

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FILED/ACCEPTED

AUG - 9 2012

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
Complaint of KSQA, L.L.C. ) MB Docket No. 12-168  
For Carriage of Television Station ) CSR-8659-M  
KSQA(TV), Topeka, Kansas )  
To: Chief, Media Bureau

**MOTION TO STRIKE, ALTERNATIVE MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL RESPONSE, AND SUPPLEMENTAL RESPONSE**

CoxCom, Inc., d/b/a Cox Communications Kansas, LLC (“Cox”), by its attorneys, hereby moves to strike the late-filed Reply of KSQA, L.L.C. (“KSQA”).<sup>1</sup> In the alternative, Cox moves for leave to file a Supplemental Response to new matter raised for the first time in the Reply, and includes its Supplemental Response herewith.

The Reply is late-filed without justification in violation of Sections 76.7(c)(3) and 1.46(c) of the Commission’s rules.<sup>2</sup> Moreover, in violation of Section 76.7(c)(1) of the rules,<sup>3</sup> it relies largely on new matter and arguments that KSQA never previously raised in its Complaint<sup>4</sup> or during discussions with Cox preceding the Complaint, and that were not raised in Cox’s Opposition.<sup>5</sup> KSQA fails to provide any justification for these violations, and the Bureau therefore should strike the Reply in its entirety. To the extent the Bureau accepts the defective Reply, Cox moves for leave to oppose KSQA’s new argument that it should be entitled to change its PSIP major channel number from Channel 22 to Channel 12 and demand carriage on Channel 12. KSQA’s major channel number 22 corresponds to its previous analog channel as reflected in numerous

<sup>1</sup> KSQA, L.L.C., Reply, MB Docket No. 12-168, CSR-8659-M (filed July 27, 2012) (the “Reply”).

<sup>2</sup> 47 C.F.R. §§ 76.7(c)(3), 1.46(c)

<sup>3</sup> *Id.* at § 76.7(c)(1).

<sup>4</sup> KSQA, L.L.C., Complaint for Carriage, MB Docket No. 12-168, CSR-8659-M (filed June 12, 2012) (the “Complaint”).

<sup>5</sup> CoxCom, Inc., d/b/a Cox Communications Kansas, LLC, MB Docket No. 12-168, CSR-8569-M (filed July 12, 2012) (the “Opposition”).

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Commission records, KSQA filings, and other independent, publicly available sources. In months of discussions with Cox, KSQA never claimed that its PSIP major channel number was anything other than Channel 22, or that it should be changed to Channel 12. KSQA also failed to seek Commission approval for such a change, and the Reply includes no showing that such a change is justified. Under these circumstances, the Bureau should either summarily strike the Reply or reject KSQA's new baseless arguments. In any event, the Bureau should deny the Complaint for the reasons stated in Cox's Opposition and herein.

**I. THE REPLY IS UNTIMELY WITHOUT JUSTIFICATION OR NOTICE AND SHOULD BE STRUCK IN ITS ENTIRETY.**

The Bureau should strike KSQA's Reply because it was late-filed without even an attempt to demonstrate good cause and without advance notice to the Bureau or to Cox as required by the Commission's rules and precedents.<sup>6</sup>

Both the Commission's rules and its well-settled precedents establish that extensions of time are not routinely granted, and require a showing of good cause.<sup>7</sup> Good cause requires a "unique and compelling reason for the pleading's late filing."<sup>8</sup> The Commission has long held that the "good cause" necessary for grant of an extension should be comprised of matters beyond the movant's control rather than mere inconvenience — and both the Commission and the courts have explicitly rejected the notion that conflicting attorney demands could justify an extension of time.<sup>9</sup> In addition, under these circumstances the Commission's rules require notice to both the Commission and Cox prior to filing a request for extension of time.<sup>10</sup>

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<sup>6</sup> See, e.g., 47 C.F.R. §§ 76.7(c)(3), 76.7(c)(1), and 1.46(c).

<sup>7</sup> 47 C.F.R. § 1.46(a); see also, e.g., Universal Service Contribution Methodology, WC Docket No. 06-122, GN Docket No. 09-51, DA 12-1188 (Wireline Competition Bur. rel. July 25, 2012); *Francisco Montero, Esq.*, 27 FCC Rcd 6386, 6389 (Med. Bur. 2012).

<sup>8</sup> *Francisco Montero, Esq.*, 27 FCC Rcd at 6389 (footnote omitted) (citing *NetworkIP v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008)).

