

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

In the Matter of)	
)	
KJLA, LLC)	CSR-8065-M
)	
v.)	
)	CSR-8073-M
CoxCom, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 2009

Released: February 11, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KJLA, LLC (“KJLA”), licensee of digital-only television broadcast station KJLA-DT, Ventura, California (“KJLA”), has filed two must carry complaints with the Commission pursuant to Sections 76.7, 76.56 and 76.61(a)(1) of the Commission's rules,¹ against CoxCom, Inc. d/b/a Cox Communications Palos Verdes and Cox Communications Orange County (“Cox”).² Cox opposed both complaints, and KJLA has filed replies.³ For administrative convenience, the Bureau is consolidating the petitions into one proceeding. For the reasons discussed below, we dismiss both of KJLA’s mandatory carriage complaints.

II. BACKGROUND

2. Under Section 614 of the Communications Act of 1934, as amended (hereinafter the “Act”), and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* (“*Must Carry Order*”), commercial television broadcast stations such as KJLA, are entitled to assert mandatory carriage rights on cable systems located within each station’s market.⁴ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen.⁵ The term DMA is a geographic market designation that

¹ 47 C.F.R. §§ 76.7, 76.56 and 76.61(a)(1).

² Complaint of KJLA, LLC against Coxcom, Inc. (CSR-8065), filed Sept. 23, 2008 (“KJLA Complaint (CSR-8065)”); Complaint of KJLA, LLC against Coxcom, Inc. (CSR-8073), filed Sept. 26, 2008 (“KJLA Complaint (CSR-8073)”).

³ Cox Motion to Dismiss and Request for Sanctions (CSR-8065), filed Oct. 16, 2008 (“Cox Opposition (CSR-8065)”); KJLA Reply and Opposition to Motion to Dismiss and Request for Sanctions (CSR-8065), filed Oct. 27, 2008 (“KJLA Reply (CSR-8065)”); Cox Opposition, Motion to Dismiss, and Request for Sanctions (CSR-8073), filed Nov. 3, 2008 (“Cox Opposition (CSR-8073)”; KJLA Reply to Opposition, Motion to Dismiss and Request for Sanctions (CSR-8073), filed Nov. 13, 2008 (“KJLA Reply (CSR-8073)”).

⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77, ¶¶ 41-46 (1993) (“*Must Carry Order*”).

⁵ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, (continued....)

defines each television market exclusive of others, based on measured viewing patterns. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station that is located in the same DMA is not entitled to carriage.⁶

3. In 1997, KJLA filed a market modification petition to include certain communities from the Los Angeles ADI within its market. These included some communities served by Cox's Los Angeles and Orange County cable systems.⁷ In 1997 (and up until January 1, 2000), KJLA-TV was assigned by Arbitron to the Santa Barbara, California Area of Dominant Influence ("ADI").⁸

4. In response to KJLA's petition, the Cable Services Bureau (now the Media Bureau or "Bureau") issued its *1998 Market Modification Order*, which agreed to add some Los Angeles ADI communities to KJLA's market, but limited these additions to certain communities within the station's Grade A contour. However, all of Cox's Los Angeles ADI communities at issue in the present matter were excluded from the station's market.⁹

5. Commencing January 1, 2000 when Arbitron ceased to provide local television market area surveys, the Commission switched to surveys prepared by Nielsen Media Research. This resulted in Ventura County, and consequently KJLA's community of license, being re-designated from the Santa Barbara ADI to the Los Angeles DMA. The Commission has used Nielsen's DMAs to determine market boundaries for broadcast signal carriage purposes since that time.

6. KJLA subsequently sought reconsideration of the Bureau's *1998 Market Modification Order* with respect to Cox's cable communities.¹⁰ KJLA also filed a complaint seeking mandatory carriage rights in all the combined Cox communities addressed in the *1998 Market Modification Order*.¹¹ KJLA reasoned that by its re-designation to the Los Angeles DMA, these communities were, by definition, now part of its market.¹²

7. The Commission denied both KJLA's petition for reconsideration and its carriage complaints as to Cox in its *2000 KJLA Reconsideration and Carriage Order*.¹³ The Bureau found that KJLA had not provided sufficient evidence to overrule its *1998 Market Modification Order* and that KJLA could not

(...continued from previous page)

commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by Nielsen Media Research. 47 C.F.R. § 76.55(e)(2).

