

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

In the Matter of
TV Max, Inc. and Broadband Ventures Six, LLC
d/b/a Wavevision, Thomas M. Balun, Eric Meltzer,
and Richard Gomez, et al.
MB Docket No. 12-113
CSR No. 8623-C
MB Docket No. 12-181
CSR No. 8669-C
MB Docket No. 12-222
CSR No. 8694-C
MB Docket No. 12-266
CSR No. 8707-C
NAL/Acct. No.: 201341410008
FRN: 0009645938

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: June 24, 2013

Released: June 25, 2013

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability For Forfeiture ("NAL") and Order, we find that TV Max, Inc. and Broadband Ventures Six, LLC (each d/b/a Wavevision), and certain of their affiliates, subsidiaries, other related entities, and their controlling parties,1 apparently willfully and repeatedly 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 signals of six television broadcast stations (collectively, the "Stations")2 without "the express authority" of the originating stations.3 Based upon the record before us, including complaints filed by the licensees of the Stations, we find TV Max apparently liable for a monetary forfeiture in the amount of two million two hundred fifty thousand dollars (\$2,250,000). In addition, we direct TV Max, Inc. to submit, no later than thirty (30) calendar days from the release date of this NAL and Order, a statement signed under penalty of perjury by an officer or director of the company describing in detail the steps it has taken to immediately come into compliance with the requirements of

1 Based upon the record before us, these entities and individuals include TV Max, Inc., TV Max, LP, TV Max Houston, Inc., TV Max Holdings, Inc., TV Max Houston, LP, TV Max Houston GP, LLC, TV Max Corporate, Inc., Broadband Ventures Group, LLC, Broadband Fiber, LLC, Broadband Ventures IV, LLC and Broadband Ventures Six, LLC, and their common controlling parties, Thomas M. Balun, Eric Meltzer and Richard Gomez. As discussed, infra, at paragraph 9, the record supports treating these entities and individuals as one and the same. For purposes of simplicity, unless otherwise noted, they will collectively be referred to herein as "TV Max."

2 The six stations involved are KTXH(TV), KRIV(TV), KXLN-DT, KFTH-DT, KPRC-TV, and KTRK-TV.

3 47 U.S.C. § 325(b)(1)(A); 47 C.F.R. § 76.64(a).

Section 325 of the Act and Section 76.64 of the Commission's rules.⁴

II. BACKGROUND

2. TV Max is a cable television operator that serves more than 10,000 subscribers in the Houston, Texas Designated Market Area ("DMA"), in 245 multiple-dwelling unit buildings (MDUs).⁵ Fox Television Holdings, Inc. ("FOX"), Univision Communications, Inc. ("Univision"), Post-Newsweek Stations, Houston, Inc. ("Post-Newsweek") and ABC, Inc. ("ABC") (collectively, the "Licensees") are the respective licensees of the Stations,⁶ each of which broadcasts within the Houston, Texas DMA.⁷

3. For the 2012-2014 carriage cycle,⁸ each of the Licensees elected retransmission consent for their respective station(s) with respect to the TV Max cable system.⁹ TV Max previously had in place retransmission agreements with each of the Licensees, but its agreements with FOX, Univision, and Post-Newsweek expired December 31, 2011, and its agreement with ABC expired March 2, 2012.¹⁰ TV Max continues to carry the Stations despite the absence of an extension or renewal agreement with them.¹¹ The Licensees each informed TV Max that TV Max was not permitted to retransmit the Stations because the agreements had either expired or were terminated under the terms of the agreement.¹² The Licensees

⁴ See *infra* ¶¶ 19 and 21.

⁵ See, e.g., Answer of TV Max to Univision Complaint, MB Docket No. 12-181, dated Jul. 19, 2012, at 1-2. According to TV Max, it currently holds a cable television franchise with the City of Houston, TX. *Id.*

⁶ FOX is the parent company of the licensee of full-power television stations KTXH(TV) and KRIV(TV), Houston, TX. Univision is the parent company of the licensee of full-power television stations KXLN-DT, Rosenberg, TX and KFTH-DT, Alvin, TX. Post-Newsweek is the licensee of full-power television station KPRC-TV, Houston, TX. ABC is the parent company of the licensee of full-power television station KTRK-TV, Houston, TX.

⁷ See FOX Complaint Concerning KTXH(TV) and KRIV(TV), Houston TX, MB Docket No. 12-113, CSR No. 8623-C (dated Apr. 12, 2012) at 2 ("FOX Complaint"); Univision Complaint Concerning KXLN-DT, Rosenberg, TX and KFTH-DT, Alvin, TX, MB Docket No. 12-181, CSR No. 8669-C (dated Jun. 21, 2012) at 2 ("Univision Complaint"); Post-Newsweek Complaint Concerning KPRC-TV, Houston, TX, MB Docket No. 12-222, CSR No. 8694-C (dated Jul. 31, 2012) at 2 ("Post-Newsweek Complaint"); ABC Complaint Concerning KTRK-TV, Houston, TX, MB Docket No. 12-266, CSR No. 8707-C (dated Sept. 5, 2012) at 2 ("ABC Complaint").

⁸ Commercial television stations are required to make elections between retransmission consent and must-carry status at three year intervals. 47 C.F.R. § 76.64(f).