<sup>9</sup> See, e.g., *Communi-Centre Broadcasting v. FCC*, 856 F.2d 1551, 1554-56 (D.C. Cir. 1988) (affirming FCC denial of extension of time requested, for among other reasons, due to competing work obligations); see also *BDPCS Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003).

<sup>10</sup> 47 C.F.R. § 1.46(c).

Here, KSQA acknowledges in a footnote that the Reply was late-filed, but fails to offer any excuse other than that KSQA and its counsel were delayed by “work obligations.”<sup>11</sup> This not only utterly fails the Commission’s standards, it completely ignores them. Cox, moreover, received no notice that KSQA planned to submit its Reply late, and KSQA apparently made no effort to inform the Commission that it intended to file a late reply. KSQA’s cavalier violation of these requirements creates an additional independent basis for striking the Reply.

KSQA also asserts in a footnote that the Reply contains “critical” information necessary to a fair resolution of the issues,<sup>12</sup> but it provides no support or elaboration of that claim. In fact, the Reply does little more than rehash KSQA’s discredited argument that the Commission’s rules and orders entitle it to carriage on its over-the-air DTV channel rather than its admitted PSIP major channel number.<sup>13</sup> That issue was fully covered in the Complaint and the Opposition, and indeed, a significant portion of the Reply consists of the same quoted language from the FCC’s *Digital Carriage Declaratory Order* that KSQA included in the Complaint and that KSQA continues to misunderstand.<sup>14</sup> Thus, the Reply adds nothing to the record that was not already included in the Complaint. In short, the late-filed Reply fails to comply with the Commission’s rules and should be stricken from the record.

## **II. KSQA’S NEW REQUEST FOR APPROVAL OF A CHANGE IN ITS PSIP CHANNEL NUMBER IS INAPPROPRIATE IN THIS PROCEEDING.**

To the extent the Bureau accepts KSQA’s defective and late-filed Reply, the Bureau should either strike the new matter raised for the first time in the Reply or summarily reject KSQA’s new claim that it be permitted to casually change its PSIP major channel number.

Cox and KSQA discussed the issue of channel placement extensively prior to submission of the Complaint, and KSQA never before suggested that its PSIP major channel number should be changed from Channel 22 to Channel 12. Indeed, in the Complaint, and again in the Reply, KSQA

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<sup>11</sup> Reply at n.1.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.* at 2-4.

<sup>14</sup> *See* Complaint at 4-6; Opposition at 3-7; *also compare* Reply at 2-3 *with* Complaint at 4-5.

admitted that its PSIP major channel number is Channel 22.<sup>15</sup> For the first time in its Reply, however, KSQA now claims its PSIP major channel number should be changed to Channel 12, and in a footnote it casually asks the Commission to reassign that virtual channel designation to KSQA.<sup>16</sup> KSQA's request for a new PSIP channel violates the Commission's rules and is outside the scope of this proceeding.

First, Section 76.7(c)(1) of the Commission's rules explicitly prohibits KSQA from raising new matters in its Reply.<sup>17</sup> KSQA's effort to inject the issue of whether its PSIP channel number should be changed is plainly outside the scope of this proceeding in violation of Section 76.7(c)(1).<sup>18</sup>

Second, although the Commission has indicated a willingness to entertain PSIP change requests to accommodate "unique" situations,<sup>19</sup> the Reply fails even to address any justification for a PSIP channel change. Moreover, granting such a casual and unsupported request in the context of this case would be both unfair and unreasonable because the Reply contradicts numerous public filings by KSQA as well as the Commission's databases on which Cox reasonably relied in attempting to negotiate a mutually agreeable channel position for KSQA.

KSQA's claims that it has no former NTSC channel and never had a construction permit for that channel are false as a matter of public record.<sup>20</sup> KSQA was issued an original construction permit for NTSC Channel 22 on August 11, 2006.<sup>21</sup> On March 14, 2008, KSQA filed a DTV

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<sup>15</sup> Complaint at 3; Reply at n.5; Opposition at 2-3 and Ex.1.

<sup>16</sup> Reply at n.5.

<sup>17</sup> 47 C.F.R. § 76.7(c)(1).

<sup>18</sup> Even if the Bureau elects not to strike the Reply in its entirety (as Cox believes the rules require), the Bureau should at the very least strike those portions of the Reply that seek to raise the issue of a PSIP reassignment for KSQA.

<sup>19</sup> Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 19 FCC Rcd 18279, 18346-47 at para. 153 (2004) ("*Second Periodic Review*").

<sup>20</sup> Reply at 3-4 & n.5.

