

Federal Communications Commission

FCC 21M-09

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

SECOND DISCOVERY ORDER

Issued: July 20, 2021

Released: July 20, 2021

1. This Second Discovery Order considers a Motion to Compel filed by Auburn Network, Inc. (ANI) on June 28, 2021, seeking documents from the Commission’s Enforcement Bureau, and the Bureau’s Opposition to that Motion. ANI requests a number of internal FCC documents from the Bureau that refer to the performance of ANI and its president and 100 percent shareholder, Michael G. Hubbard, as a Commission licensee. ANI also seeks internal FCC documents that reference Mr. Hubbard’s felony convictions, which were the impetus for this hearing proceeding.

2. ANI initially sought nine specific categories of documents from the Enforcement Bureau: (1) all documents that refer to Michael Hubbard’s felony convictions; (2) all documents that refer to Michael Hubbard’s qualifications as a Commission licensee; (3) all documents that refer to ANI’s and/or Michael Hubbard’s truthfulness and reliability; (4) all documents that refer to claimed or actual violations of FCC rules and policies by ANI and/or Michael Hubbard; (5) all complaints or other documents received by or

1 Auburn Network, Inc.’s Motion to Compel Complete Responses to its Request for Production of Documents, MB Docket No. 21-20 (filed June 28, 2021) (ANI Motion to Compel); Enforcement Bureau’s Opposition of Auburn Network, Inc.’s Motion to Compel, MB Docket No. 21-20 (filed July 2, 2021) (EB Opposition to ANI Motion to Compel).

2 Auburn Network, Inc., Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, MB Docket No. 21-20, 36 FCC Rcd. 1282 (MB 2021) (Auburn Network HDO).

that are in the possession of the Bureau that refer to ANI or Michael Hubbard; (6) all affidavits, declarations, or other written statements that refer to or discuss Michael Hubbard's felony convictions; (7) all affidavits, declarations or other written statements that refer to or relate to ANI's or Michael Hubbard's truthfulness and reliability as a Commission licensee; (8) all affidavits, declarations, documents, or other written statements on which the Bureau intends to rely in support of the position that Michael Hubbard's felony convictions should disqualify ANI and/or Hubbard from holding a Commission license; and (9) all documents regarding this case sent from or received by the Enforcement Bureau or any employee thereof to and from any other FCC Bureau, Office, or employee thereof.³ The ANI Motion to Compel focuses on requests 1-5 and 9.⁴

3. The Enforcement Bureau's primary objection to production of the requested documents is based on section 1.311(b)(3) of the Commission's rules, 47 CFR § 1.311(b)(3), which provides that Commission records are not subject to the discovery procedures of the Commission's hearing rules but are instead governed by the agency's Freedom of Information Act (FOIA) procedures codified at 47 CFR §§ 0.451 through 0.467.⁵ ANI contends that because the Enforcement Bureau is a party to this hearing proceeding, it is effectively separated from the Commission for the duration of the proceeding and therefore cannot rely on section 1.311 to withhold documents that are in its possession.⁶ The Enforcement Bureau counters that it does not have the authority to release internal Commission records other than in response to a FOIA request.⁷

4. The Enforcement Bureau's reading of the Commission's rules is accurate. Section 1.325, which sets forth procedures for discovery and production of documents, by its terms does not apply to internal FCC documents. The rule makes clear that, "Any party seeking the production of Commission records should proceed under § 0.460 or 0.461 of this chapter."⁸ Similarly, section 1.311(b)(3) provides:

Commission records are not subject to discovery under § 1.325. The inspection of Commission records is governed by the Freedom of Information Act, as amended, and by §§ 0.451 through 0.467 of this chapter. Commission employees may be questioned by written interrogatories regarding the existence, nature, description, custody, condition and location of Commission records, but may not be questioned concerning their contents unless the records are available (or are made available) for inspection under §§ 0.451 through 0.467.

³ 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 5-6.

⁴ Without conceding its objections, the Enforcement Bureau indicates that it does not have affidavits or declarations in response to Requests 6 through 8. Enforcement Bureau's Objections and Responses to Auburn Network Inc.'s First Request for Production of Documents and Things to the Enforcement Bureau, MB Docket No. 21-20 (served June 21, 2021) (EB Objections and Responses) at 7-9.

