

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

In the Matter of)
TV Max, Inc. and Broadband Ventures Six, LLC) MB Docket No. 12-113
d/b/a Wavevision, et al.) 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

FORFEITURE ORDER

Adopted: July 7, 2014

Released: July 7, 2014

By the Commission:

I. INTRODUCTION

1. In this Forfeiture Order, we assess a monetary forfeiture of two million two hundred fifty thousand dollars (\$2,250,000) against TV Max, Inc. and Broadband Ventures Six, LLC (each d/b/a Wavevision), and certain of their affiliates, subsidiaries, and other related entities (collectively, "TV Max").¹ We find that TV Max willfully and repeatedly violated Section 325 of the Communications Act

¹ Based upon the record before us, these entities 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. For purposes of simplicity, unless otherwise noted, they will collectively be referred to herein as "TV Max." See TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision, Thomas M. Balun, Eric Meltzer, and Richard Gomez, et al., MB Docket Nos. 12-113, 12-181, 12-222, and 12-266, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 9470 (2013) ("TV Max NAL" or "NAL") (finding that the record supports treating these entities as one and the same because the entities are commonly owned or controlled.) In its Response to the NAL, TV Max does not deny the findings in the NAL with respect to the relationship among and between the named entities and does not deny that the named entities are commonly owned or controlled. See generally Letter and Statement Seeking Cancellation or Reduction of FCC's Proposed Forfeiture, from Laurence S. Shtasel, Attorney for TV Max, to Steven A. Broeckert, Senior Deputy Chief, Policy Division, Media Bureau, dated July 25, 2013 ("TV Max Letter and Response to NAL"). In fact, the declarations of Thomas M. Balun and Eric Meltzer, who are officers and directors of TV Max, admit to their common ownership and control of TV Max and Broadband Ventures Group, LLC, which wholly owns Broadband Ventures Six, LLC ("BV6"). See id. at Exhibit 1: Declaration of Thomas M. Balun, ¶7 (stating Balun owns approximately 36 percent of Broadband Ventures Group, LLC) and at Exhibit 2: Declaration of Eric Meltzer, ¶1 and 3 (stating Meltzer is CFO of Broadband Ventures Group, LLC and owns

(continued....)

of 1934, as amended (the “Act”), and Section 76.64 of the Commission’s rules by retransmitting the signals of six Houston, Texas area full-power commercial television broadcast stations (collectively, the “Stations”)² without “the express authority” of the originating stations.³

2. This proceeding involves TV Max, a Houston cable operator that chose to deliver the signals of the Stations to its paying subscribers without the licensees’ express written consent and without paying them the retransmission fees that the licensees had previously required. TV Max formerly had retransmission agreements with those licensees that required such payments that expired in December 2011 and March 2012, after which TV Max continued to retransmit the signals of the Stations without extending or renewing the agreements. Each of the licensees notified TV Max that such retransmission without its consent was illegal and demanded that it cease and, after TV Max ignored these demands and continued retransmitting the Stations, each filed a complaint with the Commission. On December 20, 2012, the Media Bureau sent a letter to TV Max advising it that it had investigated the complaints and that TV Max’s carriage of the Stations without the consent of their licensees was contrary to the Act and the rules, and should immediately cease. Nevertheless, TV Max continued its rebroadcast of the Stations, using the spin-off of its Houston cable operations and fiber network to two related companies under its common ownership and control in an apparent effort to evade responsibility for its unlawful actions, which continued.⁴ The Commission issued the *NAL*, proposing a forfeiture of \$2.25 million for these violations, which continued at least six months after the Bureau’s letter, through the June 24, 2013 adoption date of the *NAL*, and perhaps longer. For the following reasons, based on the record before us, including TV Max’s response to the *NAL*, we impose a forfeiture against TV Max, including its affiliates and subsidiaries involved in its illegal operation through June 24, 2013, in the amount proposed in the *NAL*.

II. BACKGROUND

3. 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.⁵ 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.”⁶ The Commission has stated that “properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture.”⁷

4. Section 76.64(e) provides that the retransmission consent requirements do not apply “to broadcast signals received by master antenna television [MATV] facilities.”⁸ Specifically, the rule states:

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approximately 26 percent of Broadband Ventures Group, LLC). *See id.* at 9475, ¶ 9. The other entities identified in the *NAL* are publicly-declared affiliates of these entities. *See id.* at 9474-76, ¶ 9.

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

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

⁴ *TV Max NAL*, 28 FCC Rcd at 9475, ¶ 10 (concluding that “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.”).

⁵ 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.

⁶ 47 C.F.R. § 76.64(a), (j).

⁷ *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*”).

⁸ 47 C.F.R. § 76.64(e).

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 [*sic*] 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.⁹

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.”¹⁰

5. As discussed in more detail in the *NAL* issued in this case,¹¹ between April and September of 2012, the Commission received complaints from four commercial television broadcast licensees (on behalf of the six Stations) alleging that TV Max retransmitted the signals of their stations without consent in violation of Section 325 of the Act and Section 76.64 of the rules.¹² 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).¹³ 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,¹⁴ each of which broadcasts within the Houston, Texas DMA.

6. For the 2012-2014 carriage cycle,¹⁵ each of the Licensees elected retransmission consent for their respective station(s) with respect to the TV Max cable systems.¹⁶ TV Max previously had 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, 2012.¹⁷ TV Max

⁹ *Id.*

¹⁰ 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).

¹¹ *TV Max NAL*, 28 FCC Rcd at 9471-9476, ¶¶ 2-10. The facts and circumstances upon which this Forfeiture Order is based are set forth in detail in the *TV Max NAL*, and need not be repeated at length here.

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

¹³ See, e.g., Answer of TV Max to Univision Complaint, MB Docket No. 12-181 at 1-2 (dated Jul. 19, 2012). According to TV Max, it currently holds a cable television franchise with the City of Houston, TX. *Id.*

¹⁴ 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.

¹⁵ 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).