⁹ See FOX Complaint at Attachment 1, Exhibit A; Univision Complaint at Exhibit 1; Post-Newsweek Complaint at Exhibit 1; ABC Complaint at Exhibit B.

¹⁰ See FOX Complaint at 2; Univision Complaint at 2-3; Post-Newsweek Complaint at 2; ABC Complaint at 2-5.

¹¹ See FOX Complaint at 5; Univision Complaint at 2-3; Post-Newsweek Complaint at 4; ABC Complaint at 6. See also Letter of Eve R. Pogoriler, Covington & Burling (Univision counsel) dated Apr. 2, 2013; Letter of Jennifer A. Johnson, Covington & Burling (Post-Newsweek counsel) dated Apr. 2, 2013; Email of Tom W. Davidson, Akin Gump Strauss Hauer & Feld LLP (ABC counsel) dated Apr. 2, 2013; Letter of Ellen S. Agress, FOX Senior Vice President, dated Apr. 3, 2013; and see the Wavevision channel line-up shown at: <http://www.wavevision.com/houston/channel-line-up> (last visited June 21, 2013).

¹² See FOX Complaint at 3-5 and Attachments 3 and 4 (stating it sent letters to TV Max both before and after the agreement expired); Univision Complaint at 3 (stating Univision actually terminated its agreement with TV Max based on an uncured material breach for failure to pay starting in mid-2010 and, after sending several default notice letters over the course of 2011, by letter dated November 30, 2011 directed TV Max to either pay the full amount of delinquent payments or to cease transmitting the stations effective December 3, 2011); Post-Newsweek Complaint at 2 (stating it sent letters to TV Max in January and March of 2012); ABC Complaint at 5 (stating it sent a letter to TV Max in March 2012).

each filed a complaint with the Commission alleging that TV Max retransmitted without consent the signals of one or more of its stations.¹³

4. In response, TV Max does not refute that it retransmitted the Stations without their express, written consent. Rather, TV Max states it decided to carry the Stations without the Licensees' consent, and without paying retransmission consent fees, by invoking the master antenna television (MATV) exception to the retransmission consent requirement because all of its subscribers reside in MDUs.¹⁴ Nevertheless, TV Max admits that it retransmitted, from its headend, the Stations' signals without retransmission consent before MATV systems on all of its MDU buildings were installed.¹⁵

5. TV Max states that it began to convert all of its MDU buildings to MATV systems in November 2011 and had hoped to complete the installations before the first of the retransmission consent agreements expired on December 31, 2011.¹⁶ TV Max admits, however, that no more than half of its 245 MDU buildings had operational MATV systems as of January 1, 2012.¹⁷ TV Max further concedes that it had not installed MATV systems on at least 19 of its buildings as of July 19, 2012 but nonetheless continued to retransmit the Stations' signals throughout this time period,¹⁸ despite the filing of complaints by FOX in April and Univision in June, and letters sent by each Licensee informing TV Max it was not permitted to retransmit the Stations' signals.¹⁹ On July 26, 2012, TV Max asserted that it had completed installation of MATV systems on all of its MDU buildings.²⁰ TV Max acknowledged, however, that, as

¹³ See FOX Complaint at 3-5 and Attachments 3 and 4 (stating it sent letters to TV Max both before and after the agreement expired.); Univision Complaint at 3 (stating it terminated its agreement with TV Max even before its agreement was scheduled to expire because TV Max failed to make the required payments; Post-Newsweek Complaint at 2 (stating it sent letters to TV Max in January and March of 2012); ABC Complaint at 5 (stating it sent a letter to TV Max in March 2012). The Licensees seek an order from the Commission directing TV Max to comply with the law and to cease retransmitting the Stations without consent, as well as imposing appropriate sanctions for these willful, repeated and ongoing violations. See FOX Complaint at 1-2; Univision Complaint at 1-2; Post-Newsweek Complaint at 1-2; ABC Complaint at 1-2.

¹⁴ See, e.g., Response of TV Max to FOX Complaint, dated May 1, 2012, at 5 (stating "this plan was formulated and implemented for the specific purpose of qualifying TV Max's MDU operations for exemption from retransmission consent fees"); 47 C.F.R. § 76.64(e)). As discussed in more detail below, the MATV exception provides that retransmission consent requirements are not applicable to broadcast signals received by master antenna television facilities under certain circumstances. See ¶ 13, *infra*.

¹⁵ See, e.g., Surreply of TV Max to FOX Reply, dated May 25, 2012, at 3 ("TV Max admits to non-compliance with the retransmission consent regime insofar as it had failed to install MATV systems at 100% of the MDU buildings served by the company at the time the prior retransmission consent agreement with Fox expired on December 31, 2011."). See also Answer of TV Max to ABC Complaint at 2-3 (stating that its "failure to complete all [MATV] installations by January 1, 2012 was not attributable to lack of good faith efforts to comply with applicable laws and regulations").

¹⁶ See, e.g., Answer of TV Max to ABC Complaint, dated Sept. 24, 2012, at 2 ("TV Max's management hoped and expected to convert all MDU buildings to MATV systems by the time the ABC retransmission consent agreement expired on December 31, 2011").