⁵ *Id.* at 1-2.

⁶ ANI Motion to Compel at 3-4.

⁷ EB Opposition to ANI Motion to Compel at 3-4.

⁸ 47 CFR § 1.325(b). Section 0.460 covers requests for records that are routinely available for public inspection; section 0.461 covers requests for records that are not routinely available for public inspection.

The Enforcement Bureau is deemed a party in all Commission hearing proceedings.⁹ If the Commission had intended that the Enforcement Bureau not be considered part of the Commission when it becomes a party, as ANI argues, it could have easily made that distinction in the discovery rules. Rather, as evidenced above, the Commission has made quite clear that release of nonpublic Commission documents in a hearing proceeding is to be accomplished via the FOIA process and not in the course of ordinary discovery. Moreover, to the extent that it possesses the types of records that ANI requests, the Enforcement Bureau is not authorized to produce them other than through the FOIA process. Section 0.451(b)(4) of the Commission's rules indicates that, "Except as provided in § 0.461 and § 0.463, or pursuant to § 19.735-203 of this chapter, no officer or employee of the Commission shall permit the inspection of records which are not routinely available for public inspection under § 0.453, or disclose information contained therein."¹⁰ Because all six requests that are the subject of the ANI Motion to Compel seek nonpublic Commission documents, release is governed by the Commission's FOIA procedures. The ANI Motion to Compel is therefore denied on that basis.

5. Apart from FOIA, additional grounds exist for denying five of the six requests. As previously ordered, discovery in this matter is limited to the issue of whether Mr. Hubbard's felony convictions disqualify him from being a Commission licensee.¹¹ That is what the Enforcement Bureau bears the burden of proving as a predicate to revocation of ANI's broadcast licenses. Of the first five document requests that are the subject of the ANI Motion to Compel, only one fits squarely within that defined scope. Request No. 1 seeks "all documents, other than documents Auburn has already produced in response to the Enforcement Bureau's discovery requests, which refer to or reference Michael Hubbard's felony convictions." ANI's other requests – for documents that reference ANI/Hubbard's qualifications to be a licensee (No. 2), ANI/Hubbard's truthfulness and reliability (No. 3), violations of Commission rules by ANI/Hubbard (No. 4), and complaints or other documents that reference ANI/Hubbard (No. 5) – are not within the established bounds of discovery to the extent that they are not subsumed by Request No. 1. Accordingly, the ANI Motion to Compel is also denied as outside the scope of this proceeding with respect to Requests 2 through 5.

6. With Request No. 9, ANI asks the Bureau, "Concerning Michael Hubbard, Auburn and the issues raised in Docket 21-20, provide all documents sent from or received by the Enforcement Bureau, or any employee thereof, to and from any FCC Bureau, Office or employee thereof." It appears from both the Bureau's initial objection and the ANI Motion to Compel that this request is based on the inadvertent inclusion of a Media Bureau employee on an email message sent from the Enforcement Bureau to ANI's counsel.¹² The Enforcement Bureau indicates that it instructed the unintended recipient to disregard the message and provided ANI with a copy of that instruction, and avers that there have been no additional communications between the Enforcement Bureau and other Bureaus, Offices, or FCC personnel concerning

⁹ 47 CFR § 0.111(b).

¹⁰ 47 CFR § 0.451(b)(4). The potential for permissible disclosure of nonpublic information specified at 47 CFR § 0.463 (outside proceedings in which the Commission is not a party) and 47 CFR § 19.735-203 (employees' outside teaching, speaking, or writing) are not relevant here.

¹¹ *Auburn Network, Inc.*, Discovery Order, MB Docket No. 21-20, FCC 21M-06 (ALJ May 12, 2021) (*Auburn Network First Discovery Order*) at para. 9.

¹² EB Objections and Responses at 9-10; ANI Motion to Compel at 8.