¹⁶ See FOX Complaint at Attachment 1, Exhibit A; Univision Complaint at Exhibit 1; Post-Newsweek Complaint at Exhibit 1; ABC Complaint at Exhibit B.

¹⁷ See FOX Complaint at 2; Univision Complaint at 2-3; Post-Newsweek Complaint at 2; ABC Complaint at 2-5.

continued to carry the Stations despite the absence of an extension or renewal agreement with them.¹⁸ The Licensees each informed TV Max in writing 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.¹⁹ The Licensees each filed a complaint with the Commission alleging that TV Max retransmitted without consent the signals of one or more of its stations.²⁰

7. In response to the complaints, TV Max did not deny that it retransmitted the Stations without the Licensees' express, written consent. Rather, TV Max stated that it decided to carry the Stations without the Licensees' consent, and without paying the previously required retransmission consent fees, in reliance on the master antenna television (MATV) exception to the retransmission consent requirement.²¹ TV Max stated that it was relying on its installation and use of master antenna television (MATV) systems on MDUs as the basis for qualifying for the narrow exception to the rule.²² Notwithstanding its intent to rely on the MATV exception, TV Max admitted that it retransmitted the Stations' signals without retransmission consent from its headend, not via the antennas, before it completed installing MATV systems on all of its MDU buildings.²³

8. TV Max explained 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, 2011.²⁴ TV Max admitted, however, that no more than half of its

¹⁸ 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> (visited June 21, 2013).

¹⁹ See FOX Complaint at 3-5 and Attachments 3 and 4 (stating that it sent letters to TV Max both before and after the agreement expired); Univision Complaint at 3 (stating that 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 that it sent letters to TV Max in January and March of 2012); ABC Complaint at 5 (stating that it sent a letter to TV Max in March 2012).

²⁰ 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.

²¹ See, e.g., Response of TV Max to FOX Complaint at 5 (dated May 1, 2012).

²² See, e.g., *id.* (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 ¶ 17 below, the MATV exception provides that retransmission consent requirements are not applicable to cable systems only if the broadcast signals are received by master antenna television facilities under certain explicit and narrow circumstances not present here.

²³ See, e.g., Surreply of TV Max to FOX Reply at 3 (dated May 25, 2012) ("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").

²⁴ See, e.g., Answer of TV Max to ABC Complaint at 2 (dated Sept. 24, 2012) ("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").

245 MDU buildings had operational MATV systems as of January 1, 2012.²⁵ TV Max further conceded 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,²⁶ despite the filing of complaints by FOX in April and Univision in June, and letters sent by each Licensee informing TV Max that it was not permitted to retransmit the Stations' signals.²⁷ On July 26, 2012, TV Max asserted that it had completed installation of MATV systems on all of its MDU buildings.²⁸ TV Max acknowledged, however, that, as of that time, "[b]roadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems,"²⁹ meaning that TV Max retransmitted at least some broadcast signals received at its off-site cable headend via its fiber ring rather than through the on-site MATV system.³⁰

9. On December 20, 2012, 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.³¹ The Bureau set forth its initial conclusions that TV Max 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. Accordingly, the Bureau expressed its 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 [f]ailure to do so may subject TV Max to further enforcement action.³²

10. On June 25, 2013, the Commission released the *TV Max NAL* proposing a forfeiture in the amount of \$2,250,000 against TV Max for the unauthorized retransmission of the six Stations.³³ TV

²⁵ TV Max Response to FOX Complaint at Attachment 1 (Declaration of TV Max CEO Thomas Balun) ("As of January 1, 2012, about 50% of the MDU buildings served by TV Max had been fully converted to [MATV] systems. Currently [May 1, 2012], about 50% of the MDU buildings have been fully converted to [MATV] systems....").

²⁶ See Letter of Carl E. Kandutsch, TV Max counsel, dated Jul. 18, 2012 ("*July 18, 2012 TV Max Letter*"). The Licensees emphasized TV Max's "ongoing intentional violation" for this time period prior to TV Max's alleged completion of MATV systems on all of its MDU buildings. Letter of Antoinette Cook Bush, Skadden, Arps, Slate, Meagher & Flom LLP (FOX counsel) dated Jul. 11, 2012 at 2 (*FOX July 11, 2012 Letter*).

²⁷ See *supra* notes 12 and 19.

²⁸ See Email of Carl Kandutsch, TV Max counsel at 1 (dated Jul. 26, 2012) ("Kandutsch July 26 Email") (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 at 3 (dated Sept. 24, 2012).

²⁹ See Kandutsch July 26 Email at 1.

³⁰ See Letter of William T. Lake, Chief, Media Bureau, to Carl Kandutsch, TV Max counsel, dated Dec. 20, 2012 at 3, n.10 ("Initial Finding Letter") (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 (see *infra* ¶¶ 17-18), an MVPD must exclusively use the broadcast signals received from the MATV antenna for all customers in order to qualify for the MATV exception.

³¹ See Initial Finding Letter at 1.

³² *Id.* at 1.

³³ See generally *TV Max NAL*. We do not impose personal liability for the forfeiture imposed herein at this time on the individuals named in the *NAL* (i.e., Thomas M. Balun, Eric Meltzer and Richard Gomez). However, we reserve the right to take further action against these individuals if we determine that they should be held personally liable for the violations of TV Max. See TV Max Response to the *NAL* at 2-6.

Max submitted its response to the *TV Max NAL* on July 25, 2013, arguing for the cancellation or reduction of the proposed forfeiture amount.³⁴

11. Under Section 503(b)(1) of the Act, 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 lasted 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 may 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

III. DISCUSSION

12. For the reasons discussed below, we find that TV Max willfully and repeatedly violated Section 325 of the Act and Section 76.64 of the Commission’s rules by retransmitting the Stations’ signals without the express authority of the originating stations. We affirm the NAL’s proposed forfeiture amount and conclude that TV Max is liable for a forfeiture of \$2,250,000.