¹⁷ TV Max Response to FOX Complaint at Attachment 1 (Balun Declaration) ("As of January 1, 2012, about 50% of the MDU buildings served by TV Max had been fully converted to MA TV systems. Currently [May 1, 2012], about 50% of the MDU buildings have been fully converted to MA TV systems. ...").

¹⁸ See Letter of Carl E. Kandutsch, TV Max counsel, dated Jul. 18, 2012.

¹⁹ See *supra* notes 13 and 14.

²⁰ See Email of Carl Kandutsch, TV Max counsel, dated Jul. 26, 2012 ("Kandutsch July 26 Email") at 1 (stating "all MDU buildings served by TV Max have been equipped with MATV systems that are the property of the building owner."). See also Answer of TV Max to ABC Complaint, dated Sept. 24, 2012, at 3.

of that time, “[b]roadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems,”²¹ meaning that TV Max retransmitted at least some broadcast signals received at its off-site cable headend rather than through the on-site MATV system.

6. The Licensees challenge TV Max’s assertion that it qualifies for the MATV exception.²² Moreover, the Licensees point out TV Max’s “ongoing intentional violation” for the time period prior to TV Max’s alleged completion of MATV systems on all of its MDU buildings.²³

7. On December 20, 2012, as a result of its investigation of the matters raised in the complaints, culminating in a lengthy conference call on December 10, 2012 with representatives of TV Max, including TV Max CEO Thomas Balun, and of each of the Licensees, the Media Bureau issued a letter to TV Max containing its initial finding that TV Max had willfully and repeatedly violated, and continued to violate, the Commission’s retransmission consent rules, and stating that it planned to recommend that the Commission issue a Notice of Apparent Liability for Forfeiture for these violations.²⁴ Thus, the Bureau stated its initial conclusions that TV Max admittedly had retransmitted broadcast signals without consent before having installed MATV systems on all of its MDU buildings, and that even after installing MATV systems, TV Max’s method of providing broadcast signals to MDU residents did not fall within the MATV exception. In particular, the Bureau referred to TV Max’s admission that “[b]roadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems.”²⁵

8. On March 28, 2013, the Bureau requested that TV Max and each of the Licensees advise it of the status of their dispute, including TV Max’s carriage of the Stations and whether it had retransmission agreements in place with each licensee. In their respective responses, each of the Licensees indicated that TV Max continued to carry the Stations without their consent, despite the conclusion in the Bureau’s Initial Finding Letter that such carriage was illegal and the Bureau’s stated expectation that such operations should cease immediately.²⁶ In contrast, in its response, TV Max did not acknowledge that it was still engaging in such activities, stating only, for each of the Stations involved, that “since June 7,

²¹ See Kandutsch July 26 Email at 1.

²² See, e.g., Letter of Antoinette Cook Bush, Skadden, Arps, Slate, Meagher & Flom LLP (FOX counsel) dated Jul. 11, 2012.

²³ *Id.* at 2.

²⁴ See Letter by William T. Lake, Chief, Media Bureau, to Carl Kandutsch, TV Max counsel, dated Dec. 20, 2012 (“Initial Finding Letter”). The Letter stated the Bureau’s expectation that TV Max would “immediately stop retransmitting the Stations’ signals without consent and come into compliance with the Commission’s rules” and noted that TV Max’s “failure to do so may subject TV Max to further enforcement action.” *Id.* at 1.

²⁵ See Initial Finding Letter at 3, n.10 (quoting the Kandutsch July 26 Email at 1). TV Max uses the term “fiber ring” to refer to its metropolitan distribution of television signals over optical fiber, as opposed to in-building distribution (via coaxial cables). TV Max provided a schematic drawing of its MATV system within an MDU. See Attachment 4 (Schematic Drawing) to the Response of TV Max to Media Bureau Inquiries Dated June 13, 2012. Based on our engineering review of the schematic drawing, the Stations’ signals are received at the off-site headend and transmitted along with other cable programming via the fiber ring to the MDUs. The fact that the signals are additionally received at an MATV system does not override the fact that the signals are being retransmitted via the fiber ring without consent. As discussed below, an MVPD must exclusively use the broadcast signals received from the MATV antenna for all customers in order to qualify for the MATV exception.

²⁶ See Letter of Eve R. Pogoriler, Covington & Burling (Univision counsel) dated Apr. 2, 2013; Letter of Jennifer A. Johnson, Covington & Burling (Post-Newsweek counsel) dated Apr. 2, 2013; Email of Tom W. Davidson, Akin Gump Strauss Hauer & Feld LLP (ABC counsel) dated Apr. 2, 2013; Letter of Ellen S. Agress, FOX Senior Vice President, dated Apr. 3, 2013.

2012, the Stations have not been carried on any fiber ring owned or controlled by TV Max.²⁷ Its apparent representations that it was no longer improperly carrying the Stations seem inconsistent with the record evidence, including the Licensees' responses to the Bureau's inquiry and TV Max's own prior statements to the Commission.²⁸ Indeed, during the conference call with the parties and FCC staff on December 10, 2012, TV Max's CEO Thomas Balun confirmed that TV Max was still transmitting the signals of all of the Stations over its fiber ring.