<sup>21</sup> See FCC File No. BNPCT-20060424ADV. While the Form 301 for this application incorrectly indicates that it is for DTV channel 22, the technical exhibits attached to the application confirm that the application sought approval for an analog facility. See Attachment 37, Exhibit 32 (Engineering Exhibits at Exhibits C (analog contour map), E (interference study)).

construction progress report identifying Channel 22 as its NTSC channel,<sup>22</sup> and on August 26, 2009 KSQA filed an application for a DTV construction permit for its current Channel 12 facilities, again identifying Channel 22 as its NTSC channel.<sup>23</sup> Then, on January 3 and February 23, 2011, KSQA filed applications for modification of its DTV construction permit that likewise identified Channel 22 as KSQA's analog channel.<sup>24</sup> In short, KSQA has consistently represented to the Commission that the station's prior NTSC assignment was Channel 22.

Consistent with KSQA's representations that it previously was assigned NTSC Channel 22, the Commission has long acknowledged that KSQA's PSIP major channel number is Channel 22. Throughout the pre- and post-digital transition period, the Commission explicitly stated DTV stations would be required to include PSIP information that would allow over-the-air DTV receivers to tune to each station's major channel number, and that each station's PSIP channel would correspond to the station's former analog channel.<sup>25</sup> When the Commission released its final assignment of digital television channels in 2007, it identified KSQA as controlling NTSC Channel 22 and DTV Channel 12.<sup>26</sup> KSQA did not object to the Commission's identification of KSQA's PSIP major channel number 22 in 2007, and at no time since then has KSQA claimed its PSIP channel should be anything other than Channel 22 (until the self-serving request included in the Reply). Instead, since 2007, as Cox demonstrated in its Opposition, every Commission database

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<sup>22</sup> See FCC File No. BDTRCT-20080314AAX.

<sup>23</sup> See FCC File No. BMPCDT-20090810ADA.

<sup>24</sup> See FCC File Nos. BMPCDT-20110103AAE; BMPCDT-20110223ABN.

<sup>25</sup> Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 at para. 83 (2001) ("*First DTV Must-Carry Report and Order*"); Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital television, *Report and Order*, 19 FCC Rcd 18279 at paras. 152-153 (2004); Carriage of Digital Television Broadcast Signals: Amendment of Part 76 of the Commission's Rule, *Declaratory Order*, 23 FCC Rcd 14254 (2008) ("*2008 Declaratory Order*").

<sup>26</sup> Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, *Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15581, Appendix B (2007).

has identified Channel 22 as KSQA's PSIP channel number,<sup>27</sup> as have privately produced reference guides,<sup>28</sup> all without objection from KSQA.

These public records and KSQA representations formed the basis for Cox's position during negotiations that KSQA is only entitled to demand carriage on Channel 22. In its discussions with Cox, KSQA never claimed that its PSIP channel was something, or should be something, other than Channel 22; it simply claimed it was entitled to carriage on its over-the-air DTV channel, a claim Cox thoroughly refuted in its Opposition. KSQA should not be permitted to trump years of its own representations to the Commission and Cox's justifiable reliance on the Commission's public files and databases by springing a request for a PSIP channel change at the reply stage of a channel placement proceeding. The Bureau, therefore, should strike or dismiss this portion of the Reply.

### **III. KSQA Fails To Demonstrate that the Complaint Was Timely Filed.**

Cox's Opposition also demonstrated that the Complaint was late-filed under the requirements of Section 76.61(a)(5) of the Commission's rules.<sup>29</sup> KSQA admits that the Complaint was late-filed under the rules but nonetheless claims the Complaint was timely because it alleges Cox waived the filing deadline to permit completion of channel position negotiations.<sup>30</sup> KSQA's newly minted claim, however, cannot transform the Complaint into a timely filing.

The filing timelines in Section 76.61(a)(5) are Commission rules, and Cox has no authority to waive those rules. At most, Cox could agree to waive its right to assert the time limitations of 76.61(a)(5), but KSQA's own evidence shows that no such agreement was ever reached between Cox and KSQA. KSQA merely provides an email from Cox indicating that Cox would be amenable to discussing a carriage arrangement that would obviate the need for filing a complaint under the Commission's rules.<sup>31</sup> KSQA provides neither any actual agreement between Cox and KSQA whereby Cox agreed not to assert the time limitations in Section 76.61(a)(5), nor any

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<sup>27</sup> Opposition at 2 and Exhibit 1.

<sup>28</sup> See, e.g., Blonder-Tongue Laboratories, Inc., *Broadband Reference Guide* (Rev. 8.0, 2008) at 241, available at [http://www.blondertongue.com/UserFiles/file/documents/2009%20BBand%20Ref%20Guide\\_Part%201.pdf](http://www.blondertongue.com/UserFiles/file/documents/2009%20BBand%20Ref%20Guide_Part%201.pdf).

