

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

In the Matter of )
AUBURN NETWORK, INC. ) MB Docket No. 21-20
WANI(AM), Opelika, AL ) Facility ID No. 63796
WGZZ(FM), Waverly, AL ) Facility ID No. 15283
W242AX(FX), Auburn, AL ) Facility ID No. 146140
W254AY(FX), Auburn, AL ) Facility ID No. 138347
W294AR(FX), Auburn, AL ) Facility ID No. 14119
WHBD-LD, Auburn, AL ) Facility ID No. 185816
Application for Original Construction Permit ) File No. BNPFT-20180327ABZ
NEW(FX), Auburn, AL ) Facility ID No. 201389

THIRD DISCOVERY ORDER

Issued: August 3, 2021

Released: August 3, 2021

1. This Third Discovery Order in the above-captioned proceeding resolves pending discovery matters and again clarifies for the parties the parameters of discovery. The Presiding Judge finds this action necessary for expeditious resolution of this hearing proceeding, which seeks to determine whether the felony convictions of Michael G. Hubbard, the President and 100 percent shareholder of Auburn Network, Inc. (ANI), render him, and by extension ANI, unqualified to remain a Commission licensee.

2. ANI Motion to Strike. On July 12, 2021, Auburn Network, Inc. (ANI) filed a privilege log in response to the First Discovery Order in this proceeding. On July 23, the Enforcement Bureau filed a motion to compel ANI to revise its privilege log or, in the alternative, to submit the listed documents for an in camera review by the Presiding Judge. ANI moved to strike the Bureau's motion as untimely. ANI argues that pursuant to section 1.325 of the Commission's rules, 47 CFR § 1.325, the motion to compel was due within five business days of the date that it submitted its privilege log, or July

1 Auburn Network, Inc., Discovery Order, MB Docket No. 21-20, 21M-06 (ALJ May 12, 2021) (First Discovery Order).

2 Enforcement Bureau's Motion to Compel Auburn Network Inc. to Revise its Privilege Log, or, in the Alternative, to Submit its Documents for an In Camera Review, MB Docket No. 21-20 (filed July 23, 2021) (EB Motion to Compel).

3 Auburn Network Inc.'s Motion to Strike Enforcement Bureau's Untimely Motion to Compel, MB Docket No. 21-20 (filed July 26, 2021) (ANI Motion to Strike).

19. The Enforcement Bureau disagrees. It contends that because the parties were engaged in trying to reach a compromise, the five-day period should be counted from “the date on which Auburn stood by its privilege log,” or July 16, 2021.<sup>4</sup> By filing on July 23, the Bureau argues, it satisfied the five-day deadline of the rule.<sup>5</sup>

3. ANI is correct that section 1.325(a)(2) establishes a five-day deadline for filing motions to compel production of documents. The rule provides that the date runs from “the objection or claim of privilege.” That is a tight timeline during which to complete review of a lengthy list of documents and prepare a proper motion to compel, especially when, as the Bureau submits, it was following the direction of the Presiding Judge to make a good-faith effort to resolve discovery disputes prior to seeking a formal ruling.<sup>6</sup> Nonetheless, the rule provides a clear deadline and the Bureau should have sought additional time to respond before the expiration of that deadline. Previously in this proceeding, ANI was excused for filing a pleading four days late in light of the important issues to be resolved in this case.<sup>7</sup> The Enforcement Bureau is hereby afforded the same treatment for filing its pleading four days late. The parties are again reminded that they are expected to know and follow applicable rules governing the conduct of Commission hearings.<sup>8</sup> Accordingly, the Enforcement Bureau’s motion to compel stands. To account for that possibility, ANI sought and the Presiding Judge granted a motion extending ANI’s deadline to respond to the motion to compel.<sup>9</sup> The substance of the Bureau’s motion will be addressed in a separate order after ANI has had an opportunity to respond.

4. *EB Motion to Quash*. On July 16, 2021, ANI served the Enforcement Bureau with a set of thirteen interrogatories.<sup>10</sup> The Enforcement Bureau filed a motion to quash those interrogatories on July 23, 2021.<sup>11</sup> The Bureau contends that the interrogatories seek non-public Commission information similar to ANI’s earlier document requests, for which a motion to compel was denied by the *Second Discovery Order* in this proceeding.<sup>12</sup> The Bureau notes that it asked ANI to withdraw its interrogatories, which were filed prior to release of the *Second Discovery Order*, but ANI declined to do so.<sup>13</sup> ANI

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<sup>4</sup> Enforcement Bureau’s Opposition to Auburn Network Inc.’s Motion to Strike, MB Docket No. 21-20 (filed July 27, 2021) at para. 8.

<sup>5</sup> *Id.* at paras. 7-8.

<sup>6</sup> *Auburn Network, Inc.*, Order Summarizing Initial Status Conference, MB Docket No. 21-20, FCC 21M-02 (ALJ Mar. 17, 2021).

<sup>7</sup> *First Discovery Order* at para. 2.

