

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

In re: )  
)  
KSQA, L.L.C. )  
) CSR-8659-M  
v. ) Docket No. 12-168  
)  
Cox Cable Communications, Inc. )  
On behalf of its subsidiaries and affiliates )  
)

**FILED/ACCEPTED**

**NOV 16 2012**

To: The Commission  
Office of the Secretary

Federal Communications Commission  
Office of the Secretary

**APPLICATION FOR REVIEW**

KSQA, LLC, licensee of KSQA, Channel 12, Topeka, Kansas, by its attorneys, pursuant to Section 1.115 of the Commission Rules, hereby applies to the Commission to review the decision of the Media Bureau, denying and dismissing the cable carriage Complaint of KSQA LLC against Cox Cable Communications Inc. ("Cox Cable") for on-channel mandatory carriage of the signal of KSQA. *In the Matter of KSQA, L.L.C.*, CSR-8659-M, Docket No. 12-168, DA 12-1682, released, October 19, 2012 ("*Dismissal Order*"). As detailed below, the denial and dismissal decision is in conflict with Section 614 of the Communications Act, established Commission regulations and policy reflected in *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket, No. 98-120, 23 FCC Rcd 14254 (2008) ("*Carriage Election Order*") and case precedent reflected in *Channel 20 TV Company, Sterling, Colorado*, CSR-8238-M, DA 10-377, released March 5, 2010 ("*Channel 20 TV Company*").

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## I. BACKGROUND

On October 19, 2012, the Media Bureau, pursuant to delegated authority, denied and dismissed the cable carriage complaint of KSQA, LLC for on-channel carriage of the broadcast signal of KSQA(TV) filed against Cox Cable. *Dismissal Order* at par. 4. In the *Dismissal Order*, the Bureau implicitly concluded that, with the issuance of it's the *Carriage Election Order*, the Commission abrogated Section 614 of the Communications Act, its implementing regulations and set aside applicable precedent.

## II. QUESTION PRESENTED

The ultimate question presented for review is whether KSQA has the right to demand cable carriage on its over-the-air broadcast channel. The core legal question to be addressed is whether the Bureau correctly interpreted the Commission's decision in the *Carriage Election Order*, when the Bureau ruled that the *Carriage Election Order* eliminated the statutory must-carry right of a television station to be carried on its over-the-air channel.

## III. ARGUMENT

### A. KSQA HAS A STATUTORY RIGHT TO ON-CHANNEL CABLE CARRIAGE

With respect to the channel number on which stations asserting must carry rights are to be carried, the Commission before and after the digital transition has held that Section 614 of the Communications Act and Section 76.57(a) of the Commission's Rules, which implements Section 614, provide commercial television stations with three statutory channel positioning options. The Commission has consistently recognized that a station, *at its option*, may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or, (3) the channel number on which the station was carried on January 1, 1992 ("Historic Options"). *Carriage Election Order*

at par. 16. While KSQA LLC seeks carriage under the first Historic Option, “the channel number on which the station is broadcast over the air,” the *Dismissal Order* denies the request, and, as such, is inconsistent with Section 614. Although KSQA LLC argued to the Bureau the applicability of Section 614, the *Dismissal Order* inexplicably does not address the statutory on-channel positioning right. As such, the Commission should review and set aside the denial of KSQA’s rights granted by Section 614 and direct carriage on-channel carriage.

It is axiomatic that the Commission lacks the capacity to abrogate congressionally prescribed measures, and the Commission is otherwise required - even during times of evolutionary change - to adhere to rights and priorities prescribed by Congress. See, e.g., *FCC v. Pottsville Broadcasting Co.*, (1940) 309 U.S. 134, 144-145. (*terminating a Court of Appeals Writ of Mandamus but holding that the Commission's responsibility at all times is to comply with statutory measures and priorities*); *City of New York v. FCC*, (1988) 486 U.S. 57, 63 (*FCC regulations and orders are valid only if in conformity with the supremacy of federal law*).

**B. THE DISMISSAL ORDER IS INCONSISTENT WITH COMMISSION POLICY**

The *Carriage Election Order*, at paragraph 16, specifically acknowledged a broadcaster’s right to on-channel carriage following the digital transition. Yet, the *Dismissal Order* completely overlooks the pivotal paragraph which provides in pertinent part that all three of the statutory Historic Options remain in effect following the analog to digital transition. Par. 16 concludes “[the] statutory options remain available to digital must-carry broadcasters, who will make digital channel placement elections pursuant to Sections 76.57(a) or (b) just as they previously have for analog channel placement elections.”

This language plainly affirms the statutory right to on-channel carriage. In ignoring paragraph 16, the *Dismissal Order* inexplicably departs from established Commission policy.

The Commission (and therefore the Bureau), may not depart from a prior policy *sub silentio* or simply disregard a statute or regulation still on the books. *FCC v. Fox Television Stations Inc.* (2009), 556 U.S. 502, 515, citing (1974) *United States v. Nixon*, 418 U.S. 683, 696.