A. TV Max’s Retransmission of Broadcast Signals Without the Stations’ Consent Violated the Act and the Rules.

13. Based upon the evidence before us, and in view of the applicable law and Commission precedent, we affirm the conclusion in the *NAL* and find that TV Max has willfully and repeatedly violated Section 325 of the Act and Section 76.64 of the Commission’s rules by retransmitting the Stations’ signals without the express authority of the originating stations. In the *NAL*, the Commission found that these violations were based on (1) TV Max’s admitted carriage of the Stations from the time its retransmission consent agreements expired through at least July 25, 2012 without the Stations’ consent

³⁴ See generally *TV Max Letter and Response to NAL*; see also “Declaration of Thomas M. Balun Regarding Statement of Planned Compliance,” dated July 25, 2013 (“*TV Max Compliance Statement*”).

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).

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 (through the date the *NAL* was released) in part via its cable system and not exclusively using its MATV facilities to retransmit the broadcast signals to its subscribers.⁴³ In its Response to the *NAL*, TV Max claims that (1) it completed MATV installation on all buildings by March 31, 2012, and not July 26, 2012, and (2) there have been no ongoing violations since the installation of the MATV system. Therefore, TV Max argues that imposition of the forfeiture proposed in the *NAL* is barred by the statute of limitations.⁴⁴ As discussed below, we reject these claims by TV Max and affirm the *NAL*'s findings.

14. First, we affirm the *NAL*'s finding that TV Max violated the retransmission consent rules for the nearly seven months from January 1, 2012 to July 25, 2012⁴⁵ – 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.⁴⁶ We reject TV Max's claim in its response to the *NAL* that its actual date of completion for MATV installation on all buildings was March 31, 2012, and not July 26, 2012. To support its claim in its response to the *NAL*, TV Max suggests that the July 26, 2012 completion date that it previously asserted was simply a mistake made by its (former) counsel in one email and points to a declaration by its CEO Thomas Balun (dated June 26, 2012) in which Mr. Balun asserts that the completion date was March 31, 2012.⁴⁷ We do not find this claim credible. Significantly, TV Max previously disavowed March 31, 2012 as being the completion date. In a letter dated July 18, 2012, TV Max admitted that the claimed March 31, 2012 completion date used by Mr. Balun in his June 26, 2012 declaration was an error.⁴⁸ Furthermore, TV Max's claim contradicts the overwhelming evidence in the

⁴³ See *TV Max NAL*, 28 FCC Rcd at 9477-79, ¶¶ 14-16.

⁴⁴ TV Max Response to the *NAL* at 10 (arguing that “[b]ecause ... Section 503(b)(6) permits proposed forfeitures only for violations that occurred within one year of the *NAL*, there is no basis in this case for any forfeiture”). See *infra* note 75.

⁴⁵ We note that, consistent with 47 U.S.C. § 503(b)(6), the *NAL* proposed forfeitures only for those violations that occurred within one year prior to the *NAL* (*i.e.*, those on or after June 25, 2012). *TV Max NAL*, 28 FCC Rcd at 9479, ¶ 18, n.65. See *infra* note 75.

⁴⁶ 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* ¶ 6.

⁴⁷ TV Max Response to the *NAL* at 8-9 (citing to Response of TV Max to Media Bureau Inquiries Dated June 13, 2012 (dated June 26, 2012) at Attachment 1: Declaration of Thomas Balun Responding to June 13, 2012 Inquiries (*June 26, 2012 Balun Declaration*)).

⁴⁸ See *July 18, 2012 TV Max Letter* at 1 (stating “[i]n paragraph 4 of the June 26, 2012 Declaration of Thomas Balun, Responding to June 13, 2012 Inquiries, Mr. Balun avers both that as of March 31, 2012, MATV systems had been installed at all 245 MDU buildings served by TV Max, *and* that MATV systems had not been installed at 19 of those buildings. The second averment is correct, not the first, and the confusion is the result of error on the part of counsel in failing to delete from the draft Declaration information that was updated for the final, signed version of the Declaration.”). TV Max issued this letter after a letter by FOX indicated that the March 31, 2012 date could not be accurate. *FOX July 11, 2012 Letter* at 2 (“TV Max for the first time fully and unconditionally admits in the TV Max Response that it serves many buildings in which it has failed to install alleged master antenna systems and regarding which it presents no plan to do so. ... [A]s a result, TV Max's claim that it has installed the alleged master antenna systems at 100% of its buildings cannot be accurate”). Indeed, in initially disavowing the assertion that MATV systems were installed on all buildings by March 31, 2012, TV Max acknowledged that the June 26, 2012 Balun declaration (paragraph 4) – on which the Response relies – contradicted itself. See *June 26, 2012 Balun Declaration* (stating in paragraph 4 that, “of 245 MDU properties, 206 had been converted to MATV systems by TV Max as of March 31, 2012”). Moreover, TV Max recognized that the March 31, 2012 date contradicted the spreadsheet of MATV installation dates in Attachment 2 to TV Max's June 26, 2012 letter. See Response of TV Max to Media Bureau Inquiries Dated June 13, 2012 (dated June 26, 2012) at Attachment 2 (indicating that, as of

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record, including statements made by TV Max's counsel throughout the proceeding and by Mr. Balun himself in his other sworn declarations accompanying TV Max's pleadings. In fact, in each pleading and accompanying declarations of Mr. Balun in which a MATV completion date is proffered, either a date later than March 31, 2012 or July 26, 2012 precisely is indicated as the expected or final MATV completion date.⁴⁹ Therefore, we find TV Max's new claim to be disingenuous,⁵⁰ and reject it as an attempt by TV Max to obscure the egregiousness of its misconduct.⁵¹

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March 31, 2012, MATV installation was refused at 16 properties and that TV Max was unable to contact the owners of five properties).

