

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

In re:)	
)	
KSQA, L.L.C.)	MB Docket No. 12-168
Licensee of Television Station)	
KSQA, Channel 12)	CSR-8659-M
For Carriage of KSQA (TV), Topeka, KS)	

To: The Commission

**SUPPLEMENT TO APPLICATION FOR REVIEW
AND REPLY TO OPPOSITION**

KSQA LLC., licensee of KSQA, Channel 12, Topeka, Kansas, by its attorneys, pursuant to Section 1.115 of the Commission Rules, hereby files this “Supplement to Application for Review and Reply to the Opposition” (“Supplement”)¹ in response to the Opposition to Application for Review (“Opposition”) filed on December 3, 2012, by CoxCom Inc., dba Cox Communications Kansas L.L.C. (“Cox”). KSQA’s Application for Review requests that the Commission review and set aside the decision of the Media Bureau denying and dismissing KSQA’s Complaint for Carriage against Cox, seeking must-carry rights on Channel 12 (the “*Dismissal Order*”).

KSQA submits this Supplement primarily to bring to the Commission’s attention the letter from the Media Bureau which holds that KSQA’s PSIP² channel is, and always has been, Channel 12 (the “*Channel 12 Letter*”).³ This directly contradicts the *Dismissal Order*, which

¹ Simultaneously with the filing of this Supplement, KSQA is filing a Motion for Leave to file the Supplement.

² Program Service Information Protocol.

³ Letter from Barbara Kreisman, Chief, Video Division to James L. Winston, counsel for KSQA, dated December 3, 2012 (a copy is attached as Attachment C).

erroneously held that KSQA only has must-carry rights on its PSIP channel, and that KSQA's PSIP channel was Channel 22. The *Channel 12 Letter* makes clear that KSQA has, and always had, must-carry rights on Channel 12, which is its over-the-air channel and correct PSIP channel. Thus, the Commission has before it two directly conflicting decisions issued by the Media Bureau with respect to KSQA's must-carry rights on Channel 12 on Cox's cable system. KSQA submits that the only reasonable way to reconcile these conflicting decisions is to promptly grant the Application for Review, reverse the *Dismissal Order*, and direct Cox to immediately begin carriage of KSQA on Channel 12, KSQA's PSIP and over-the-air must-carry channel.

I. The Media Bureau's *Channel 12 Letter* Refutes the Reasoning of the Dismissal Order and Requires Reversal of the Dismissal Order

On August 23, 2012, KSQA filed a request to waive the Channel 22 PSIP designation, which the Commission had assigned to KSQA, and to be allowed to use its over-the-air channel, Channel 12, as its PSIP channel. On December 3, 2012, the day the Opposition was filed, in response to the PSIP waiver request, the Bureau released the *Channel 12 Letter*, directing KSQA to cease broadcasting on Major Channel 22 and commence broadcasting on Channel 12 as the KSQA Major Channel. The *Channel 12 Letter* inadvertently misstates that KSQA operates on Major Channel 22. KSQA has never broadcast on Channel 22, only on its over-the-air RF frequency, Channel 12. Despite this misstatement, the *Channel 12 Letter*, at p. 2, citing the PSIP Standard, Annex B, at 1.2, correctly holds that the KSQA PSIP Major Channel is, and always has been, Channel 12.

Indeed, the *Dismissal Order* contemplated, that, if the Media Bureau determined that KSQA's Major Channel Number should be Channel 12, Cox should commence carriage on Channel 12 immediately:

Although we must dismiss KSQA's Complaint to be carried on Channel 12, we do so without prejudice to KSQA renewing its carriage demand and, if necessary, filing a renewed carriage complaint after its petition to change or delete its Major Channel Number 22 is resolved. We are hopeful that a renewed complaint will not be necessary because Cox will comply with the carriage obligations in full after this ambiguity in KSQA's digital Major Channel Number is resolved.⁴

In spite of the language in the *Dismissal Order* acknowledging that it could be superseded by a decision on KSQA's waiver request, Cox continues its refusal to carry KSQA on Channel 12. Under the circumstances, KSQA asks the Commission to grant the Application for Review, reverse the *Dismissal Order*, and direct Cox to immediately commence carriage of the KSQA signal on cable Channel 12.⁵

II. Cox's Opposition Fails to Refute the Basis for KSQA's Application for Review

KSQA has demonstrated above that the *Dismissal Order* was based upon a clearly mistaken point of law. Therefore, the *Dismissal Order* should be reversed on that basis alone. However, should the Commission fail to reverse the *Dismissal Order* based upon the Channel 12 Letter, KSQA demonstrates below, that the *Dismissal Order* should still be reversed upon the grounds presented in KSQA's Application for Review.

In its Opposition, Cox advances several arguments. KSQA responds to three: (a) Section 614 of the Communications Act and Commission orders⁶ "unequivocally" deny KSQA the right to demand on-channel cable carriage (b) KSQA "misunderstands" *Channel 20 TV Company*⁷

⁴ *Dismissal Order* at par. 5.

⁵ On December 21 2012, KSQA sent yet another request to Cox requesting immediate cable carriage on Major Channel 12. Unfortunately, given Cox's history of intransigence, KSQA does not expect Cox to honor the request. KSQA requests leave to amend this Supplement to advise the Commission if Cox does not commit to commence timely carriage of KSQA.

⁶ Although the Opposition uses the plural "orders," only one order is cited, the *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*).

⁷ See *Channel 20 TV Company*, Sterling, Colorado, CSR-8238-M, DA 10-377, released March 5, 2010; 25 Rcd 2219 (Media Bureau 2010) ("*Channel 20 TV Company*").

cited by KSQA in support of its position and that case is otherwise inapposite and (c) KSQA has not requested carriage on Channel 22.⁸

A. Section 614 Applicability

Section 614 of the Act and Section 76.57(a) of the Commission's Rules implementing Section 614 are unequivocal. For decades, the statute and the implementing rules have been and continue to detail a broadcast station's fundamental historic carriage rights to cable carriage on a station's over-the-air channel. The Commission has held that "... the statutory [carriage] options remain available to digital must-carry broadcasters..."⁹ Similarly, the Bureau has concluded that Section 614 of the Act and implementing Commission rules "...apply fully in the digital context."¹⁰ The Program Service Information Protocol has been but a tracking tool as an *identifier* for a broadcaster's over-the-air channel, not a substitute or substitute positioning channel. See *Carriage Election Order*, pars 15-16, holding only that "... a broadcast station channel is no longer identified by reference to its over-the-air channel but by its PSIP channel." (emphasis added) Channel identification is not channel positioning.

Cox cites Section 614(b)(4)(B) of the Act¹¹ to support its argument that the Commission is empowered by Congress to abrogate broadcasters' historic carriage rights under Section 614 and that the Commission did so in the *Carriage Election Order*. However, Section (b)(4)(B) by its express terms applies only to modification of technical transmitting standards for advanced television, not to cable channel positioning. Critically, assuming *arguendo* the Section's applicability, that Section specifically requires a rulemaking proceeding prior to the Commission

⁸ While the request for carriage on Channel 22 is now moot, because KSQA has must-carry rights on Channel 12, Cox's false assertions require a response from KSQA.

⁹ *Carriage Election Order*, par. 16.

¹⁰ *Channel 20 TV Company*, par. 3, citing, *inter alia*, *Carriage Election Order*.

¹¹ See 47 U.S.C. 534(b)(4)(B).

modifying the carriage rules. The *Carriage Election Order* was not such a proceeding. Thus, Section 614(b)(4)(B) is not applicable.

B. Channel 20 TV Company Applicability

Cox argues that KSQA misreads and misunderstands *Channel 20 TV Company* and argues that case does not support the holding that a broadcast station remains entitled to carriage on its over-the-air channel. Opposition, at 3. While that case holds that a broadcaster *may* demand carriage on its PSIP channel, it does not hold that a station may demand carriage “only on its PSIP channel,” as Cox maintains. Pivotaly, the ordering clause of *Channel 20 TV Company*, at par. 16, provides absolute clarity as to the continuing applicability of Section 614 of the Act and implementing Section 76.57 regulations. The Ordering Clause states:

16. Accordingly, **IT IS ORDERED** that the petition filed by Channel 20 TV Company, licensee of television broadcast station KCDO-TV, Sterling, Colorado, **IS GRANTED IN PART AND DISMISSED IN PART** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, and section 76.57 of the Commission’s rules, 47 U.S.C. § 534(d)(3); 47 C.F.R. § 76.57. Bresnan Communications **IS ORDERED** to reposition KCDO on Channel 3, the station’s over-the-air channel number, on Bresnan’s cable system serving Sterling, Colorado, within 60 days of the release date of this order.

Thus, the Ordering Clause makes clear that the statutory basis for the decision had not changed from its historical meaning.

C. Channel 22 Carriage Request

The *Dismissal Order* noted that: (a) in another proceeding KSQA had filed a request to delete the Channel 22 PSIP Standard showing in the Commission’s TV Query database as the KSQA Major Channel, (b) the *Dismissal Order* was without prejudice to the outcome of the PSIP delete/waiver request, and (c) KSQA currently was entitled to carriage on Channel 22.

In the Application for Review, at note 12, KSQA reported to the Commission that on November 6, 2012, pursuant to the *Dismissal Order*, KSQA requested Cox to provide KSQA

with cable carriage on Channel 22, on an interim basis pending the outcome of the PSIP change request.¹² Cox represented to the Commission that the KSQA report to the Commission was false, providing a supporting and sworn declaration of one of its officers. Opposition, at 5. KSQA submits herewith confirming documentation of its formal request for carriage, dated November 6, 2012, and sent to Cox via certified return receipt requested. The return receipt document from the U. S. Postal Service shows that the letter request was delivered to Cox on November 9, 2012, and that receipt was acknowledged by Lisa McDonald. See Attachment A. Additionally, on December 12, 2013, KSQA informally provided Cox with a copy of the letter and the postal certified receipt documentation. See Electronic mail transmittal from Greg Talley, Member of KSQA LLC to Jay Allbaugh, Vice President of Cox, dated December 12, 2012, at Attachment B.¹³ KSQA submits that good faith required Cox to inquire of KSQA for verification, rather than recklessly alleging that KSQA had made a misrepresentation to the Commission, in total disregard of the attendant effects of such a reckless allegation.

Further, on December 13, 2012, after receipt of the documentation demonstrating the November 6, 2012 request for carriage on Channel 22, Cox filed an Erratum conceding its misrepresentation. Inexplicably, and in defiance of the Dismissal Order, Cox still fails to confirm that it will commence carriage. Erratum, at 1, amending the Opposition at par. 2. KSQA submits that the totality of the circumstances reflect a lack of good faith by Cox.¹⁴

¹² The reference in the Opposition, at 5, that no carriage request for Channel 22 was made during failed negotiations for carriage prior to the filing of the Application for Review lacks good faith, given that KSQA reported the request date as November 6, 2012 following the *Dismissal Order*.

¹³ This electronic message was sent to Cox only after KSQA did not get a response to a prior telephone request for discussions to confirm the November 6, 2012 request.

¹⁴ In view of the totality of circumstances, KSQA requests the Commission to declare that Cox has failed to act in good faith.

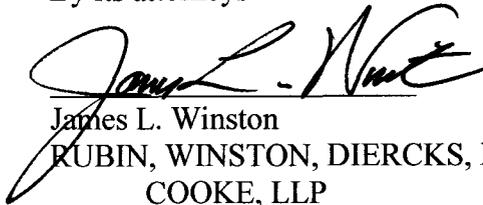
III. Conclusion

Given the foregoing, KSQA LLC requests the Commission to review and set aside the *Dismissal Order* because it is inconsistent with the *Channel 12 Letter*, applicable statutory provisions and implementing regulations. KSQA requests that the Commission issue an order directing Cox Cable to commence carriage immediately of the KSQA signal on its PSIP and over-the-air Channel 12, consistent with Section 614 of the Act, implementing rules, established Commission policy, case precedent, and the PSIP Standard, Annex B, at 1.2.

Respectfully submitted,

KSQA, L.L.C.

By its attorneys



James L. Winston

RUBIN, WINSTON, DIERCKS, HARRIS &
COOKE, LLP

1201 Connecticut Avenue, N.W. Suite 200

Washington, D.C. 20036

(202) 861-0870

jwinston@rwdhc.com

December 28, 2012

Attachment A

U. S. Postal Service Certified Mail Return Receipt Documents

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Systems manager
 Cox Cable
 901 George Washington Blvd
 Wichita, ks 67211

COMPLETE THIS SECTION ON DELIVERY

A. Signature

x *Lisa McDonald*

 Agent Addressee

B. Received by (Printed Name)

McDonald, Lisa

C. Date of Delivery

11-9-12

D. Is delivery address different from item 1? Yes

If YES, enter delivery address below: No

3. Service Type

 Certified Mail Express Mail Registered Return Receipt for Merchandise Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

 Yes

2. Article Number

(Transfer from service label)

7012 0470 0001 3893 6607

UNITED STATES POSTAL SERVICE

TOPEKA KS 66601



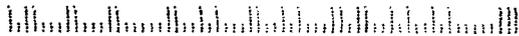
First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

KSQA

800 SW Jackson St #1407

Topeka ks 66612





KSQA-TV12 TOPEKA

November 6, 2012

Via Certified Mail-Return Receipt Requested

System Manager
Cox Cable Communications Inc.
901 George Washington Blvd.
Wichita, Ks 67211

Re: Notice of Election to Exercise Must Carry Rights
Dear System Manager:

KSQA L.L.C., licensee of television station KSQA, Topeka, Kansas, licensed to Topeka, Kansas and operating on channel 12 in the Topeka Nielsen DMA, located at 800 S.W Jackson Street, Topeka, Suite 1407, Kansas, hereby provides you notice that it has elected to assert its MUST CARRY rights, pursuant to Sections 76.64 and 76.66 of the Rules and Regulations of the Federal Communications Commission [FCC], 47 Code of Federal Regulations, Sections 76. 64 and 76.66.

KSQA LLC hereby also elects to be carried pursuant to the Commission's Memorandum Decision and Order, In re KSQA, DA 12-1692, released October 19, 2012 [Order]. As the Order provides that KSQA is entitled to carriage on the PSIP channel 22 designation, KSQA elects to be carried on cable channel 22, unless we agree with your system to be carried on another channel, in which case KSQA elects to be carried on that channel. This election and demand for carriage on Channel 22 is specifically without prejudice to KSQA LLC renewing its election during the current election cycle for carriage on Channel 12 upon FCC action on the request for waiver or deletion of the Program System Information Protocol channel 22 designation for KSQA.

Should you require any additional information in connection with this election, please contact me.

Sincerely,


Gregory Talley
Operations Manager

Attachment B

Electronic Mail Communication
From Greg Talley to Jay Allbaugh

v 5.6

- [Homepage](#)
- [Email](#)
- [Calendar](#)
- [Files](#)
- [Fax](#)
- [Check Email](#)
- [Compose](#)
- [Address Book](#)
- [Settings](#)
- [Tools](#)
- [Help](#)

Search... Move to Folder

Go [Advanced Search](#) Print

Unlimited Usage: 108MB

Sent Items > Message Detail
Subject: Carriage Request Documents
From: <Greg@ksco2.com> (Attachments: 2)
Date: Thu, Dec 13, 2012 1:18 pm
To: j.allbaugh@ksco.com

- Inbox (21)
- Bulk Mail
- Drafts (1)
- Templates
- Send Later
- Sent Items**
- Trash (1)

Mr. Allbaugh:
 Attached are copies of the letter sent Cox on November 6, 2012, formally requesting interim carriage on Channel 22. Also attached are service documents showing delivery and receipt of the letter by Cox on November 9, 2012.

Thank You
 Gregory M. Talley
 Operations Manager

Download		Size	Action(s)
Attachments			
Cox Mast Cox 11-06-12.pdf	680 k	Download	
Cox Certified Confirmation.pdf	433 k	Download	

Attachment C

Media Bureau Letter of December 3, 2012



Federal Communications Commission
Washington, D.C. 20554

December 3, 2012

KSQA, LLC
c/o James L. Winston
Rubin, Winston, Diercks, Harris & Cooke, LLP
1201 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Re: KSQA(TV), Topeka, KS
Facility ID No. 61251
PSIP Waiver Request

Dear Counsel,

This letter is in reference to a request submitted by KSQA, LLC ("KSQA"), the licensee of KSQA(TV), Topeka, Kansas, digital RF channel 12, to waive Section 73.682(d), which requires digital broadcast television signals to comply with ATSC A/65C ("ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006") ("PSIP Standard").¹ KSQA(TV) is currently operating on virtual major channel 22 and now requests virtual major channel 12 in lieu of channel 22. CoxCom, LLC, d/b/a Cox Communication Kansas, LLC ("Cox") commented on KSQA, LLC's PSIP waiver request.² We find that the PSIP Standard mandates that KSQA(TV) operate on virtual major channel number 12, and that KSQA, LLC's PSIP waiver request is therefore moot.

The PSIP Standard explains, "For a new broadcaster without an existing NTSC license, the major channel number for the digital virtual channels controlled by the broadcaster shall be set to the FCC assigned RF channel number for ATSC digital TV broadcasts."³ KSQA(TV) did not hold an NTSC license prior to the digital transition⁴ and therefore qualifies as a new broadcaster without an existing NTSC license pursuant to the PSIP Standard. KSQA(TV)'s FCC assigned RF channel number for ATSC digital TV broadcasts is 12 and therefore should be operating on virtual major channel 12.

¹ 47 C.F.R. §73.682(d) (incorporated by reference, see §73.8000).

² Cox states that it takes "no position on the ultimate question of whether the Commission should grant KSQA's requested waiver," but that should the Commission grant "the PSIP [channel] [c]hange [r]request, any change to KSQA's PSIP designation be effective only prospectively, and that KSQA be granted no right to cable carriage on [c]hannel 12 until the mandatory carriage period commencing January 1, 2015. Cox's request concerning KSQA's cable carriage rights is outside the scope of this proceeding and will not be addressed herein.

³ PSIP Standard, Annex B at 1.2.

⁴ FCC File No. BNPCT-20060424ADV (Digital Construction Permit granted Aug. 11, 2006); FCC File No. BLCDDT-20110919ABN (Digital License to Cover granted Nov. 29, 2011).

Therefore, KSQA, LLC, licensee KSQA(TV), Topeka, Kansas, is required to operate on virtual major channel 12 pursuant to the PSIP Standard and Section 73.682(d) of the Commission's Rules. KSQA(TV), Topeka, Kansas is directed to immediately commence operations on virtual major channel 12 as required by our rules. Furthermore, given that KSQA(TV) is directed to operate on digital major channel 12 in lieu of channel 22, we find that KSQA, LLC's PSIP waiver request is moot.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. A. Kreisman', written over a horizontal line.

Barbara A. Kreisman
Chief, Video Division
Media Bureau

Cc: CoxCom, LLC, d/b/a Cox Communications, LLC, c/o Gary S. Lutzker, Esq.

CERTIFICATE OF SERVICE

I, James L. Winston, a partner in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that on December 28, 2012, true copies of the foregoing "Supplement to Application for Review and Reply to Opposition" were mailed, first class U.S. mail, postage pre-paid to the following:

Cox Cable Communications, Inc.
System Manager
901 George Washington Boulevard
Wichita, KS 67211

KTKA
General Manager
6835 NW Highway 24
Topeka, KS 66618

Gary S. Lutzker, Esq.
Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

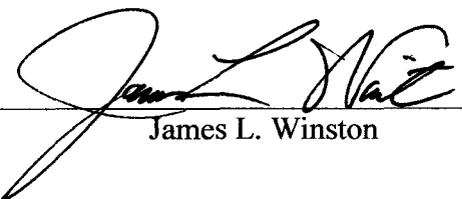
KTMJ-CA
General Manager
6835 NW Highway 24
Topeka, KS 66618

City Manager
City of Topeka
City Hall
215 SE 7th Street
Topeka, KS 66603-3914

KTWU
General Manager
1700 College
Topeka, KS 66621-1100

WIBW
General Manager
631 SW Commerce Place
Topeka, KS 66615

KSNT
General Manager
6835 NW Highway 24
Topeka, KS 66618



James L. Winston