9. As the Licensees pointed out to the Commission in a joint letter dated April 18, 2013,²⁹ TV Max, has, in fact, continued the operations that the Bureau on December 20 advised were contrary to the Act and rules. Despite the Bureau's stated expectation that TV Max immediately discontinue retransmission of the Stations without their consent and in the absence of an applicable exemption to the retransmission consent requirement, TV Max, through a number of commonly owned and controlled companies continued the apparently violative retransmissions. As the Licensees note, on December 3, 2012, TV Max e-mailed the Bureau and counsel for each of the Licensees "to provide the Media Bureau and the complainants with updated information concerning TV Max as required by Section 76.6(a)(6) of the Commission's rules," namely that "certain" of its assets had been "acquired by Broadband Ventures Six, LLC and Broadband Fiber, LLC, each a Delaware limited liability company." Specifically, TV Max advised that, effective July 1, 2012,³⁰ "TV Max's head-end and cable television subscriber assets were acquired by Broadband Ventures Six, LLC, and TV Max's fiber optic network facility located in Houston, Texas, was acquired by Broadband Fiber, LLC." TV Max indicated that, while it "continues to exist and operate as holder of a cable television franchise with the City of Houston, the relevant service provider is Broadband Ventures Six, LLC."³¹ As the Licensees maintain in their April 18 filing, both of those entities are corporate affiliates of and under common control with TV Max. TV Max does not deny these allegations. Our review of the record leads us to agree with this assessment.

- According to the records of the Texas Secretary of State, provided as Attachments 1 and 2 to the April 18 Licensee Letter, TV Max and Broadband Ventures Six, LLC ("BV6") appear to be under the common control of two individuals: Thomas M. Balun and Eric Meltzer. They are listed as the officers and directors of TV Max, Inc., along with Christian J. Balun and Matthew T. Balun. For BV6, only Thomas Balun and Eric Meltzer are listed, as its two "managers." In Attachment 3, only Richard Gomez is listed for Broadband Fiber LLC ("BF"), as its "Governing Person." Attachments 2 and 3 reveal that BV6 and BF share a common mailing address: 290 King of Prussia Road, Radnor, Pennsylvania 19087. Those records further indicate that BF did not file

²⁷ See Email of Carl Kandutsch, TV Max counsel, dated Apr. 5, 2012 ("Kandutsch Apr. 5 Email").

²⁸ See, e.g., Kandutsch July 26 Email (In response to the Bureau's question on July 25, 2012, asking "In the buildings that TV Max has converted to MATV, does it still deliver broadcast signals via its fiber ring," TV Max responded: "Yes. Broadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems.").

²⁹ See Letter of Ellen S. Agress, FOX Senior Vice President, Christopher G. Wood, Univision Senior Vice President and Associate General Counsel, Jennifer A. Johnson, Covington & Burling (Post-Newsweek counsel) and Susan L. Fox, ABC Vice President, dated April 18, 2013 ("April 18 Licensee Letter"). TV Max has not responded to this submission.

³⁰ Section 76.6(a)(6) of the Rules, which notes the responsibility of parties to a pending complaint proceeding "for the continuing accuracy and completeness of all information and supporting authority furnished," requires that such information "be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint." 47 C.F.R. §76.6(a)(6). TV Max failed to explain why it waited more than five months before advising the Commission of these developments.

³¹ See Email of Carl Kandutsch, TV Max counsel, dated Dec. 3, 2012 ("Kandutsch Dec. 3 Email")

with the Secretary of State for authority to transact business in Texas until October 23, 2012, well after the June 7, 2012 date on which TV Max claims it no longer owned the Houston fiber ring and July 1, 2012, when it has represented that its assignment of the fiber network assets to BF occurred, which assets BF then began to lease to BV6.

- In its application to the Texas Public Utilities Commission (PUC) for authority to operate (Attachment 4 to the April 18 Licensee Letter), BF, represented by Carl Kandutsch, also TV Max's attorney in the subject proceeding, identifies TV Max as "an affiliate of Applicant" in disclosing the subject FCC complaints by the Licensees against TV Max in the response to Question 13 (a). The response to Question 2(h) notes that Broadband Ventures Group, LLC wholly owns both BF and BV6. Under Question 2(f), the filing identifies Richard Gomez as Vice President of BF. As noted at Attachment 5 to the FOX Complaint, Gomez also is Vice President and General Manager of TV Max. Finally, in the response to Question 17, BF indicates that, in June 2010, the entity Broadband Ventures IV acquired 73.8 percent of TV Max Holdings, and that TV Max Houston, LP, "an indirect wholly owned subsidiary of TV Max Holdings, Inc." is the entity that assigned its "CATV and cable television subscriber-related assets" to BV6 in June 2012 and its fiber optic network assets to BF the following month, the transactions reported to the Commission by TV Max in its December 3, 2012 email.
- In its March 1, 2013 filing responding to PUC staff questions, BF states that, as of June 7, 2012, BV6 "leased capacity ('dark fiber') on the fiber optic network owned and operated by TVMax Houston, LP," and that BF subsequently acquired the fiber network from TV Max on July 1, 2012. As a result of these transactions, BF asserts, "TVMax continues to hold the City of Houston municipal cable franchise," but "BV 6 is a private cable operator" that "leases dark fiber that is owned by [BF] and used for the transmission of video programming signals to subscribing residents of multi-dwelling buildings served by BV 6." TV Max CEO Tom Balun is noted as the "sponsor" of each such response.³²