⁴⁹ For example, in TV Max's May 1, 2012 Response to the FOX complaint, TV Max states that it expected all buildings to be converted to MATV systems by the end of May 2012. Response of TV Max to FOX Complaint at 2 (dated May 1, 2012) ("As of January 1, 2012, about 50% of the MDU buildings served by TV Max had been fully converted to [MATV] systems. Currently [May 1, 2012], about 50% of the MDU buildings have been fully converted to MA TV systems, and the remaining MDU buildings will be fully converted by the end of May 2012") and 10 (Declaration of Thomas Balun, ¶5, stating "[a]s 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, and upon information and belief, 100% of the MDU buildings will be fully converted within 30 days of today's [May 1, 2012] date"). In TV Max's May 24, 2012 Surreply to the FOX Reply, TV Max states that it expected all buildings to be converted to MATV systems by June 1, 2012. Surreply of TV Max to FOX Complaint at 1 (dated May 24, 2012) ("TV Max has been working diligently to complete the installation of MATV systems at all MDU buildings as efficiently as practically possible, and that such installation of MATV systems at 100% of the MDU buildings will be complete by June 1, 2012.") and 8 (Declaration of Thomas Balun declaring under penalty of perjury "that the facts described in the Surreply and in this Supplemental Declaration are true and correct to the best of my knowledge, information and belief"). In TV Max's July 19, 2012 Answer to the Univision complaint, TV Max states that, as of June 30, 2012, 19 buildings were not yet converted to MATV systems and that it would – no later than September 19, 2012 – do one of three things: "(i) secure permission and complete installation of MATV systems; (ii) offer TV Max's property-specific assets for sale to another service provider; or (iii) terminate transmission of the [s]ignals." Answer of TV Max to Univision Complaint at 2-3 and 10-11 (dated July 19, 2012) (Declaration of Thomas Balun, ¶5, repeating the assertion in TV Max's Answer). Finally, in at least three pleadings filed after July 26, 2012 – including TV Max's August 3 Surreply to the Univision Reply, TV Max's August 17 Answer to the Post-Newsweek complaint, and TV Max's Answer to the ABC complaint, TV Max states that, "as of July 26, 2012, master antennas have been fully installed and are currently operational at all MDU buildings served by TV Max." Surreply of TV Max to Univision Complaint at 2 and 7 (dated August 3, 2012) (Declaration of Thomas Balun, ¶2, stating "TV Max's failure to install MATV systems at all multi-dwelling unit ("MDU") buildings by January 1, 2012 was not attributable to lack of good faith efforts to comply with applicable laws and regulations, but to the unanticipated resistance of some building owners to the rooftop antenna installations. TV Max has been continuously working to overcome that resistance, and as of July 26, 2012, master antennas have been fully installed and are currently operational at all MDU buildings served by TV Max."); Answer of TV Max to Post-Newsweek Complaint at 3 and 12 (dated August 17, 2012) (Declaration of Thomas Balun, ¶5, stating "TV Max admits that as of December 31, 2011, when the Post-Newsweek retransmission consent agreement expired, TV Max had only completed MATV installations on about 50% of the 245 MDU buildings served. Nonetheless, TV Max's failure to complete all installations by January 1, 2012 was not attributable to lack of good faith efforts to comply with applicable laws and regulations, and as of July 26, 2012, master antennas have been fully installed and are currently operational at all MDU buildings served by TV Max."); Answer of TV Max to ABC Complaint at 2-3 and 12 (dated September 24, 2012) (Declaration of Thomas Balun, ¶5, stating "TV Max admits that as of March 2, 2012, when the ABC retransmission consent agreement expired, TV Max had not completed MATV installations on all of the 245 MDU buildings served. Nonetheless, TV Max's failure to complete all installations by March 2, 2012 was not attributable to lack of good faith efforts to comply with applicable laws and regulations, and as of July 26, 2012, master antennas have been fully installed and are currently operational at all MDU buildings served by TV Max.").

⁵⁰ This is not the only time that TV Max has been less than forthright with the facts in this proceeding. For example, in the *NAL*, the Commission observed that TV Max had been apparently lacking in candor in its April 5, 2013 response to a Bureau email inquiry on March 28, 2013 about the status of the dispute. *TV Max NAL*, 28 FCC Rcd at 9475, ¶ 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

(continued....)

15. We also reject TV Max's claim that the *NAL* "inaccurately concludes that TV Max conceded that it improperly 'retransmitted the Stations' without paying any fees."⁵² In fact, TV Max concedes in its Response to the *NAL* that it retransmitted the Stations' signals without the broadcasters' consent and before it claimed to have completed installation of MATV systems on all MDU buildings.⁵³ We further reject TV Max's argument that it was lawful for it to stop paying retransmission fees when it adopted a plan to install MATV systems on all MDUs and that "any relatively minor delays [in completion of the MATV system] do not constitute willful violations."⁵⁴ We reiterate that Section 76.64(e) provides no exception for planning or beginning conversion to a MATV system.⁵⁵ Nor do we find the delays at issue in this proceeding "minor."⁵⁶ Further, TV Max asserts that it "could not afford the price gouging engaged in by the Stations, which charge small operators like TV Max retransmission fees wildly higher than those it offers to much larger cable operators...."⁵⁷ Such claims do not justify its retransmission of the Stations' signals without each station's express authority.⁵⁸

16. Accordingly, the *NAL* correctly concluded that TV Max continued to retransmit the signals while it installed MATV systems on its MDU buildings and did not complete such installation on all buildings until July 26, 2012.⁵⁹ Because TV Max consciously and deliberately retransmitted the Stations without having written retransmission consent agreements in place, the violations are willful.⁶⁰ Furthermore, because TV Max retransmitted the Stations' signals for more than one day, the violations are not only willful, but also repeated.⁶¹ Therefore, we affirm the conclusion in the *NAL* that TV Max

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or controlled by TV Max" was lacking in candor."). TV Max did not respond to this language in the *NAL* in its Response to it.

⁵¹ See TV Max Response to the *NAL* at 9 (stating "[t]his discrepancy of nearly four months [between March and July] is significant and resulted in the dramatic overstatement of the alleged misconduct").

⁵² TV Max Response to the *NAL* at 7.

⁵³ See TV Max Response to the *NAL* at 7-8 (now claiming MATV systems were installed by March 31, 2012). As discussed above, we reject TV Max's new claim that it completed installation of MATV systems by March 31, 2012, but note that even the March 31, 2012 date was after the expiration of TV Max's retransmission agreements with the Stations.