ANI/Hubbard or this hearing proceeding.¹³ If there are other documents responsive to Request No. 9 that are within the scope of this proceeding, they would be responsive to Request No. 1, i.e., documents that refer to Michael Hubbard's felony convictions. Accordingly, the ANI Motion to Compel is also denied as repetitive with respect to Request No. 9.

7. As a result, the only documents that could emanate from the ANI Motion to Compel would be in response to Request No. 1, if ANI chooses to file a FOIA request for internal documents in the possession of the Enforcement Bureau that refer to Mr. Hubbard's felony convictions. Notably, the Commission's FOIA rules indicate that internal Commission documents normally "are privileged and not available to private parties through the discovery process, because their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents."¹⁴ ANI contends that to the extent that the Enforcement Bureau claims that some of the information it seeks is privileged, it should produce a privilege log that includes the names of the preparers and all recipients, the date of the document, the type of document, and the general subject matter.¹⁵ The Bureau argues that pursuant to the Federal Rules of Civil Procedure, a privilege log is only required when a party withholds information that is otherwise discoverable, which is not the case here.¹⁶ Further, the Bureau submits that until the Commission's FOIA staff issues a decision, it would be wasteful to require the preparation of a privilege log, and that disclosure of the subject matter for which a privilege is claimed may violate section 1.311(b)(3).¹⁷

8. Section 1.113(b)(3), quoted above, prohibits employees from divulging the contents of nonpublic Commission records, but permits the disclosure of information regarding their "existence, nature, description, custody, condition and location." The formal privilege log sought by ANI could require the disclosure of specific information prior to review of the material by the Commission's FOIA staff, contrary to the intent, if not the letter, of the rule. It is not dispositive, however, that the Federal Rules of Civil Procedure deem a privilege log appropriate only if the requested information is otherwise discoverable; as noted previously in this proceeding, the Commission may follow the Federal Rules of Civil Procedure as a guide but is not bound by those rules.¹⁸ To afford ANI sufficient information to determine whether to incur the effort, expense, and possible delay inherent in filing a FOIA request, the Enforcement Bureau is directed to provide a list of all documents in the possession of the trial staff that constitute "all documents, other than those Auburn has already produced in response to the Enforcement Bureau's discovery requests, which refer to or reference Michael Hubbard's felony convictions."¹⁹ The list should

¹³ EB Objections and Responses at 10.

¹⁴ 47 CFR § 0.457(e).

¹⁵ ANI Motion to Compel at 5.

¹⁶ EB Opposition to ANI Motion to Compel at 6-7 (citing Fed. R. Civ. P. 26(b)(5)).

¹⁷ *Id.* at 7.

¹⁸ *Auburn Network First Discovery Order* at para. 5.

¹⁹ The Enforcement Bureau objects that it would be overly burdensome to require it to comb through the "more than 16,000 pages" of ANI documents to enable it to discern which documents have already been produced. EB Objections and Responses at 3. The Presiding Judge does not find this argument persuasive.

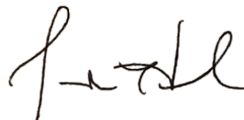
only include information limited to the “existence, nature, description, custody, condition and location” of the items identified as responsive. The list need not include internal drafts and memoranda, including internal emails, not shared outside of the Enforcement Bureau.

9. The Presiding Judge intends to avoid any unnecessary delay that might result if the FOIA process is invoked. As both the Enforcement Bureau and ANI have an interest in expedient disposition of this matter, the Presiding Judge expects the parties to conclude the discovery process in good faith and to avoid either holding back relevant information or pursuing disclosure of information that is ultimately of questionable utility. To that end, the parties are reminded of the ultimate question to be answered in this proceeding: Do 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? That determination necessarily rests primarily on the circumstances of the activities for which Mr. Hubbard was criminally convicted.

10. Accordingly, **IT IS ORDERED** that the Motion to Compel filed by Auburn Network, Inc., on June 28, 2021, **IS DENIED** to the extent detailed herein.

11. **IT IS FURTHER ORDERED** that the Enforcement Bureau shall produce the list described above within 14 days of release of this order.

FEDERAL COMMUNICATIONS COMMISSION



Jane Hinckley Halprin
Administrative Law Judge