10. The public record and the prior statements from TV Max suggest that TV Max's April 5, 2013 representation to the Bureau that, "since June 7, 2012, the [S]tations have not been carried on any fiber ring owned or controlled by TV Max" was lacking in candor. In light of the Licensees' letters to TV Max requesting that it cease carriage of their stations with the expiration of their retransmission consent agreements, the Licensees' complaints before the Commission, and the Bureau's ongoing investigation, it appears that TV Max simply assigned the cable operation and fiber optic network to two related companies in an effort to evade responsibility for its ongoing violations. To the extent that TV Max seeks to avoid the consequences of its illegal operation through the use of various related and commonly controlled corporate entities, the Commission and the courts have long stated that, "[w]here the statutory purpose could ... be easily frustrated through the use of separate ... entities, the Commission is entitled to look through corporate form and treat separate entities as one and the same for purposes of regulation. We have treated affiliated entities collectively where necessary to ensure compliance with the Communications Act and Commission policies and regulations."³³ As a result of its evasion, the record is unclear as to the precise relationship of these entities and their respective roles in TV Max's ongoing misconduct. However, what the record suggests is that their functions are controlled by TV Max, Inc. and its principals, including Messrs. Balun, Meltzer and Gomez. We reject TV Max's apparent attempt to evade responsibility before the Commission, and find that, for all purposes relevant here, the record

³² See Letter of Ellen S. Agress, FOX Senior Vice President, dated April 3, 2013, Exhibit 1, at 1-2.

³³ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, 25 FCC Rcd 13874, 13887, ¶ 33 (2010); see also *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 12-1925, 2013 WL 1364274, at p. 25 (4th Cir. Apr. 5, 2013).

supports treating these entities and their controlling parties as one and the same.³⁴

11. Section 503(b)(1) of the Act provides that any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable for a forfeiture penalty.³⁵ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³⁶ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,³⁷ and the Commission has so interpreted the term in the Section 503(b) context.³⁸ The Commission may also assess a forfeiture for violations that are merely repeated and not willful.³⁹ “Repeated” means that the act was committed or omitted more than once or lasts more than one day.⁴⁰ In order to impose a forfeiture, the Commission must issue a notice of apparent liability identifying the alleged violation and proposing a forfeiture amount, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed or why it should be reduced and must include a detailed factual statement and pertinent documents and affidavits as support.⁴¹ The Commission will then adjust the proposed forfeiture as necessary or appropriate based on the response and issue a final forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.⁴²

12. Section 325 of the Act requires cable systems and other MVPDs to obtain “the express authority of the originating station” to retransmit a broadcasting station’s signal.⁴³ The Commission codified this requirement in Section 76.64 of the rules, which further requires retransmission consent agreements to be in writing and to “specify the extent of the consent being granted.”⁴⁴ The Commission has stated that “properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture.”⁴⁵

³⁴ We further note that, to the extent that TV Max, Inc. or any of the captioned enterprises are retransmitting the Stations without their consent and by means of a fiber ring or any means other than the master antenna, they are violating the Act and the rules, whether or not they own the fiber ring.

³⁵ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

³⁶ 47 U.S.C. § 312(f)(1).

³⁷ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³⁸ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³⁹ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) (“*Callais Cablevision, Inc.*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

⁴⁰ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

⁴¹ See 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

⁴² See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

⁴³ 47 U.S.C. § 325(b)(1)(A). Although Section 325(b) sets forth certain limited exceptions to the retransmission consent requirement, none applies to the present situation.

⁴⁴ 47 C.F.R. § 76.64(a), (j).

⁴⁵ *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) (“*Must Carry Order*”).

13. Section 76.64(e) provides that the retransmission consent requirements do not apply “to broadcast signals received by master antenna television [MATV] facilities.”⁴⁶ Specifically, the rule states:

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.⁴⁷

In explaining the basis for the MATV exception, the Commission used the analogy “of an individual purchasing and installing a roof top antenna to receive broadcast signals.”⁴⁸

III. DISCUSSION

A. Retransmission of Broadcast Signals Without Consent

14. Based upon the evidence before us, and in view of the applicable law and Commission precedent, we conclude that TV Max has willfully and repeatedly violated Section 325 of the Act and Section 76.64 of the Commission’s rules, and persists in its violation of these provisions, by retransmitting the Stations’ signals without the express authority of the originating stations. As discussed below, the violations are based on (1) TV Max’s admitted carriage of the Stations from the time their retransmission consent agreements expired through at least July 25, 2012 without the Stations’ consent and without a master antenna television (MATV) system in place in all the buildings it serves; and (2) TV Max’s ongoing carriage of the Stations without their consent since July 26, 2012 because it was not exclusively using its MATV facilities to retransmit the broadcast signals to its subscribers.

15. TV Max concedes that it violated the retransmission consent rules for the almost seven-month time period from January 1, 2012 to July 25, 2012 – the time period that it did not have MATV systems in place for all of its MDU buildings and retransmitted the Stations’ signals without the broadcasters’ consent.⁴⁹ TV Max continued to retransmit the signals while it installed MATV systems on its MDU buildings and did not claim to have completed such installation on all buildings until July 26, 2012.⁵⁰ TV Max asserts that its violations are not “willful” because it did not charge building residents

⁴⁶ 47 C.F.R. § 76.64(e).