⁵⁴ See TV Max Response to the *NAL* at 7 (stating "when TV Max could not afford the price gouging engaged in by the Stations, which charge small operators like TV Max retransmission fees wildly higher than those it offers to much larger cable operators, it adopted a sensible and lawful plan to continue to serve its subscribers through a master antenna television ('MATV') system.") and 8. See also *TV Max NAL*, 28 FCC Rcd at 9477-78, ¶ 15.

⁵⁵ TV Max *NAL*, 28 FCC Rcd at 9478, ¶ 15.

⁵⁶ See *infra* note 62.

⁵⁷ TV Max Response to the *NAL* at 7.

⁵⁸ See, e.g., *Bailey Cable TV, Inc.*, MB Docket No. 12-35, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2625, 2627, ¶ 7 (MB 2012).

⁵⁹ 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. Indeed, the Commission's acceptance of TV Max's claimed July 26, 2012 MATV completion date gives TV Max the benefit of the doubt. Notably, this claim was not supported by any documentation. Ultimately, we find the claimed MATV completion date is not dispositive, given our finding below that such MATV installation did not excuse TV Max's admitted retransmission of the broadcast signals received at its off-site headend to subscribers..

⁶⁰ See 47 U.S.C. § 312(f)(1).

⁶¹ See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

willfully and repeatedly violated the retransmission consent rules for this nearly seven-month period.⁶² TV Max's violations were 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.

B. TV Max Did Not Satisfy the MATV Exception to the Requirement for Retransmission Consent.

17. We affirm the conclusion in the *NAL* that TV Max's unlawful retransmission of the Stations' signals over its cable systems to its cable subscribers is not cured by its installation of MATV systems on its MDU buildings. The mere presence of off-air antennas at an MDU does not satisfy the narrow requirements of the exception in Section 76.64(e).⁶³ As explained in the *NAL*, the MATV exception to the requirement for retransmission consent pertains only to "broadcast signals received by master antenna television facilities."⁶⁴ 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. In addition, we find TV Max's violations since December 20, 2012 were particularly flagrant because TV Max continued retransmitting the Stations without their consent after this date, despite the Bureau's Initial Finding Letter on this date advising TV Max that its operation was not in compliance with the Act and the rules.

18. TV Max claims that "there is nothing in the record that establishes that a single subscriber in any of the 245 MDUs serviced by TV Max has received or is receiving off-air programming from any source other than the installed antennas."⁶⁵ We disagree. Significantly, TV Max does not deny delivering the broadcast signals to subscribers from a source other than the MATV antennas (*i.e.*, its off-site headend facility).⁶⁶ Indeed, TV Max has admitted that "[b]roadcast signals are delivered to MDU residents using both the fiber ring and the MATV systems,"⁶⁷ meaning that TV Max retransmitted at least some broadcast signals received at its off-site cable headend rather than via the on-site MATV system.⁶⁸ TV Max further indicated in its *Compliance Statement* in response to the *NAL* that it would continue using the fiber ring to deliver the broadcast Stations until at least December 31, 2013, if not longer.⁶⁹ In light of its own statements regarding use of the fiber ring rather than exclusively using the over-the-air antennas at the individual buildings for all of its customers, we affirm the *NAL*'s finding that TV Max

⁶² 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. *TV Max NAL*, 28 FCC Rcd at 9478, ¶ 15, n.55.

⁶³ 47 C.F.R. §76.64(e).

⁶⁴ *TV Max NAL*, 28 FCC Rcd at 9478, ¶ 16. *See also* 47 C.F.R. § 76.64(e).

⁶⁵ TV Max Response to the *NAL* at 10. Notably, this statement contradicts TV Max's admission that it retransmitted the Stations' signals without the broadcasters' consent during the time period before TV Max claimed to have completed installation of MATV systems on all MDU buildings; *see supra* discussion at Section III.A.

⁶⁶ *See, e.g., FOX July 11, 2012 Letter* at 2-3 (stating "TV Max continues to avoid making the plain statement that Fox stations' broadcast signals are actually received by all TV Max end-users through the use of the [MATV] systems").

⁶⁷ *See* Kandutsch July 26 Email at 1. In addition, 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 the fiber ring. *See TV Max NAL*, 28 FCC Rcd at 9478, ¶ 16, n.58.

⁶⁸ *See supra* note 30.

⁶⁹ *TV Max Compliance Statement* at ¶ 3 (announcing for the first time that TV Max would convert all of its customers to DISH Network by December 31, 2013).

retransmitted the Stations' signals from an off-site (central) headend. As the Bureau advised TV Max in the December 20, 2012 letter, the MATV exception in Section 76.64(e) pertains only to "broadcast signals received by master antenna television facilities."⁷⁰ It does not apply to signals retransmitted from an off-site headend facility. Thus, TV Max failed to satisfy the criteria in the narrow exception to the requirement for retransmission consent during the period covered by the NAL.⁷¹

C. TV Max Is Liable for a Forfeiture in the Amount of \$2,250,000.

19. We affirm the proposed forfeiture in the *NAL* and find that TV Max is liable for a forfeiture in the amount of two million two hundred fifty thousand dollars (\$2,250,000). The proposed forfeiture in this case was assessed in accordance with Section 503(b)(1) of the Act, Section 1.80 of the Commission's rules, and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.⁷² In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account "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 such other matters as justice may require."⁷³ The *Forfeiture Policy Statement* and Section 1.80 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.⁷⁴

20. TV Max's violations have occurred for more than 365 days and involve six separate stations.⁷⁵ Given the longstanding and repeated nature of TV Max's unauthorized carriage of multiple

⁷⁰ 47 C.F.R. § 76.64(e).