<sup>8</sup> ANI also contends that the Bureau’s efforts to reach a compromise were insufficient and that the Bureau failed to certify that it had done so. ANI Motion to Strike at 2-3. The Presiding Judge is satisfied with the Bureau’s description of its outreach to ANI recounted in its Motion to Compel.

<sup>9</sup> *Auburn Network, Inc.*, Order Granting Extension of Time, MB Docket No. 21-20, 21M-10 (ALJ July 27, 2021).

<sup>10</sup> Auburn Network Inc.’s First Set of Interrogatories to the Enforcement Bureau, MB Docket No. 21-20 (served July 16, 2021).

<sup>11</sup> Enforcement Bureau’s Motion to Quash and/or for Protection From Responding to Auburn Network Inc.’s First Set of Interrogatories, MB Docket No. 21-20 (filed July 23, 2021) (EB Motion to Quash).

<sup>12</sup> *Auburn Network, Inc.*, Second Discovery Order, MB Docket No. 21-20, FCC 21M-09 (ALJ July 20, 2021) (*Second Discovery Order*).

<sup>13</sup> EB Motion to Quash at 2.

responds that the Commission's rules provide for the filing of a motion to quash in response to subpoenas, but not interrogatories.<sup>14</sup> It further argues that the *Second Discovery Order* is not a bar to its interrogatories because the Enforcement Bureau was directed in that order to provide limited information regarding the requested materials, and because that order was addressed to document requests and not interrogatories.<sup>15</sup> ANI also alleges that responses to its interrogatories will inform its argument that the process that resulted in initiation of this proceeding was improper.<sup>16</sup>

5. The Bureau served a timely set of objections to ANI's interrogatories on July 30, 2021.<sup>17</sup> While the Bureau's submission of its objections to ANI's interrogatories effectively moots its motion to quash, the Presiding Judge believes it necessary to address recurring issues to provide guidance to the parties as they conclude the discovery process and begin preparing their case submissions. As an initial matter, the fact that section 1.334 of the Commission's rules, 47 CFR § 1.334, provides for a motion to quash a subpoena does not prohibit the Bureau's motion to quash ANI's interrogatories. The Bureau did not file its motion under the purview of section 1.334. Rather, the Bureau raised interlocutory issues in a manner consistent with the Commission's rules, which afford the presiding officer the flexibility to conduct hearing proceedings "as will best conduce to the proper dispatch of business and the ends of justice."<sup>18</sup>

6. ANI's interrogatories raise some of the same issues as its document requests, which were subsequently addressed by the *Second Discovery Order* in this proceeding. In particular, some of ANI's interrogatories seek non-public FCC information. The *Second Discovery Order* made clear that non-public FCC information may only be released in response to a request filed pursuant to the Commission's Freedom of Information Act (FOIA) procedures and not in the normal course of discovery.<sup>19</sup> The *Second Discovery Order* accordingly denied ANI's motion to compel production of non-public FCC documents. To enable ANI to make an informed decision whether to file a FOIA request with the Commission, the *Second Discovery Order* directed the Enforcement Bureau to provide a list of documents in the possession of its trial staff that reference Michael Hubbard's felony convictions, limited to information regarding the "existence, nature, description, custody, condition and location" of responsive documents, consistent with section 1.113(b)(3) of the Commission's rules, 47 CFR § 1.113(b)(3).<sup>20</sup>

7. Other interrogatories posed by ANI focus on communications it alleges that the Enforcement Bureau may have had with the Media Bureau and other FCC staff regarding Michael Hubbard's felony convictions. The *Second Discovery Order* considered a related document request for "all documents sent from or received by the Enforcement Bureau, or any employee thereof, to and from

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<sup>14</sup> Auburn Network, Inc.'s Opposition to Enforcement Bureau's Motion to Quash, MB Docket No. 21-20 (filed July 29, 2021) (ANI Opposition to Motion to Quash) at 2 (citing 47 CFR § 1.334).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 4-7.

<sup>17</sup> Enforcement Bureau's Objections to Auburn Network Inc.'s First Set of Interrogatories, MB Docket No. 21-20 (served July 30, 2021).

<sup>18</sup> 47 CFR § 0.341(f).

<sup>19</sup> *Second Discovery Order* at para. 4.

<sup>20</sup> *Id.* at para. 8.

any FCC Bureau, Office or employee thereof” regarding the issues raised in this proceeding.<sup>21</sup> The *Second Discovery Order* denied the motion to compel production of such documents both because the request was for non-public information outside of the FOIA process, and because responsive documents would necessarily be included in the list to be produced by the Bureau as described above. ANI’s opposition to the Bureau’s Motion to Quash provides additional context to its aim in seeking information about inter-Bureau communication. ANI alleges that the Enforcement Bureau was communicating and planning litigation strategy with FCC decision-making personnel prior to release of the Hearing Designation Order in this proceeding. ANI argues that this is a violation of the Commission’s *ex parte* rules and that the Bureau “cannot be both part of the decision-making process and the prosecuting party in this proceeding.”<sup>22</sup>

8. As the Presiding Judge has indicated, the inquiry at the core of this hearing proceeding is whether the felonies of which Michael Hubbard stands convicted render him, and by extension ANI, unqualified to remain a Commission licensee in light of the Commission’s character qualifications policy. The Presiding Judge is the sole decisionmaker with respect to that question, and examination of the process that culminated in release of the Hearing Designation Order does not assist in resolving that issue. Moreover, the Presiding Judge does not have authority to rule on what appears to effectively be an application for review of the Hearing Designation Order. Pursuant to section 1.115(e)(1) of the Commission’s rules, 47 CFR § 1.115(e)(1), an application for review of a hearing designation order issued under delegated authority is deferred until the filing of exceptions to the Initial Decision in the case and is to be decided by the Commission.