⁶ See *Must Carry Order*, 8 FCC Rcd at 2990, ¶ 102.

⁷ See *1998 Market Modification Order*, 13 FCC Rcd at ¶¶ 7, 13.

⁸ More specifically, KJLA-TV was then known as KSTV-TV, Channel 57, licensed to Ventura, California, and transmitting from South Mountain, Ventura. *In re Costa de Oro Television, Inc.*, 13 FCC Rcd. 4360, ¶ 7 (1998) ("*1998 Market Modification Order*"); see also *infra* ¶ 5.

⁹ See *id.* at ¶¶ 13 & nn.27-28, 28, 30-31.

¹⁰ Through reconsideration, KJLA sought the addition of Cox's Los Angeles systems found to be outside the station's Grade A contour, but KJLA did not seek reconsideration of the *1998 Market Modification Order* as to Cox's Orange County communities which lay outside its Grade B contour. See *In re Costa de Oro Television, Inc.*, 15 FCC Rcd 12637, 12641, ¶ 9 & n.12, 12643-44, ¶14 (2000) ("*2000 KJLA Reconsideration and Carriage Order*").

¹¹ *2000 KJLA Reconsideration and Carriage Order* 15 FCC Rcd at 12643-44, ¶ 14. The communities subject to the mandatory carriage petition against Cox were also the same communities that were the subject of the *1998 Market Modification Order*. See *id.*

¹² *Id.* at 12644, ¶14.

¹³ *Id.* at 12642, ¶ 11, 12644-45, ¶¶ 14-15.

reach certain Cox communities at issue in the instant case.¹⁴ The Bureau also concluded that KJLA could not seek mandatory carriage rights in communities previously excluded from its market, even though those communities had been re-designated into its market as part of Nielsen's moving the station from the Santa Barbara ADI to the Los Angeles DMA.¹⁵

8. In 2003, KJLA again filed a mandatory carriage complaint seeking carriage on Cox's cable systems in the very same communities previously found to be outside its market.¹⁶ In its *2003 Carriage Order*, the Bureau again denied KJLA's must-carry complaints, stating that "KJLA is not a local station entitled to mandatory carriage on... Cox... cable systems," but that "[i]f the Commission, at some future date, reverses the Bureau's orders, then the station may assert its right to carriage as is appropriate."¹⁷ In addition, the Bureau found "irrelevant" KJLA's alternative justification for carriage - its intent to commence operation of KJLA-DT and to provide a signal comparable to other stations in the market.¹⁸

9. On August 27, 2008, KJLA shut down its channel 57 analog transmission, moved its antenna site from South Mountain, Ventura to Mount Wilson in Los Angeles, and commenced digital-only operations as KJLA-DT on channel 49.¹⁹ KJLA asserts that on August 5, 2008 it wrote to Cox electing mandatory carriage for KJLA-DT on Cox's cable systems for the remainder of the 2006-2008 triennial carriage cycle.²⁰ Similarly, on August 26, 2008, KJLA mailed a second election letter, this time electing mandatory carriage for KJLA-DT on Cox's cable systems for the 2009-2011 triennial carriage cycle.²¹

10. By letter dated September 4, 2008, Cox rejected KJLA's must-carry elections with respect to both triennial carriage cycles, arguing that these letters were a "legal nullity," and that Cox had no legal obligation to carry the station as a result of the FCC's repeated exclusion of the communities served by Cox from KJLA's market.²² By letter dated September 11, 2008, KJLA demanded mandatory carriage of

¹⁴ *Id.* at 12642, ¶ 11.

¹⁵ *Id.* at 12644, ¶ 15. The United States Court of Appeals for the District of Columbia Circuit subsequently upheld the Commission's decision that the market determinations rendered under the ADI standard continue to be binding on parties in carriage cycles occurring after the transition to DMAs. *See Costa de Oro Television, Inc., v. FCC*, 294 F.3d 123, 122-129 (2002).