<sup>29</sup> Opposition at 7-9.

<sup>30</sup> Reply at 4-5.

<sup>31</sup> *Id.* at 4-5 & Exhibit 1.

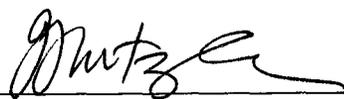
evidence, written or oral, that KSQA accepted Cox's offer to negotiate such an agreement. Cox did nothing more than offer to have its attorney address the issue of the Commission's filing limitations, which cannot be mistaken for concluding an agreement. No such agreement or evidence exists because the email provided by KSQA never led to any further negotiations or, obviously, an agreement.<sup>32</sup> Instead, KSQA rejected Cox's good-faith offer to carry KSQA on Channel 10 and filed the Complaint. As the foregoing demonstrates, even if Cox and KSQA could have agreed to an extension under Section 76.61(a)(5) without Commission approval, no such agreement was ever reached, and Cox remained free to point out KSQA's failure to meet the May 1, 2012 deadline for filing the Complaint.

### CONCLUSION

For these reasons, the Commission should strike the Reply and deny KSQA's requested relief based on the information contained in the Complaint and Answer.

Respectfully submitted,

COXCOM, INC. D/B/A COX  
COMMUNICATIONS KANSAS, LLC

By:   
\_\_\_\_\_  
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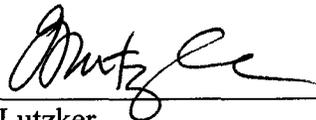
August 9, 2012

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<sup>32</sup> Contrary to the Supplemental Declaration of Wade Booker attached to the late-filed Reply, the attached Declaration of Mr. Jay Allbaugh confirms that Cox never agreed to waive the protection of Section 76.61(a)(5) of the Commission's rules. Mr. Allbaugh nevertheless acknowledges that his offer to carry KSQA on a mutually agreeable channel may have been misconstrued by Mr. Booker. *See* Declaration of Jay Allbaugh, attached hereto.

**VERIFICATION**

To the best of my knowledge, information and belief formed after reasonable inquiry, the foregoing Motion To Strike and Alternative Motion for Leave To File Supplemental Response and Supplemental Response is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



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Gary S. Lutzker

August 9, 2012

**CERTIFICATE OF SERVICE**

I, Sandra Dallas Jeter, hereby certify that a true and correct copy of the foregoing Motion To Strike, Alternative Motion for Leave To File Supplemental Response and Supplemental Response was sent by first class U.S. mail, postage prepaid, except where hand-delivery is indicated, on this 9th day of August 2012 to the following:

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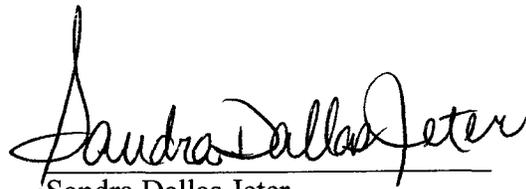
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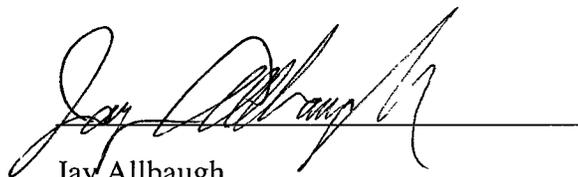
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In the Matter of )  
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For Carriage of Television Station ) CSR-8659-M  
KSQA(TV), Topeka, Kansas )

To: Chief, Media Bureau

**DECLARATION OF JAY ALLBAUGH**

1. My name is Jay Allbaugh and I am Vice President, Field Government and Public Affairs for CoxCom, Inc. d/b/a Cox Communications Kansas (“Cox”), which operates cable systems in the Topeka, Kansas Designated Market Area.
2. I have read the foregoing “Motion To Strike, Alternative Motion for Leave To File Supplemental Response and Supplemental Response” (the “**Motion**”) and I am familiar with the contents thereof.
3. Contrary to the Supplemental Declaration of Booker Wade attached to the Reply, at no time did I agree that Cox would waive the filing deadlines contained in the rules of Federal Communications Commission (“FCC”), although I did communicate Cox’s willingness to carry KSQA on a mutually agreeable channel position and my desire to resolve the carriage issue without FCC intervention, which Mr. Booker apparently misconstrued.
4. The facts contained herein and within the foregoing Motion are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry. The Motion is well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.
5. I declare under penalty of perjury that the foregoing is true and correct



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Executed on: August 8, 2012