⁴⁷ *Id.*

⁴⁸ *See Must Carry Order*, 8 FCC Rcd at 2997-98, ¶ 135; *modified by* Memorandum Opinion & Order, 9 FCC Rcd 6723, at ¶ 79 (1994); *corrected by* Erratum, 9 FCC Rcd 7882 (CSB 1994).

⁴⁹ *See, e.g.*, TV Max Surreply to FOX Reply (dated May 25, 2012) at 3 (“TV Max admits to non-compliance with the retransmission consent regime insofar as it had failed to install MATV systems at 100% of the MDU buildings served by the company at the time the prior retransmission consent agreement with Fox expired on December 31, 2011.”). As noted above, each of the retransmission agreements expired December 31, 2011, except for that of ABC, which expired March 2, 2012. *See supra* ¶ 3.

⁵⁰ *See, e.g.*, Answer of TV Max to ABC Complaint, dated Sept. 24, 2012, at 3 (stating “as of July 26, 2012, master antennas have been fully installed and are currently operational at all MDU buildings served by TV Max.”). *See also* Kandutsch July 26 Email at 1.

for the broadcast signals and “has been working diligently and in good faith” to complete the MATV systems to qualify for the exception.⁵¹ Section 76.64(e), however, provides no exception to operators that are in the process of converting to a MATV system. Further, although the MATV exception requires that subscribers not be charged for the broadcast signals, the exception also requires that the broadcast signals be received by the MATV facilities. By also delivering the Stations’ signals to its MDU subscribers from an off-site headend via fiber or other means, and not solely by a MATV system, TV Max fails to meet the narrow exception to the retransmission consent rules allowed under the Section 76.64(e) MATV exception.⁵² TV Max consciously and deliberately retransmitted the Stations without having written retransmission consent agreements in place. The violations are therefore willful.⁵³ Furthermore, because TV Max retransmitted the Stations’ signals for more than one day, the violations are not only willful, but also repeated.⁵⁴ Therefore, TV Max willfully and repeatedly violated the retransmission consent rules for this nearly seven-month time period.⁵⁵ TV Max’s violation was particularly flagrant because it knew that it could not possibly qualify for the MATV exception during this nearly seven-month time period because, as it admits, it did not even have a MATV system in place for all of its MDUs. In addition, it has continued retransmitting the Stations without their consent, notwithstanding the Bureau’s Initial Finding Letter advising TV Max that its operation was not in compliance with the Act and the rules and indicating its expectation that it would immediately come into compliance with the law.

16. Moreover, we find that TV Max’s unlawful retransmission of the Stations’ signals over its cable system to its cable subscribers is not cured by its installation of MATV systems on its MDU buildings. The MATV exception in Section 76.64(e) pertains only to “broadcast signals received by master antenna television facilities.”⁵⁶ The record shows that TV Max is retransmitting the Stations’ signals from an off-site (central) headend that serves multiple MDUs (“off-site headend”) rather than exclusively using the MATV antennas at the individual buildings for all of its customers.⁵⁷ TV Max states that it uses both the MATV system and its cable headend to provide subscribers the broadcast signals in question.⁵⁸ Nevertheless, TV Max claims that it complies with the MATV exception because the broadcast signals received by the MATV systems are made available to all MDU residents at no charge and at the resident’s option.⁵⁹ The MATV exception in Section 76.64(e) pertains only to

⁵¹ See, e.g., TV Max Surreply to Univision Reply (dated August 6, 2012) at 1-2.

⁵² See 47 C.F.R. § 76.64(e).

⁵³ See 47 U.S.C. § 312(f)(1).

⁵⁴ See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

⁵⁵ There is a gap of 208 days from when the agreements expired with FOX, Univision and Post-Newsweek and 146 days from when the extension agreement expired with ABC, and when TV Max asserted that it completed installation of the MATV antennas in all its buildings. Nonetheless, during this gap period, TV Max continued to retransmit the broadcast signals to its customers without consent from the Stations whose signals were retransmitted.

⁵⁶ 47 C.F.R. § 76.64(e).

⁵⁷ See Kandutsch July 26 Email at 1 (“Answer to Interrogatory,” stating “Broadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems.”).

⁵⁸ See *id.* Moreover, in a conference call with the parties and FCC staff on December 10, 2012, TV Max’s CEO Thomas Balun confirmed that TV Max was transmitting the signals of all of the broadcast stations over its fiber ring. He made no mention of BV6 or BF, which, according to TV Max’s April 5, 2013 e-mail response to the Bureau’s March 23 inquiry, had respectively succeeded TV Max as the provider of the cable service in Houston, and as owner of the fiber ring since June 7, 2012, more than six months earlier.

⁵⁹ TV Max Surreply to FOX at 2-3.