⁷¹ *Id.* See *TV Max NAL*, 28 FCC Rcd at 9478, ¶ 16. We also reject the argument in the Response to the *NAL* that TV Max did not retransmit "signals" because the fiber ring employed by TV Max "transmit[s] light, not signals." TV Max Response to the *NAL* at 10, n.4. The signal is the information (in this case the audio and video), not the means of delivery. On a coaxial communication network, signals are modulated onto radio frequency waves for transmission to receivers. On a fiber optic network, signals are modulated onto light waves for transmission. (In fact, light waves are radio waves at a much higher frequency.) In both cases, the video and audio information or signal that is being transmitted is the same.

⁷² 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80, *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 (1997), reconsideration denied, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁷³ 47 U.S.C. § 503(b)(2)(E).

⁷⁴ 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) ("*Bailey NAL 1*") (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); see also *Bailey Cable TV, Inc.*, MB Docket No. 12-34, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 2631 (MB 2012) ("*Bailey NAL 2*") (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).

⁷⁵ We consider each day that TV Max retransmitted each of the six Stations without consent to be a separate violation. See, e.g., *St. George Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 11447, 11454, ¶ 21 (2012) (treating each of the four days a cable operator failed to comply with the Commission's cable signal leakage limit as separate violations). Under Section 503(b)(6) of the Act, we may propose forfeitures only for violations that occurred within one year of the date of issuance of the NAL. See 47 U.S.C. § 503(b)(6). Therefore, the *NAL* proposed a forfeiture only for violations that occurred within one year prior to the *NAL* (i.e., June 25, 2012 through June 24, 2013). 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

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broadcast stations' signals, as well as the egregious nature of the violations which continued even after the Bureau issued its Initial Findings Letter, the Commission found TV Max's violations of the retransmission consent requirements to be very serious.⁷⁶ A straightforward application of the base forfeiture amount would have resulted in a proposed forfeiture of \$16,425,000.⁷⁷ The Commission, however, acknowledged TV Max's relatively small size and limited operations. Therefore, notwithstanding the presence of aggravating factors,⁷⁸ the Commission decided that a proposed forfeiture amount of \$2.25 million was warranted.⁷⁹

21. In its Response to the NAL, TV Max seeks a reduction of the forfeiture amount, claiming a variety of mitigating factors. These claims include that: (1) the *NAL* overstated the time period during which it was retransmitting the Stations without consent and without a MATV system in place;⁸⁰ (2) TV Max did not benefit financially from the retransmission of the Stations because it "de-linked" the broadcast channels from all tiers of pay-television programming;⁸¹ (3) TV Max has no history of prior offenses;⁸² (4) TV Max has no ability to pay the forfeiture amount;⁸³ and (5) the proposed forfeiture amount is inconsistent with Commission precedent.⁸⁴ For the reasons discussed herein, we reject these claims and find no reason to reduce the NAL's proposed forfeiture amount.

22. First, as discussed above, we reject TV Max's disingenuous claim of an earlier MATV facility completion date, which is directly contradicted by its other sworn representations to the Commission.⁸⁵ As discussed in the NAL, the extended time period (between when the retransmission agreements expired with the Stations and when TV Max asserted completion of the MATV systems on all of its buildings) demonstrates its violations were particularly flagrant.⁸⁶

23. Second, contrary to TV Max's claimed "absence of any economic motivation,"⁸⁷ we find that TV Max obtained a substantial financial benefit from its MATV scheme by not paying retransmission

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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").

⁷⁶ *TV Max NAL*, 28 FCC Rcd at 9480, ¶ 18.

⁷⁷ \$7,500 base forfeiture amount x 365 violations x 6 unlawfully carried stations = \$16,425,000. *See supra Bailey NAL 1 and Bailey NAL 2.*

⁷⁸ The *NAL* indicated that several factors would ordinarily warrant an upward adjustment of the forfeiture amount, including egregious misconduct, repeated violation, intentional violation, and substantial economic gain. *TV Max NAL*, 28 FCC Rcd at 9480, ¶ 18 (*citing* 47 C.F.R. § 1.80(b)(8)).

⁷⁹ *TV Max NAL*, 28 FCC Rcd at 9480, ¶ 18 (concluding this amount would satisfy the Commission's goal "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").

⁸⁰ TV Max Response to the *NAL* at 7-9.

⁸¹ TV Max Response to the *NAL* at 9.

⁸² TV Max Response to the *NAL* at 10.

⁸³ TV Max Response to the *NAL* at 10-14.

⁸⁴ TV Max Response to the *NAL* at 14-17.

⁸⁵ *See supra* ¶ 14.

⁸⁶ *TV Max NAL*, 28 FCC Rcd at 9478, ¶ 15 (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.).

⁸⁷ TV Max Response to the *NAL* at 9 ("[t]he absence of any economic motivation on the part of TV Max with respect to the provision of off-air programming is certainly a mitigating factor in determining the appropriateness of any forfeiture amount.").

fees to the Stations. Indeed, TV Max contends that so-called “price gouging” by broadcasters through high retransmission fees was the reason it adopted its MATV plan to stop paying retransmission fees.⁸⁸ In addition, even though it did not charge for the broadcast signals it received at the MATV system, TV Max does not deny retransmitting – and charging for – the broadcast signals received at the off-site headend.⁸⁹ Indeed, TV Max admits that it did not reduce the price of its cable service (nor alter its promotional website noting its delivery to subscribers of the programming of the six Stations) after allegedly removing the broadcast channels from its channel lineup.⁹⁰ Thus, not only is economic motivation not a mitigating factor here, but we find the *NAL* correctly concluded that economic motivation was, in fact, an aggravating factor.⁹¹

