

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

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

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 2012

Released: October 19, 2012

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

I. INTRODUCTION

1. KSQA, L.L.C., licensee of commercial broadcast television station KSQA, Channel 12, Topeka, Kansas filed the above captioned must carry complaint pursuant to Sections 76.7, 76.56 and 76.61 of the Commission's rules,¹ seeking to ensure carriage on its over-the-air channel number 12 on cable systems operated by Cox Cable Communications, Inc. ("Cox").² Cox has filed an opposition to this complaint,³ to which KSQA has filed a reply.⁴ For the reasons discussed below, we dismiss KSQA's complaint without prejudice to its refiling once its petition seeking to waive or delete its Major Channel Number 22 is resolved.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and the implementing rules adopted by the Commission, commercial television broadcast stations, such as KSQA, are entitled to assert mandatory carriage rights on cable systems located within their market.⁵ A station's market for this purpose is its designated market area, or DMA, as defined by the Nielsen

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

² Complaint for Carriage by KSQA, L.L.C. (CSR-8659-M), filed June 12, 2012 ("KSQA Complaint").

³ Opposition and Motion to Dismiss by Cox Cable Communications, Inc., filed July 12, 2012 ("Cox Opposition").

⁴ Reply by KSQA, filed July 27, 2012 ("KSQA Reply"). In addition, several supplemental pleadings were filed. See Motion to Strike, Alternative Motion for Leave to File Supplemental Response, and Supplemental Response by Cox, filed Aug. 9, 2012; KSQA Motion for Leave to File Notice (Aug. 23, 2012), attaching Letter from James L. Winston, Counsel, KSQA to Marlene H. Dortch, Secretary, FCC (Aug. 23, 2012) ("KSQA Waiver Request"); and, Letter from Gary S. Lutzker, Counsel, Cox to Marlene H. Dortch, Secretary, FCC at 1 (Sept. 7, 2012) ("Cox Opposition to KSQA Waiver Request").

⁵ See *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). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See *Carriage of Digital Television Broadcast Signals First Report and Order*, See 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001); see also 47 C.F.R. § 76.64(f)(4).

Company.⁶ The Commission has clarified that “broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent.”⁷ Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with four possible channel positioning options to which they may assert their rights. Pursuant to Section 76.57, a commercial broadcast station 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, 1992.⁸ A broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.⁹

3. Cox operates cable television systems in Topeka, Kansas, in the Topeka, Kansas DMA.¹⁰ KSQA asserts that by letter dated September 28, 2011, it elected mandatory carriage on Cox's cable system on the channel on which it broadcasts over the air digitally, Channel 12.¹¹ On January 27, 2012, after carriage of the station had not commenced and after it had not received a response from Cox, KSQA sent a letter reasserting its mandatory carriage rights on Cox's system and requesting carriage on Channel 12.¹² Thereafter, Cox and KSQA engaged in telephone and email discussions about KSQA's desire to be carried on Channel 12.¹³ Cox is currently carrying the local CBS affiliate, WIBW, Topeka (Channel 13) on Channel 12, and Cox informed KSQA that it preferred not to move WIBW.¹⁴ After KSQA and Cox were unable to reach an agreement on an alternative channel placement, Cox denied KSQA's carriage request on the ground that KSQA's PSIP Major Channel designation of 22, and not 12, was the only channel on which KSQA was entitled to invoked carriage under Section 76.57(1).¹⁵ On June 12, 2012, KSQA filed its must carry complaint seeking carriage on its over-the-air Channel 12.

III. DISCUSSION

4. Although the parties have raised various arguments, the primary issue before us is whether KSQA has a right to demand carriage on Channel 12 of Cox's cable system when its over-the-air broadcast channel is 12, yet its PSIP Major Channel Number is 22. KSQA argues a station has two must-carry channel positioning options under Section 76.57(1) – the right to mandatory carriage on its current

⁶ 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, 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).

⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd. 4142, 4144, ¶ 15 (1993).

⁸ *See* 47 C.F.R. § 76.57(a).

⁹ *See* 47 C.F.R. § 76.57(d).

¹⁰ Complaint at 1.

¹¹ Complaint at 2 and Exh. 2, Letter from Gregory Talley, Operations Manager, KSQA to System Manager, Cox (Sept. 28, 2011).

¹² Complaint at 2 and Exh. 3, Letter from Gregory Talley, Operations Manager, KSQA to System Manager, Cox (Jan. 27, 2012).

¹³ Complaint at 2-3. KSQA provides a record of email exchanges starting April 19, 2012, which it asserts evidence the parties' attempts to amicably work out a carriage arrangement for KSQA on Cox's cable system. *See* KSQA at 5 & Exh. 1.

¹⁴ Complaint at 2-3.

¹⁵ KSQA Reply at Exhibit 2, Supplementary Declaration of Booker Wade, ¶ 2, KSQA Complaint at Exh. 6, Letter from Gary S. Lutzker, Counsel, Cox to Gregory M. Talley, Operations Manager, KSQA (May 18, 2012).

over-the-air channel number or to carriage on its PSIP Major Channel Number.¹⁶ In its 2008 Declaratory Order concerning the carriage of digital broadcast television signals, the Commission stated that in digital broadcasting for purposes of channel positioning, 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.¹⁷ Accordingly, under Section 76.57(1) of our rules, KSQA's channel positioning choice may attach only to its Major Channel Number as carried in its PSIP, namely Channel 22, and KSQA is incorrect that it would also have a right to carriage on Channel 12. Therefore its demand that it be carried on Channel 12 must be denied.

5. We are aware that KSQA has filed a formal request with the Commission's Media Bureau, Video Division, to waive its Channel 22 designation as currently contained in its PSIP, and to substitute that number with its over-the-air channel number 12, or, alternatively, it seeks to delete its PSIP Channel 22 designation completely.¹⁸ 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.¹⁹ We are hopeful that a renewed complaint will not be necessary because Cox will comply with its carriage obligations in full after this ambiguity in KSQA's digital Major Channel Number is resolved.

V. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED**, that pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, the must carry complaint filed by KSQA, L.L.C., licensee of commercial broadcast television station KSQA, Channel 12, Topeka, Kansas against Cox Cable Communications, Inc. **IS DISMISSED**.

7. This action is taken under authority delegated by Section 0.283 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

¹⁶ Complaint at 6.

¹⁷ *Carriage of Digital Television Broadcast Signal: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd. 14254, 14258 ¶¶ 15-16 (2008) ("2008 Declaratory Order").

As noted above, one of those statutory options is carriage on the broadcast channel number. In digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's "major channel number" is identified in its program and system information protocol ("PSIP"). This usually corresponds to the radio frequency at which the station previously broadcast its analog signal.... Thus, the cable operator can identify the correct channel location by reference to the PSIP.... We clarify that any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in the station's PSIP.

¹⁸ KSQA Waiver Request at 1 & 4.

¹⁹ We note that Cox has filed a letter motion in which it objects to KSQA's attempt to change the outcome of this proceeding by changing its PSIP. See Cox Opposition to KSQA Waiver Request at 1. However, as Cox admits, "[i]f the PSIP Channel Change Request is granted retroactively, the Commission's rules and the pending must-carry proceeding between Cox and KSQA will be moot." *Id.* at 2. If our decision herein would be mooted by a change in KSQA's PSIP, we choose instead to reconsider these matters once KSQA's PSIP number issue is settled.

²⁰ 47 C.F.R. § 0.283.