“broadcast signals received by master antenna television facilities.”⁶⁰ It does not apply to signals retransmitted from an off-site headend facility, even if the customer also has access to a MATV or over-the-air version of the signal and has the option whether or not to receive the stations. The MATV exception applies only when an operator merely facilitates a subscriber’s access to an over-the-air television signal received by a MATV antenna and where the signal made available without charge to subscribers is the same over-the-air signal received by the MATV antenna.⁶¹ TV Max’s retransmission of broadcast signals received at the off-site headend does not qualify for the MATV exception and, therefore, TV Max persists in its willful and repeated violation of the retransmission consent rules by transmitting the broadcasters’ signals to subscribers without the Stations’ consents.

B. Proposed Forfeiture Amount and Reporting Requirement

17. Applying the Forfeiture Policy Statement, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that TV Max is apparently liable for a forfeiture in the amount of two million two hundred fifty thousand dollars (\$2,250,000). The Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Commission’s rules specify a base forfeiture amount of seven thousand five hundred dollars (\$7,500) for each violation of the cable broadcast carriage rules, up to a maximum amount of \$37,500 for each violation (or each day) if the violator is a cable operator.⁶² In assessing the proposed monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80 of the Commission’s rules,⁶³ which include the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶⁴

18. As detailed above, TV Max has willfully and repeatedly violated, and is still currently violating, the Commission’s retransmission consent rules. These violations have occurred for more than 365 days and involve six separate stations.⁶⁵ Given the longstanding and repeated nature of TV Max’s

⁶⁰ 47 C.F.R. § 76.64(e).

⁶¹ *Id.*

⁶² See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recons. denied* 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); 47 C.F.R. § 1.80(b). See also *Bailey Cable TV, Inc.*, MB Docket No. 12-35, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2625 (MB 2012) (identifying a total base forfeiture amount of \$255,000 for a 34-day violation of the retransmission consent rules but reducing the proposed forfeiture to \$15,000 based on the operator’s inability to pay); Forfeiture Order, 27 FCC Rcd 7473 (MB 2012) (imposing the \$15,000 forfeiture); and see *Bailey Cable TV, Inc.*, MB Docket No. 12-34, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2631 (MB 2012) (identifying a total base forfeiture amount of \$255,000 for a 34-day violation but reducing the proposed forfeiture to \$15,000 based on the operator’s inability to pay); Forfeiture Order, 27 FCC Rcd 7470 (MB 2012) (imposing the \$15,000 forfeiture).

⁶³ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

⁶⁴ See *id.*

⁶⁵ We note that under Section 503(b)(6) of the Act, we may only propose forfeitures for violations that occurred within one year of the date of issuance of this NAL. See 47 U.S.C. § 503(b)(6). Therefore, we are proposing a forfeiture only for violations that occurred within one year of this NAL (*i.e.*, those that occurred within the most recent 365 days of the issuance of the NAL). It is a well-settled principle of law, however, that the Commission may properly consider prior offenses that occurred more than one year before a violation to establish the context for determining an appropriate forfeiture amount. See, *e.g.*, *InPhonic, Inc.*, Order of Forfeiture and Further Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 8689, 8701 ¶ 28 (2007); *Roadrunner Transp., Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-72 ¶ 8 (2000) (“While the Commission may not . . . find the Licensees liable for violations committed prior to [the NAL], it may lawfully look at facts arising before that date in determining an appropriate forfeiture amount”). We further note that, in assessing the magnitude of the forfeiture amount proposed herein, we (continued....)

unauthorized carriage of multiple broadcast stations' signals, as well as the egregious nature of the violations which continued even after the Bureau issued its Initial Findings Letter, we consider TV Max's violations of the retransmission consent requirements to be very serious. In addition, we find that several factors would ordinarily warrant an upward adjustment of the forfeiture amount, including egregious misconduct, repeated violation, intentional violation, and substantial economic gain.⁶⁶ At the same time, however, in determining the forfeiture amount, we also note that TV Max has only 10,000 subscribers, apparently operates in only one market, and is not affiliated with a larger cable operator or other large corporate entity. Given these special circumstances, we believe that an upward adjustment would lead to an inappropriately high forfeiture amount.⁶⁷ Therefore, taking into account the unique facts of this case, we find a forfeiture amount of \$2.25 million is warranted.⁶⁸ Our goal is to ensure that the forfeiture amount is sufficient to act as a deterrent to future violations and to ensure that the forfeiture is not considered merely an affordable cost of doing business. We find that, given TV Max's relatively small size and limited operations, this goal is satisfied with our proposed forfeiture amount.

19. Furthermore, to the extent it has not already done so, as the Bureau advised TV Max in its December 20 Initial Finding Letter, we expect it to immediately come into compliance with the retransmission consent requirements.⁶⁹ Failure to cease carriage of the signals without the Stations' consent will constitute an apparent further violation that will potentially subject TV Max to additional enforcement sanctions. We direct TV Max to submit a written statement signed under penalty of perjury, pursuant to Section 1.16 of the rules,⁷⁰ by an officer or director of TV Max, describing in detail the steps it has taken to immediately come into compliance with the requirements of Section 325 of the Act and Section 76.64 of the Commission's rules.⁷¹ This statement must be submitted no later than thirty (30) calendar days from the release date of this *NAL* and Order.