¹⁶ *See Costa de Oro Television, Inc. v. Cox Communications, Inc.*, 18 FCC Rcd 7103, 7103 & n.1 (2003) ("2003 Carriage Order").

¹⁷ *Id.* at 7106, ¶ 9. At the time, KJLA had filed Applications for Review of the Bureau's prior decisions, arguing that it was a Los Angeles station entitled to mandatory carriage on all cable systems in that DMA; these petitions remain pending. *See id.*

¹⁸ *Id.*

¹⁹ *See* KJLA Reply (CSR-8065), Ex. A, Declaration of Kenneth W. Brown, at ¶¶ 2, 9A ("Brown Decl.")

²⁰ These appear to be the same cable systems the Bureau addressed in past orders, and neither party disputes this. *See* KJLA Complaint (CSR-8065), Ex. A, Aug. 5, 2008 Letter from Francis X. Wilkinson, VP & General Manager, KJLA to James Leach, Vice President, Public Affairs, Cox Cable. KJLA sought carriage on all of Cox's Los Angeles cable systems, including those serving the following communities: **Aliso Viejo**: Palos Verdes Estates, Palos Verdes Peninsula, Rancho Palos Verdes, Rolling Hills, Rolling Hills Estates, San Pedro; **Irvine**: Corona Del Mar, Irvine, Newport Beach, Orange, Tustin; and **Rancho Palos Verdes**: Aliso Viejo, Capistrano Beach, Corona Del Mar, Coto De Caza, Dana Point, El Toro, Foothill Ranch, Irvine, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Modjeska Canyon, Newport Beach, Orange, Rancho Santa Margarita, San Clemente, San Juan Capistrano, Silverado, Trabuco Canyon, and Tustin. *Id.*

²¹ KJLA Complaint (CSR-8073), Ex. A, Aug. 26, 2008 Letter from Francis X. Wilkinson, VP & General Manager, KJLA to James Leach, Vice President, Public Affairs, Cox Cable. KJLA sought carriage on the identical communities it listed in its Aug. 5th letter. *Compare id. with supra* n. 20.

²² KJLA Complaint (CSR-8065) and KJLA Complaint (CSR-8073), Ex. B, Sept. 4, 2008 Letter from James Leach, Vice President, Public Affairs, Cox Cable to Francis X. Wilkinson, VP & General Manager, KJLA.

its signal on Cox's cable systems serving the Los Angeles, California DMA, for the remainder of the 2006-2008 triennial carriage cycle and the 2009-2011 carriage cycle.²³ Before Cox responded to these carriage demands, KJLA filed the two complaints that are the subject of this order. KJLA's first complaint, filed on September 23, 2008 concerned its assertion of carriage rights on Cox's cable systems for the current 2006-2008 carriage cycle (the "2006-2008 Complaint").²⁴ KJLA's second complaint, filed on September 26th, was for its carriage rights on those same systems for the upcoming 2009-2011 carriage cycle (the "2009-2011 Complaint").²⁵

11. KJLA argues Cox's rejection of its present carriage requests is without basis.²⁶ KJLA states that as a result of its transition to digital-only operations at the Mount Wilson antenna farm - the transmission site for nearly all Los Angeles full-power television stations, over-the-air availability of the station jumped from 4 million to 13 million households, entitling it to cable carriage treatment equal to the other similarly located stations in the DMA carried by Cox.²⁷ KJLA argues that the Bureau's prior orders have "no bearing on KJLA's digital carriage rights in the [2006-2008 or 2009-2011] triennial cycle," given that KJLA has become a digital-only station and the prior orders dealt with KJLA's *analog* signal coverage of the Cox communities.²⁸ KJLA also argues that "at no time has the Commission ever held that market modification decisions involving analog stations would be given effect over digital-only stations *before or after* the DTV Transition."²⁹ KJLA therefore argues that its "digital-only operation effectively amounts to a new station, and the station's [2006-2008 and 2009-2001] carriage rights in the Cox Communities effectively amounts to a whole new ballgame."³⁰