24. Third, we do not view TV Max’s claimed history of no prior offenses to warrant a reduction in the forfeiture amount. In consideration of the totality of circumstances here, we do not believe that TV Max has established an exemplary regulatory record entitling it to mitigation. Indeed, notwithstanding its receipt of notice from the Licensees that its transmission of their Stations without their consent violated the Act and rules, the Licensees’ subsequent complaints to the Commission, and the Bureau’s letter confirming the illegality of TV Max’s carriage of the Stations and instruction that TV Max immediately come into compliance, TV Max continued to carry the Stations because, again in its words, it “could not afford the price gouging engaged in by the Stations” in the form of the retransmission fees they demanded. This misconduct occurred for an extended period: from the time TV Max’s retransmission consent agreements with the Licensees expired in December 2011 and March 2012 through at least the June 24, 2013 adoption date of the *NAL*. Therefore, in determining whether a reduction of the forfeiture is warranted, we find that the egregious, intentional and repeated nature of TV Max’s violations and TV Max’s high degree of culpability present in this case easily outweigh TV Max’s claimed history of no prior offenses.⁹² Furthermore, even though we cannot impose forfeitures for the significant and multiple prior offenses that occurred more than one year prior to the *NAL* (*i.e.*, December 31, 2011 through June 24, 2012), we may take note of these prior offenses in considering whether a reduction in the forfeiture amount is warranted.⁹³

25. Fourth, we reject TV Max’s claim for a further downward adjustment of the forfeiture amount based on an inability to pay. In the *NAL*, the Commission already significantly reduced the amount of the forfeiture because the total amount seemed inappropriately high considering TV Max’s relatively small size and limited operations.⁹⁴ The Commission requires a party claiming an inability to

⁸⁸ TV Max Response to the *NAL* at 7.

⁸⁹ In its Response to the *NAL*, TV Max claims that it did not charge for “off-air broadcast programming,” but does not deny charging for the broadcast signals received at the off-site headend and delivered via the fiber ring. See TV Max Response to the *NAL* at 9. Thus, not only does this demonstrate significant economic motivation, but it offers further evidence of TV Max’s lack of compliance with the MATV exception. See 47 C.F.R. § 76.64(e).

⁹⁰ *Id.* FOX Reply to TV Max Response (dated May 15, 2012) at 8 (“TV Max does not deny the averment in the Complaint that TV Max did not reduce its retail rates upon expiration of its retransmission consent agreement with FOX.”); Surreply of TV Max to FOX Reply (dated May 25, 2012) at 3 (claiming its decision not to reduce the price to be “irrelevant”).

⁹¹ See *TV Max NAL*, 28 FCC Rcd at 9480, ¶ 18.

⁹² See *supra* ¶¶ 16-17 (finding TV Max’s violations were particularly flagrant). See *Radio License Holding XI, LLC*, Forfeiture Order, FCC 14-10 at ¶ 16 (rel. Feb. 10, 2014) (determining that no downward adjustment was warranted upon consideration of the record as a whole).

⁹³ As discussed in *supra* ¶ 14, we herein affirm the finding in the *NAL* that TV Max’s retransmission of the Stations without their consent from the time its retransmission consent agreements expired (*e.g.*, December 31, 2011) through June 24, 2012 (the last day barred by the statute of limitations) violated the Act and rules. As noted *supra* in note 75, the Commission may properly consider prior offenses that would be barred by the statute of limitations to establish the context for determining an appropriate forfeiture amount.

⁹⁴ See *supra* ¶ 20. See also *TV Max NAL*, 28 FCC Rcd at 9480, ¶ 18.

pay a forfeiture to provide tax returns or financial statements prepared in accordance with generally accepted accounting principles for the most recent three-year period, or other reliable and objective documentation that accurately reflects the party's current financial status. We have reviewed the documents that TV Max submitted in support of its inability to pay claim and find that TV Max has failed to provide sufficient documentation to support its claim. As a threshold matter, TV Max has failed to provide the required documentation as specified in the *NAL* (for the most recent three year period) for each and every entity named in the *NAL*,⁹⁵ and the limited financial statements that TV Max did provide do not include any certification as to their correctness, nor does TV Max certify that the financial statements were prepared in accordance with generally accepted accounting principles.⁹⁶ In addition, the profit and loss statements submitted by TV Max are incomplete and do not provide gross revenue data.⁹⁷ In fact, the hodge-podge of financial data supplied by TV Max seems calculated to prevent the Commission from drawing any meaningful conclusions regarding TV Max's inability to pay claim. Therefore, in the absence of reliable gross revenue or other data, we are unable to evaluate TV Max's claim of inability to pay.⁹⁸ In addition, we note that the Commission has previously rejected inability to pay claims in cases of repeated or otherwise egregious violations,⁹⁹ and we find that the repeated and egregious violations present in this case would independently warrant rejection of TV Max's inability to pay claim.¹⁰⁰

26. Fifth, and finally, as discussed above, we find the *NAL* properly calculated the forfeiture amount in accordance with forfeiture policy and Commission precedent.¹⁰¹ TV Max claims that the proposed forfeiture amount "is substantially larger – by order of magnitude – and far more punitive than is typically proposed by the FCC."¹⁰² We reject this claim. The cases TV Max cites in the Response to

⁹⁵ *TV Max NAL*, 28 FCC Rcd at 9482, ¶ 26.

⁹⁶ See *TV Max Response to NAL* at Exhibit A.

⁹⁷ See *id.* at Exhibit A-1 (BV6 profit & loss statement covering June through December 2012), Exhibit A-2 (TV Max Houston, Inc. profit & loss statement covering January through May 2012), and Exhibit A-3 (TV Max Houston, Inc. profit & loss statement covering January through December 2011). With regard to a party's claim that a forfeiture should be reduced due to its inability to pay, the Commission has determined that gross revenues are generally the best indicator of ability to pay a forfeiture. See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992) ("*PJB Communications MO&O*"); *Hoosier Broadcasting Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 8640 (2000); *Coleman Enterprises, Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385 (2000).

⁹⁸ We note that, in previous cases assessing a broadcast licensee's ability to pay, the Commission has reviewed not only the financial condition of the individual station at issue or the portion of its operations relevant to the underlying violation, but also in appropriate circumstances, all financial sources available to the licensee, including the revenues of affiliated operations of that licensee and even parent companies. *SM Radio, Inc.*, Order on Review, 23 FCC Rcd 2429, 2432, ¶10 (2008). See also *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 756, 760-62 (2005) (finding that licensee failed to provide sufficient information needed to evaluate an inability to pay claim); *Frank Neely*, Memorandum Opinion and Order, 22 FCC Rcd 1434, 1436 (Enf. Bur. 2007) (same); *Pang Cheng*, Memorandum Opinion and Order, 20 FCC Rcd 2351, 2353 (Enf. Bur. 2005) (same). Such an analysis is appropriate here.