IV. ORDERING CLAUSES

20. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,⁷² and Sections 0.61, 0.283, and 1.80 of the Commission's rules,⁷³ that TV Max, Inc., TV Max, LP, TV Max Houston, Inc., TV Max Holdings, Inc., TV Max Houston, LP, TV Max Houston GP, LLC, TV Max Corporate, Inc., Broadband Ventures Group, LLC, Broadband Fiber, LLC, Broadband Ventures IV, LLC, Broadband Ventures Six, LLC, Thomas M. Balun, Eric Meltzer and Richard Gomez, are hereby **NOTIFIED** of their **APPARENT JOINT AND SEVERAL LIABILITY FOR FORFEITURE** in the

(Continued from previous page) _____

need not, and do not, make a determination of whether the violations are subject to the statutory forfeiture limit for a "continuing" violation in Section 503 of the Act.

⁶⁶ See 47 C.F.R. § 1.80(b)(8).

⁶⁷ Such calculation could, however, be quite appropriate in other cases.

⁶⁸ See 47 C.F.R. § 1.80(b). While TV Max provided some financial information in response to the Bureau's request, it did not provide all of the information requested, nor sufficient information for us to assess whether a downward adjustment for inability to pay is appropriate here. See Letter by Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, to Carl Kandutsch, TV Max counsel, dated Apr. 12, 2013. We note, however, that TV Max will have an opportunity to provide complete financial information in response to this *NAL*. See *infra* ¶¶ 25-26.

⁶⁹ See *id.*

⁷⁰ 47 C.F.R. § 1.16.

⁷¹ The declarant must have first-hand knowledge of the matters asserted.

⁷² See 47 U.S.C. § 503(b).

⁷³ See 47 C.F.R. §§ 0.61, 0.283, and 1.80.

amount of two million two hundred fifty thousand dollars (\$2,250,000) for willfully and repeatedly violating Section 325 of the Communications Act of 1934, as amended, and Section 76.64 of the Commission's rules.

21. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, TV Max, Inc., TV Max, LP, TV Max Houston, Inc., TV Max Holdings, Inc., TV Max Houston, LP, TV Max Houston GP, LLC, TV Max Corporate, Inc., Broadband Ventures Group, LLC, Broadband Fiber, LLC, Broadband Ventures IV, LLC, Broadband Ventures Six, LLC, Thomas M. Balun, Eric Meltzer and Richard Gomez, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture, including a detailed factual statement in support of their request for reduction or cancellation of the proposed forfeiture, and supported by pertinent documents and affidavits.

22. **IT IS FURTHER ORDERED** that TV Max **SHALL SUBMIT** a written statement as described in paragraph 19, no later than thirty (30) calendar days from the release date of this *NAL* and Order. This statement must be mailed to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, and a copy of this statement must also be transmitted via email to Steven A. Broecker at Steven.Broeckaert@fcc.gov and Evan Baranoff at Evan.Baranoff@fcc.gov.

23. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the *NAL*/Account number and FRN referenced above. Each paying party must also send electronic notification within forty-eight (48) hours of the date said payment is made to Steven.Broeckaert@fcc.gov and Evan.Baranoff@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁷⁴ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank — Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank — Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

24. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁷⁵ If you have questions regarding payment procedures, please contact

⁷⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://transition.fcc.gov/Forms/Form159/159.pdf>.

⁷⁵ See *id.* § 1.1914.

the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

25. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the rules.⁷⁶ Mail this written statement to Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, and include the NAL/Acct. No. referenced in the caption. A copy of this statement must also be sent via email to Steven A. Broeckaert at Steven.Broeckaert@fcc.gov and Evan Baranoff at Evan.Baranoff@fcc.gov.

26. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits, with respect to TV Max, Inc., TV Max, LP, TV Max Houston, Inc., TV Max Holdings, Inc., TV Max Houston, LP, TV Max Houston GP, LLC, TV Max Corporate, Inc., Broadband Ventures Group, LLC, Broadband Fiber, LLC, Broadband Ventures IV, LLC, Broadband Ventures Six, LLC, Thomas M. Balun, Eric Meltzer and Richard Gomez: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

27. **IT IS FURTHER ORDERED** that the complaints in the above-referenced proceedings **ARE GRANTED** to the extent indicated herein, and the complaint proceedings **ARE HEREBY TERMINATED**.

28. **IT IS FURTHER ORDERED** that a copy of this *NAL* and Order shall be sent, by First Class Mail and Certified Mail-Return Receipt Requested, to TV Max, Inc., TV Max, LP, TV Max Houston, Inc., TV Max Holdings, Inc., TV Max Houston, LP, TV Max Houston GP, LLC, TV Max Corporate, Inc., Broadband Ventures Group, LLC, Broadband Fiber, LLC, Broadband Ventures IV, LLC and Broadband Ventures Six, LLC, Attention: Thomas M. Balun, CEO, 10300 Westoffice Drive, Suite 200, Houston, TX 77042; and to Thomas M. Balun, 10300 Westoffice Drive, Suite 200, Houston, TX 77042, Eric Meltzer, 10300 Westoffice Drive, Suite 200, Houston, TX 77042, and Richard Gomez, 10300 Westoffice Drive, Suite 200, Houston, TX 77042; and to Carl E. Kandutsch, their attorney, 2520 Avenue K, Suite 700-760, Plano, Texas 75074.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷⁶ 47 C.F.R. §§ 1.16 and 1.80(f)(3).