C. THE DISMISSAL ORDER IS INCONSISTENT WITH PRIOR BUREAU DECISIONS

Prior to the *Dismissal Order*, the Bureau in another proceeding clarified that Section 614 of the Act and implementing Commission rules “...apply fully in the digital context.” See *Channel 20 TV Company*, Sterling, Colorado, CSR-8238-M, DA 10-377, released March 5, 2010, par. 3, citing, *inter alia*, the *Carriage Election Order*.

In *Channel 20 TV Company*, the cable operator denied the broadcast station’s request for on-channel carriage on Channel 3 and instead placed the station on Channel 20, its PSIP channel.<sup>1</sup> As herein, another broadcast station, KTVD, Denver, Colorado (MyNetworkTV), co-owned with KUSA, Denver (NBC), was then carried on Channel 3. Interpreting the *Carriage Election Order*, the Bureau concluded that Channel 20 TV Company was entitled to on-channel carriage on Channel 3 and directed the cable operator to provide such carriage. Yet, in the instant case, the Bureau departs from the holding in *Channel 20 TV Company*, concluding that -

In [the *Carriage Election Order*] concerning the carriage of digital broadcast television signals, the Commission stated that in digital broadcasting for purposes of channel position, a station’s over the air broadcast channel number is no longer identified by reference to its over the air radio frequency, but instead to its Major Channel Number as carried in its PSIP.

*Dismissal Order* at par. 4. The *Dismissal Order* then concludes “...under Section 76.57(a) of our rules, KSQA’s channel positioning choice may attach *only* to its Major Channel Number as carried in its PSIP.” [emphasis added] The conclusion of “only” is not supported by the plain language of the *Carriage Election Order*. While the *Carriage Election Order* uses the

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<sup>1</sup> PSIP refers to the Program System Information Protocol., a system for matching and tracking consumer branded inputs of branded analog channels to digital channels.

expression that a station is “...no longer *identified* by reference to its over the air radio frequency...” [emphasis added], it strains credulity to conclude that the Commission in the use of this single expression in a single sentence without prior notice, public input, or detailed discussion in this order, meant to abrogate a statute,<sup>2</sup> implementing regulations and decades of policies. Indeed, if the Bureau’s interpretation of the *Carriage Election Order* is correct, the Commission completely failed to provide any explanation for eliminating the statutory right to on-channel carriage and replacing it solely with a computer-embedded identifier. KSQA maintains that the Commission did not, and could not, remove any Historic Option, but instead provided an *additional* PSIP option.

#### IV. THE PSIP WAIVER REQUEST

KSQA LLC recognizes that the *Dismissal Order* states that it is without prejudice to a pending PSIP waiver request, and KSQA is hopeful that the outcome of that proceeding will provide for a waiver or the deletion of Channel 22 as an identifier for KSQA, as KSQA has never broadcast on Channel 22, only Channel 12. However, there are no assurances that the PSIP waiver request proceeding will have a favorable outcome for KSQA. Neither are there assurances that the waiver proceeding will not be unduly delayed. KSQA(TV) has been denied carriage on Channel 12 by Cox Cable for more than one year. Although KSQA has requested interim carriage on Channel 22,<sup>3</sup> as of this writing, KSQA has received no response from Cox Cable regarding its request for interim carriage on Channel 22, which means that KSQA is not being carried by Cox Cable on any channel. KSQA, therefore, seeks relief from the Commission

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<sup>2</sup> As detailed in Section III, B, above, the Commission is powerless to override Section 614 even with prior notice.

<sup>3</sup> KSQA LLC notes that on November 6, 2012, pursuant to the *Dismissal Order*, KSQA formally requested Cox Cable to provide *interim* carriage on Channel 22 pending and without prejudice to the outcome of the waiver proceeding.

in this Application for Review.

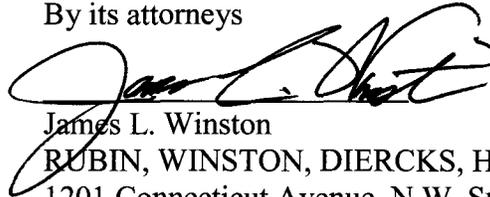
**V. CONCLUSION**

KSQA LLC requests the Commission to review and set aside the *Dismissal Order* and issue an order directing Cox Cable to commence carriage of the KSQA signal on its over the air Channel 12, consistent with Section 614 of the Act, implementing rules, established Commission policy and case precedent.

November 16, 2012

Respectfully submitted,

**KSQA, LLC**  
By its attorneys



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**CERTIFICATE OF SERVICE**

I, Daniela Harris, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that on November 16, 2012, true copies of the foregoing “Application for Review” were mailed, first class U.S. mail, postage pre-paid to the following:

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