy concerns more recently articulated by the Commission, in several ways:

First, Congress wanted to promote “the continued availability of ... free television programming ...” The MATV systems that TV Max has installed on MDU buildings, at significant expense to TV Max,

⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12) (emphasis added).

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12) – (14).

⁶ *Id.*, § 2(a)(15).

⁷ *Id.*, § 2(17).

allow each and every resident of those buildings *to continue to receive off-air broadcast programming at no charge, even after TV Max's right-of-entry agreement with the MDU building owner has expired, and after TV Max no longer provides pay television services to any resident in the building.* Therefore, TV Max's MATV systems ensure the continued availability of free television programming at each of the 245 MDU buildings served by the company, even after the building owner has severed its relationship with TV Max's cable system. Neither the building owner nor any resident of the building has been or will be charged by TV Max for the continuing availability of broadcast television programming through the MATV systems installed by TV Max into the indefinite future.

Second, Congress wanted to ensure the continued availability of free television programming *“especially for viewers who are unable to afford other means of receiving programming.”* As indicated in the Declaration of Thomas Balun filed with TV Max's Answer⁸, TV Max has not charged any TV Max subscriber any off-air broadcast signals since November 2011, when those signals were de-linked from TV Max's basic programming tier. Moreover, the MATV systems installed at each building allow every resident of each building to receive free broadcast television programming, including Post-Newsweek affiliate station KPRC, *regardless of whether or not the resident subscribes to any TV Max pay service.* TV Max's investment in MATV systems for its MDU customers confers a residual benefit on station KPRC (and therefore on Post-Newsweek), by expanding the station's viewing audience. By enabling the reception of off-air programming by MDU residents who are unable to afford pay television service, the MATV systems installed by TV Max at its sole expense “assist ... the broadcaster (*i.e.*, Post-Newsweek) to increase its viewership, and thereby attract additional advertising revenues that might otherwise be earned by the cable system operator”⁹ – even among viewers “who are unable to afford other means of receiving programming,” such as through cable or satellite television subscription services.

Third, Congress was concerned that consumers were being driven away from broadcast television and toward cable pay-television in order to “obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals.” Congress' concern in 1992 was that “[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television systems, do not have input selector switches or cannot otherwise receive broadcast television services.” It should be noted that this concern was and remains especially grave with regard to consumers who live in densely populated apartment buildings in urban locations, where line-of-sight issues often degrade the availability of off-air broadcast signals by means of individual “rabbit ear” antenna devices – the very market served by TV Max in Houston, Texas.

⁸ Declaration of Thomas Balun dated August 17, filed as Attachment 1 to Answer of TV Max to Enforcement Complaint in MB Docket No. 12-222, CSR-8694-C (the “Balun Declaration”), paragraph 2.

⁹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(15).

More recently, the Commission has expressed a similar concern when considering whether to require cable operators to continue delivering analog versions of digital signals broadcast by “must-carry” stations after the February 17, 2009 mandatory analog-to-digital conversion deadline. The Commission’s concern in the “digital must-carry” proceeding was with the continued ability of consumers – many of whom could not afford to purchase digital television sets or analog conversion devices – to receive free broadcast programming in the new digital format. As in 1992, the government had a strong interest following the digital television (“DTV”) conversion in ensuring that technical innovations in the *delivery* of video programming signals to consumers do not negatively impact lower income consumers who cannot afford to purchase the equipment, devices and /or services that allow those consumers to *receive* free broadcast signals in the evolving technical environment.

In 2007, the Commission addressed the issue by requiring mandatory dual carriage of digital and analog versions of must-carry broadcast signals, including the down-conversion of digital broadcast signals to analog format: “[R]equiring down-conversion of digital must-carry signals will likely impose only a modest burden on a cable operator’s system as a whole and will materially advance the government’s important interest in preserving over-the-air broadcasting, promoting the widespread dissemination of information from a multiplicity of sources, and minimizing any adverse consumer impacts associated with the DTV transition.”¹⁰

TV Max’s combined cable and MATV delivery systems address this ongoing concern with the limited signal reception options available to consumers (especially those who cannot afford digital television sets) both before and following the DTV conversion, by offering MDU residents a choice: If the resident’s unit is equipped with a digital television or a digital converter, the resident may receive the off-air signal directly through the building’s MATV facilities, at no charge, and without the need to purchase an individual antenna; alternatively, if the unit is not equipped with a digital television or a digital converter, the resident may receive, also at no charge, an analog duplication of the off-air signal that is down-converted and inserted into the building’s MATV system for delivery to the resident’s analog television set.

For all of these reasons, TV Max strongly disagrees with Post-Newsweek’s characterization of its position vis-à-vis federal law and its public policy purposes. On the contrary, TV Max’s signal delivery systems serve important governmental interests in preserving the availability of free broadcast signals to viewers.

¹⁰ Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, CS 98-120, Third Report and Order and Third Further Notice of Proposed Rule Making, 22 F.C.C. Rcd 21064 at 21094 (2007).

Finally, it should be noted that TV Max has requested and has scheduled good faith retransmission consent negotiations with Post-Newsweek with regard to station KPRC-TV, and expects to resolve all outstanding issues concerning that station's signals as expeditiously as possible.

Respectfully submitted,

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

By: Carl Kandutsch

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Dated: August 31, 2012

CERTIFICATE OF SERVICE

I certify that on this 31st day of August 2012, I caused the foregoing Surreply of TV Max to Reply of Post-Newsweek Stations, Houston, Inc. to be served by registered U.S. mail, overnight delivery, return receipt requested, except where email is indicated, on the following:

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Handwritten signature of Carl E. Kandutsch in black ink, written over a horizontal line.

Carl E. Kandutsch