⁹⁹ See, e.g., *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840,7844-45 (Enf. Bur. 2011) (holding that violator's repeated acts of malicious and intentional interference outweighed evidence concerning his ability to pay), *recon. dismissed*, Memorandum Opinion and Order, 28 FCC Rcd 1170 (Enf. Bur. 2013); *Hodson Broadcasting*, Forfeiture Order, 24 FCC Rcd 13699, 13704 (Enf. Bur. 2009) (holding that permittee's continued unauthorized operation outweighed its inability to pay claim); *Whisler Fleurinor*, Forfeiture Order, 28 FCC Rcd 1087, 1090 (Enf. Bur. 2013) (rejecting inability to pay claim because violator's demonstrated inability to pay was outweighed by the gravity of repeated operation of an unlicensed radio station).

¹⁰⁰ See *supra* note 92.

¹⁰¹ See *supra* ¶ 20.

¹⁰² TV Max Response to *NAL* at 14.

the *NAL* are either fully consistent with our findings in this case¹⁰³ or distinguishable, as they are – as TV Max concedes – “factually different” and do not relate to violations of Section 325 of the Act or Section 76.64 of the rules.¹⁰⁴ The Commission is not obligated to handle forfeitures in the same way where the details of the violations are different.¹⁰⁵

D. Reporting Requirement

27. In the *NAL*, the Commission directed TV Max to submit a written statement signed under penalty of perjury, pursuant to Section 1.16 of the rules,¹⁰⁶ by an officer or director of TV Max, describing in detail the steps it had taken “to immediately come into compliance with the requirements of Section 325 of the Act and Section 76.64 of the Commission’s rules.”¹⁰⁷ In response to this directive, TV Max submitted a “Statement of Planned Compliance,” signed by Mr. Balun, with its Response to the *NAL* on July 25, 2013. Rather than honoring the Commission’s demand for immediate compliance, TV Max indicated that it planned to come into compliance by converting to DISH Network programming, but would not complete that conversion until December 31, 2013, and would notify its subscribers of the planned change “[o]n or before August 30, 2013.”¹⁰⁸ TV Max has provided no additional updates with respect to its plan to come into compliance. In addition, a visit to TV Max’s (Wavevision) website and review of its channel lineup indicates that it has not yet converted to DISH Network programming and continues to retransmit broadcast stations.¹⁰⁹ Therefore, we direct TV Max to submit a written statement signed under penalty of perjury, pursuant to Section 1.16 of the rules,¹¹⁰ by an officer or director of TV Max, confirming that it has taken these actions, and has come into compliance with the requirements of Section 325 of the Act and Section 76.64 of the Commission’s rules, consistent with the representations of Mr. Balun in his sworn declaration, providing the details of each action that it has so taken, including when it did so.¹¹¹ This statement must be submitted no later than thirty (30) calendar days from the release date of this Forfeiture Order. We note that TV Max’s continued carriage of the broadcast Stations’ signals without the Stations’ retransmission consent subsequent to the period of time covered by this *NAL* (*i.e.*, on and after June 25, 2013) constitutes further violations that will potentially subject TV Max to additional enforcement sanctions.

IV. ORDERING CLAUSES

28. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹¹² and Section 1.80(f)(4) of the Commission’s rules,¹¹³ 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, **ARE JOINTLY AND SEVERALLY**

¹⁰³ See *supra* note 74 (discussing *Bailey* *NALs* 1 and 2).

¹⁰⁴ TV Max Response to *NAL* at 14.

¹⁰⁵ See *America’s Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355, ¶ 14 (2001).

¹⁰⁶ 47 C.F.R. § 1.16.

¹⁰⁷ *TV Max NAL*, 28 FCC Rcd at 9489, ¶19.

¹⁰⁸ *TV Max Compliance Statement* at ¶ 3 (estimating it would convert all of its customers to DISH Network by December 31, 2013).

¹⁰⁹ See the Wavevision channel line-up shown at: <http://www.wavevision.com/houston/channel-line-up> (last visited June 18, 2014).

¹¹⁰ 47 C.F.R. § 1.16. The declarant must have first-hand knowledge of the matters asserted.

¹¹¹ See *supra* *TV Max Compliance Statement*.

¹¹² 47 U.S.C. § 503(b).

¹¹³ 47 C.F.R. § 1.80(f)(4).

LIABLE FOR A MONETARY FORFEITURE in the 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.¹¹⁴

29. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the rules within thirty (30) calendar days after the release date of this Forfeiture Order.¹¹⁵ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Communications Act of 1934, as amended.¹¹⁶ TV Max shall send electronic notification of payment to Steven A. Broeckaert at Steven.Broeckaert@fcc.gov and Evan Baranoff at Evan.Baranoff@fcc.gov on the date said payment is made.

30. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹¹⁷ 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.

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. 20554.¹¹⁸ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

31. **IT IS FURTHER ORDERED** that TV Max **SHALL SUBMIT** a written statement as described in paragraph 27, starting no later than thirty (30) calendar days from the release date of this Forfeiture Order. These statements must be mailed to Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington DC

¹¹⁴ 47 U.S.C. § 325; 47 C.F.R. § 76.64.

¹¹⁵ 47 C.F.R. § 1.80.

¹¹⁶ 47 U.S.C. § 504(a).

¹¹⁷ FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹¹⁸ See 47 C.F.R. § 1.1914.

20554, and a copy of this statement must also be transmitted via email to Steven A. Broeckaert at Steven.Broeckaert@fcc.gov and Evan Baranoff at Evan.Baranoff@fcc.gov.

32. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Laurence S. Shtasel, Counsel to TV Max, Blank Rome, LLP, One Logan Square, Philadelphia, PA 19103-6998.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary