

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

In the Matter of

Fields Cable TV

Enforcement Complaint Concerning
WYMT-TV, Hazard, Kentucky, and
WKYT-TV, Lexington, Kentucky

MB Docket 12-221
CSR 8693-C

To: The Secretary's Office
Attn: The Media Bureau

**REPLY OF GRAY TELEVISION LICENSEE, LLC TO
ANSWER OF FIELDS CABLE TV**

Gray Television Licensee, LLC ("Gray"), licensee of television stations WYMT-TV, Hazard, Kentucky, and WKYT-TV, Lexington, Kentucky, (the "Stations"), hereby files this Reply to the Answer of Fields Cable TV ("Fields") in the above referenced proceeding.¹ Fields does not dispute – indeed, even admits – the key facts. Namely, for almost two years, Fields has retransmitted the Stations without Gray's express written consent in violation of federal law.² Despite warnings from Commission staff, Fields continues to retransmit the Stations. Accordingly, Gray respectfully requests that the Bureau issue an order imposing sanctions on Fields for its flagrant and willful violation of federal law.

¹ This Reply is timely filed in accordance with the letter from Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, FCC, to James Fields and Robert J. Folliard (Feb. 24, 2014).

² 47 U.S.C. § 325(b)(1)(A) (requiring multichannel video programming distributors to obtain a broadcast licensee's express written consent before retransmitting the station's signal). As Gray explained in its Complaint, the various exceptions to this rule, including those for local commercial stations that elect to assert their must-carry rights, are not applicable here.

I. FIELDS HAS RETRANSMITTED THE STATIONS WITHOUT CONSENT IN VIOLATION OF FEDERAL LAW FOR ALMOST TWO YEARS.

None of the facts in this proceeding are in dispute. As Gray explained in its Complaint, Fields has not had consent to retransmit the Stations since May 31, 2012. On a conference call with the Commission's staff on August 6, 2012, Mr. James Fields acknowledged that Fields does not have consent to retransmit the Stations. Nevertheless, Mr. Fields admitted that Fields was continuing to retransmit the Stations. To this day, to the best of Gray's knowledge, Fields continues to retransmit the Stations, yet at no point since May 31, 2012, has Fields had the necessary consent under Section 325(b) of the Communications Act to retransmit the Stations.

Fields' Answer does not provide any legitimate justification for this continuing violation of law. First, Fields notes that the cable community of Combs, Kentucky is less than five miles from WYMT-TV's tower and subscribers can likely receive WYMT-TV over the air with an antenna. The Commission, however, in *Bailey Cable TV* rejected that exact excuse calling it "irrelevant."³ Second, Fields claims that the fees that Gray is seeking are excessive. Once again, in *Bailey Cable TV*, the Commission confronted and rejected this objection: "an increase [in fees] does not justify an MVPD's retransmission of a broadcasting station's signal without the originating station's express authority."⁴

To deflect blame from its decisions, Fields claims that it did not receive a "stop transmitting letter" suggesting, perhaps, that Fields believes it did not have notice that its conduct was illegal. This is not true. Both Gray and the Commission staff explained to Fields on multiple occasions the consequences of the failure to obtain consent. On April 30, 2012, Gray sent Fields a letter notifying

³ *Bailey Cable TV, Inc.*, 27 FCC Rcd 2631, ¶ 7 (2012) ("We also find irrelevant to this matter Bailey's statement that it receives the signal free over the air to antenna receivers."). See also *TV Max, Inc.*, 28 FCC Rcd 9470, ¶ 16(2013) (stating that an MVPD must obtain retransmission consent "even if the customer also has access to a MATV or over-the-air version of the signal and has the option whether or not to receive the station [via such over-the-air means].")

⁴ *Bailey*, 27 FCC Rcd at ¶7.

it that it was in material breach of the parties retransmission agreement. The letter further explained that, if Fields did not come into compliance by May 30, 2012, Fields would not have consent to retransmit the Stations.⁵ Fields did not respond. Accordingly, on June 1, 2012, Gray sent a second letter to Fields explaining that the parties' agreement had terminated, and Fields did not have consent to retransmit either Station.⁶ Again, Fields ignored the letter. On July 26, 2012, after having been ignored for three months, Gray filed its Complaint with the Commission and served a copy on Fields. Fields did not respond until August 6, 2012, when the Commission staff hosted a conference call with Gray and Fields. On the call, the Bureau explained that Fields either needed Gray's consent or it must immediately cease retransmitting the Stations. For the next eighteen months (and counting), Fields ignored that advice and continued to retransmit the Stations without consent.