9. It is the hope of the Presiding Judge that the guidance provided herein will re-focus any remaining discovery requests on information relevant to the impact of Michael Hubbard’s felonies on ANI’s fitness to hold a Commission license. To that end, ANI is given ten calendar days from the date of this order to recast its interrogatories consistent with this guidance as well as with the *Second Discovery Order*. Upon receipt of those updated interrogatories, the Enforcement Bureau will have ten calendar days to respond. If a motion to compel is contemplated, it is due within seven days of that response pursuant to section 1.323(c) of the Commission’s rules, 47 CFR § 1.323(c).

10. *EB Request for Status Conference.* On July 30, 2021, the Enforcement Bureau filed a motion requesting that the Presiding Judge convene a status conference.<sup>23</sup> ANI filed responsive comments on August 2, 2021, indicating that it is not opposed to participating in a conference but requesting a stay of the deadline for it to file a motion to compel answers to its interrogatories until after a conference is held. ANI seeks an additional stay, until after the requested conference, of the August 5 deadline to respond to the Bureau’s motion to compel ANI to revise its privilege log.<sup>24</sup> In light of the guidance provided herein, the Presiding Judge does not believe that a status conference is necessary at this time. The deadline for ANI to file a motion to compel answers to its interrogatories is extended until after those interrogatories are recast, as detailed above. The deadline for ANI to respond to the Bureau’s motion to compel it to revise its privilege log is extended by one week given the proximity of the current due date to the release date of this order.

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<sup>21</sup> *Id.* at para. 6 (quoting Auburn Network Inc.’s First Request for Production of Documents and Things to the Enforcement Bureau, MB Docket No. 21-20 (served June 11, 2021) at Request No. 9).

<sup>22</sup> ANI Opposition to Motion to Quash at 6-7.

<sup>23</sup> Enforcement Bureau’s Motion for a Status Conference, MB Docket No. 21-20 (filed July 30, 2021).

<sup>24</sup> Auburn Network Inc.’s Comments on Enforcement Bureau’s Motion for a Status Conference and Request for Stay, MB Docket No. 21-20 (filed Aug. 2, 2021).

11. *Extension of Discovery Period and Other Deadlines.* Discovery in this proceeding is currently scheduled to conclude on August 16, 2021.<sup>25</sup> That deadline is no longer adequate to provide for the resolution of pending discovery matters. The deadlines delineated previously in this proceeding are therefore each extended by approximately 60 days. The revised schedule is as follows:

|  |                   |
|--|-------------------|
| Deadline for Completion of Discovery   | October 15, 2021  |
| Affirmative Case Due   | November 30, 2021 |
| Responsive Case Due  | January 18, 2022  |
| Reply to Responsive Case Due   | February 8, 2022  |
| Deadline to Request Oral Hearing and to File Motion to Accept Additional Pleadings | February 22, 2022 |

Additional extension of these deadlines is not anticipated absent a showing of extraordinary circumstances. As expressed in the *Second Discovery Order*, the Presiding Judge expects the parties to conclude the discovery process expeditiously and in good faith.

12. Accordingly, **IT IS ORDERED** that the Enforcement Bureau's Motion to Quash and/or for Protection from Responding to Auburn Network Inc.'s First Set of Interrogatories, filed July 23, 2021, **IS DISMISSED AS MOOT.**

13. **IT IS FURTHER ORDERED** that Auburn Network, Inc. **SHALL REVISE** the interrogatories it submitted on July 16, 2021, in a manner consistent with this order **WITHIN 10 DAYS** of the release date of this order.

14. **IT IS FURTHER ORDERED** that Auburn Network Inc.'s Motion to Strike Enforcement Bureau's Untimely Motion to Compel, filed July 26, 2021, **IS DENIED.**

15. **IT IS FURTHER ORDERED** that the Enforcement Bureau's Motion for a Status Conference, filed July 30, 2021, **IS DENIED.**

16. **IT IS FURTHER ORDERED** that the Request for Stay included in Auburn Network Inc.'s Comments on Enforcement Bureau's Motion for a Status Conference and Request for Stay **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED.**

17. **IT IS FURTHER ORDERED** that the revised hearing schedule detailed above **IS ADOPTED.**

FEDERAL COMMUNICATIONS COMMISSION

  
Jane Hinckley Halprin  
Administrative Law Judge

<sup>25</sup> *Auburn Network, Inc.*, Order Revising Hearing Schedule, MB Docket No. 21-20, FCC 21M-08 (ALJ May 20, 2021).