12. Cox responds that the Bureau should dismiss both complaints because multiple Commission orders have found KJLA not to be a local commercial television station in Cox's cable system communities, and these communities are therefore outside the station's market for must-carry purposes.³¹ Cox argues previous Commission orders remain binding on KJLA and are not nullified by KJLA's commencement of digital broadcasting.³²

III. DISCUSSION

13. The relief requested by KJLA simply cannot be achieved by the filing of a carriage complaint. Our prior precedent clearly and repeatedly established that KJLA is not a local station in the

²³ KJLA Complaint (CSR-8065), Ex. C, Sept. 11, 2008 Letter from Francis X. Wilkinson, VP & General Manager, KJLA to James Leach, Vice President, Public Affairs, Cox Cable. KJLA demanded carriage for the current triennial carriage cycle (2006-2008) on those Cox systems not presently carrying the station. *Id.* In a simultaneous letter, KJLA similarly requested carriage on the identical Cox cable systems for the 2009-2001 triennial carriage cycle. Cox Opposition (CSR-8073), Ex. 2, Sept. 11, 2008 Letter from Francis X. Wilkinson, VP & General Manager, KJLA to James Leach, Vice President, Public Affairs, Cox Cable.

²⁴ KJLA Complaint (CSR-8065) at 4.

²⁵ KJLA Complaint (CSR-8073) at 4.

²⁶ See KJLA Complaint (CSR-8065) at 3, and KJLA Complaint (CSR-8073) at 3.

²⁷ See KJLA Reply (CSR-8065) at 4-5 and KJLA Reply (CSR-8073) at 4-5, Ex. A, Brown Decl. at 3. (Mr. Brown declares that tests in the Cox Communities confirmed a KJLA-DT signal level and quality equal to or better than those of current Mt. Wilson stations feeding Cox.)

²⁸ KJLA Complaint (CSR-8065) at 2-3, and KJLA Complaint (CSR-8073) at 2-3.

²⁹ KJLA Complaint (CSR-8065) at 3, and KJLA Complaint (CSR-8073) at 3.

³⁰ KJLA Complaint (CSR-8065) at 4, and KJLA Complaint (CSR-8073) at 4.

³¹ See Cox Opposition (CSR-8065) at 2, 6-8, and Cox Opposition (CSR-8073) at 2, 6-10.

³² See Cox Opposition (CSR-8065) at 2, 8-11, and Cox Opposition (CSR-8073) at 2, 11-14.

communities at issue served by Cox's cable systems. We find KJLA has no standing to assert mandatory carriage rights on those cable systems. Therefore, KJLA's carriage complaints will be dismissed. Although KJLA-DT recently commenced digital-only operations from a new location, these changed circumstances do not entitle KJLA to automatic carriage rights in communities previously excluded from its market. As a pre-condition for asserting its mandatory carriage rights in Cox's cable system communities, KJLA must first file a market modification petition. KJLA must demonstrate that it meets the required market modification factors to include these communities in its market and therefore be entitled to mandatory carriage rights in them.

14. Cox argues KJLA neither sought nor received a stay or extension of the Bureau's *1998 Market Modification Order*.³³ It points out the *2000 KJLA Reconsideration and Carriage Order* expressly held that KJLA could not seek mandatory carriage rights for the Cox communities.³⁴ Cox further points out the *2003 Carriage Order* again denied KJLA carriage in the Cox communities on the very same grounds – i.e., that KJLA was not a local station entitled to mandatory carriage on Cox's cable systems.³⁵ Cox argues that because the Bureau's *1998 Market Modification Order* removed the Cox communities from KJLA's market, by definition KJLA is not a "local" commercial television station with respect to the Cox communities, as they are not "within the same television market."³⁶ It argues KJLA's carriage demands are therefore patently frivolous, as only "local" stations may obtain review of a carriage denial through filing a must-carry action.³⁷

15. KJLA seeks to distinguish its instant carriage complaints by arguing that the digital-only nature of KJLA-DT, as well as its changed transmitter location and coverage area, effectively amount to a new station requiring a modified market area.³⁸ Cox responds that contrary to KJLA's contentions, the Commission has repeatedly deemed its decisions regarding analog broadcast stations to be binding on subsequent digital facilities.³⁹

16. In its *2001 DTV Carriage Order*, the Commission stated it had "sought comment on whether any change to the market modification process was warranted to accommodate the difference between analog and digital broadcasting."⁴⁰ The Commission concluded in that *Order* that its previous television market determinations would remain binding on digital stations, stating that "the market of the station's digital signal is coterminous with the station's market area for its analog signal."⁴¹ The Commission

³³ Cox Opposition (CSR-8065) at 4, and Cox Opposition (CSR-8073) at 3.

³⁴ Cox Opposition (CSR-8065) at 4 & n.10, and Cox Opposition (CSR-8073) at 3-4 & n.11 (citing *2000 KJLA Reconsideration and Carriage Order* 15 FCC Rcd at 12644, ¶ 15).

³⁵ Cox Opposition (CSR-8065) at 4 & n.11, 7 and Cox Opposition (CSR-8073) at 4 & n.12, 8 (citing *2003 Carriage Order* 18 FCC Rcd at 7106, ¶ 9).

³⁶ Cox Opposition (CSR-8065) at 6-7 & nn.20-21 and Cox Opposition (CSR-8073) at 6-7 & nn.27-28 (citing 47 U.S.C. §§ 534(h)(1)(A) & (C)).

³⁷ Cox Opposition (CSR-8065) at 7 & n.28 and Cox Opposition (CSR-8073) at 8 & n.40 (citing 47 U.S.C. §§ 534(d) ("A local commercial television station that is denied carriage ... in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission."))

³⁸ See KJLA Complaint (CSR-8065) at 4 and KJLA Complaint (CSR-8073) at 4.

³⁹ See Cox Opposition (CSR-8065) at 9 and Cox Opposition (CSR-8073) at 11.

⁴⁰ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues*, 16 FCC Rcd. 2598, 2635-36 ¶ 84 (rel. January 23, 2001) ("2001 DTV Carriage Order").

⁴¹ In the *2001 DTV Carriage Order*, the Commission stated:

We find that our current reliance on Nielsen's market designations, publications, and assignments for analog signal carriage issues should continue for digital signal carriage issues. The presumption, therefore, is that the

(continued....)

further held that the same procedural and evidentiary framework for market modification proceedings would be used for digital stations.⁴²

17. Simply put, a station such as KJLA, whose market has already been shaped by a prior, standing market modification decision, cannot seek carriage on Cox cable systems serving communities excluded from its market by that decision, without first prevailing in a market modification petition that adds those communities to its market.⁴³

IV. CONCLUSION

18. We find that KJLA has no standing to file must-carry complaints with respect to Cox cable systems serving communities previously excluded from its market by prior market modification orders. Therefore, we dismiss both of KJLA's must-carry complaints (CSR-8065 and CSR-8073) and decline to consider the other arguments raised by the parties. We also decline to sanction KJLA, as requested by Cox.

V. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, that the Mandatory Carriage Complaints (CSR-8065 & CSR-8073) filed by KJLA, LLC, licensee of digital-only television broadcast station KJLA-DT, Ventura, California, **ARE DISMISSED**.

20. This action is taken under authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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market of the station's digital signal is coterminous with the station's market area for its analog signal during the transition period. In addition, we find that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television cases during the transition period. We realize, of course, that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, we will take into consideration changes in signal strength and Grade B contour coverage because of new digital television channel assignments and power limits. All other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.

Id. at 2636 ¶ 85 (citation omitted).

⁴² *See id.*

⁴³ This same rule applies in the analog context. The Commission has found that an analog station's relocation of its transmitting facilities, resulting in a greater area of coverage or population served, does not by itself constitute changed circumstances which guarantee automatic reconsideration of a prior market modification decision and carriage in the contested communities. *See In re Avenue TV Cable Serv., Inc.*, 19 FCC Rcd 16116, 16117 ¶ 3, 16118 ¶ 6 (2004). Such an analog station is still expected to demonstrate that it meets the market modification criteria, such as Grade B coverage of the subject cable system communities and the provision of locally-focused programming. *See Id.* at 16118-19 ¶ 6; *see also* 47 U.S.C. § 534(h)(1)(C)(ii).