II. GRAY MADE A GOOD FAITH EFFORT TO SETTLE WITH FIELDS BUT THOSE EFFORTS PROVED FRUITLESS.

In an attempt to resolve its differences with Fields amicably, Gray entered into settlement discussions. If Fields would have agreed to honor the terms of the retransmission agreement that Fields signed in 2011, Gray would have withdrawn its notice of termination and would have granted Fields consent to continue retransmitting the Stations. Fields, however, rejected those terms. As Fields explained in its Answer, Fields refused to reimburse Gray for a portion (but less than all) of the fees that Gray has incurred pursuing this matter. Reimbursing a party for expenses that it incurs as a result of the other party's material breach of an agreement is standard in all of Gray's retransmission agreements with all MVPDs, including the agreement that Fields signed in 2011. It is an industry standard clause that likely can be found in virtually all broadcast retransmission consent agreements. Over the years, broadcasters and cable operators alike have agreed to include this provision in retransmission agreements because the innocent party should not suffer when it enforces

⁵ See Complaint at Exhibit C.

⁶ See Complaint at Exhibit D.

its rights under an agreement. Under the circumstances, it would have been appropriate for Gray to pursue every last cent that Fields owed, but, as an accommodation and in an attempt to bring its settlement to a close Gray agreed to cap its expenses well below the total damages that Gray has incurred over the years as a result of Fields' conduct. Ultimately, however, a settlement with Fields proved impossible because Fields refused to accept any responsibility for its role in causing this dispute.

In any event, as the Commission has made clear on several occasions, the details regarding any potential settlement or other financial terms are irrelevant when considering whether Fields had consent to retransmit the Stations – and plainly, it did not. The Commission will not insert itself in the middle of a private negotiation that touches upon the appropriate consideration that a cable operator should pay for the right to retransmit a broadcast signal.⁷ Rather, under the Commission's rules, "the cable operator has the discretion to decide whether to enter into a retransmission consent agreement, but in the absence of such an agreement, the Act and the Commission's rules prohibit retransmission of the station's signal."⁸

III. FIELDS VIOLATED THE GOOD FAITH BARGAINING RULES.

As Gray explained in its Complaint, Fields' conduct leading up to the execution of the 2011 retransmission agreement violated the good faith bargaining rules. As the parties prior retransmission agreement was heading toward expiration, Fields refused to engage in any meaningful conversations with Gray. In fact, Fields obstinacy reached such a level that Gray was forced to ask the local sheriff to hand deliver Gray's retransmission consent election notices because Fields refused delivery of all mail from Gray.⁹ Moreover, for the next several months Fields ignored every attempt Gray made to negotiate a new agreement until one of Gray's employees tracked down Mr. Fields in

⁷ *Mediacom Communications Corp. v. Sinclair Broad. Group, Inc.*, 22 FCC Red 47, ¶ 6 (2007).

⁸ *Bailey Cable TV*, 27 FCC Red at ¶ 7.

⁹ *See* Complaint at 2.

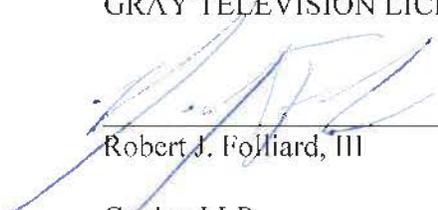
person on December 30, 2011 (one day before the parties' agreement was set to expire), and Mr. Fields agreed to enter into a new retransmission agreement. These facts are undisputed, and constitute a violation of Fields obligation to negotiate in good faith.¹⁰

CONCLUSION

By retransmitting the Stations' signals without Gray's express written consent for almost two years, Fields violated Section 325(b) of the Communications Act and the Commission's rules. Accordingly, Gray respectfully requests that the Commission issue an order requiring that Fields come into compliance with the Commission's rules and imposing whatever sanctions the Commission deems appropriate under the circumstances.

Respectfully submitted,

GRAY TELEVISION LICENSEE, LLC



Robert J. Follard, III

Coolley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, D.C. 20004
(202) 776-2357

Its Attorney

April 3, 2014

¹⁰ See 47 C.F.R. §76.65(b)(1). Refusing to negotiate retransmission consent or acting in a manner to unreasonably delay negotiations is a per se violation of the good faith obligations.

VERIFICATION

I have reviewed the foregoing Reply and found the factual matters set forth therein to be true to the best of my knowledge and belief. In addition, to the best of my knowledge, information and belief formed after reasonable inquiry, the Reply 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. I declare under penalty of perjury that the foregoing is true and correct.


Robert J. Folliard, III
April 3, 2014

CERTIFICATE OF SERVICE

I certify that on this 3rd day of April, 2014, I caused the foregoing Reply to be served by hand delivery (or first-class mail where noted) on the following:

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Diana Sokolow
Attorney Advisor, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. James Fields*
Fields Cable TV
102 North Engle Street
Combs, KY 41729

*Denotes delivery via first-class mail


Rayya Khalaf