

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

FIFTH DISCOVERY ORDER

Issued: October 18, 2021

Released: October 18, 2021

1. This Fifth Discovery Order resolves remaining discovery issues in the above-captioned proceeding now that the period for discovery has ended. The parties are reminded that the filing schedule in this proceeding is as follows:

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, 2022^1

As detailed below, this order (1) agrees with Auburn Network, Inc. (ANI) that the items identified in its Privilege Log of September 10, 2021, are properly withheld, and (2) grants a motion filed by the Enforcement Bureau to withdraw its motion to compel of September 24, 2021.

2. The First Discovery Order in this proceeding directed ANI to produce documents in

^1 See Auburn Network, Inc., MB Docket No. 21-20, FCC 21M-11 (ALJ Aug. 3, 2021) (Third Discovery Order).

response to a request from the Enforcement Bureau, or to describe responsive documents in a privilege log in a manner sufficiently specific to support a claim of privilege. The documents to be included related to the six felonies for which Michael G. Hubbard, the President and 100 percent shareholder of ANI, stands convicted.² ANI submitted a privilege log on July 12, 2021, that listed more than 350 emails that it has withheld based on a claim of attorney-client privilege and one email for which it asserts the attorney work product privilege. By its own admission, ANI had included in its initial privilege log items that “are not connected to the 23 counts with which Mr. Hubbard was charged or the 6 counts on which he was convicted, therefore, they are not relevant to this proceeding.”³

3. The *Fourth Discovery Order* in this proceeding granted in part a motion to compel filed by the Enforcement Bureau and directed ANI to revise its privilege log to include only information related to Mr. Hubbard’s six felony convictions.⁴ On September 10, 2021, ANI submitted a significantly leaner privilege log that lists 56 items for which it asserts attorney-client privilege and one item for which it claims attorney work product privilege.⁵ The Enforcement Bureau has not filed a motion to compel or otherwise commented on this revised privilege log.

4. As indicated in the *Fourth Discovery Order*, a party asserting attorney-client privilege must show (1) the existence of an attorney-client relationship; (2) the existence of a communication from the client to his or her attorney; (3) that the communication is legally related; and (4) that there is an expectation of confidentiality as to that communication.⁶ The privilege also encompasses communications from the attorney to the client,⁷ and between the client and the attorney’s non-attorney representatives.⁸ All of the emails listed in the revised Privilege Log for which attorney-client privilege is claimed are between Mr. Hubbard and one or more individuals identified as his counsel or their representatives.⁹ The first two elements of the privilege are therefore satisfied. Moreover, the listed subjects of the emails are sufficient to categorize them as legally-related, as required by the third element, and the context indicates an intention typical of the attorney-client relationship that the communication was made in confidence, which satisfies the fourth element. Accordingly, ANI has made a satisfactory showing that the communications it identifies in its revised Privilege Log as subject to attorney-client privilege are indeed appropriately withheld.

5. The one entry for which ANI claims a work product privilege is an email dated July 6,

² *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-06 (ALJ May 12, 2021) (*First Discovery Order*).

³ Auburn Network Inc.’s Opposition to Enforcement Bureau’s Motion to Compel, MB Docket No. 21-20 (filed Aug. 12, 2021) at 6.

⁴ *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-12 (ALJ Aug. 31, 2021) (*Fourth Discovery Order*).

⁵ Auburn Network, Inc.’s Production of a Revised Privilege Log in Compliance With the Presiding Judge’s Fourth Discovery Order, MB Docket No. 21-20 (filed Sept. 10, 2021).

⁶ *Fourth Discovery Order* at para. 5 (citing *Maritime Communications/Land Mobile, LLC*, EB Docket No. 11-71, 33 FCC Rcd 11822, 11842-43 (2018) (*Maritime*)).

⁷ *Id.* (citing *Maritime*, 33 FCC Rcd at 11843 n.171).

⁸ *Id.* (citing *Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)).

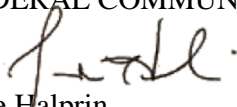
⁹ ANI did not initially identify whether the individuals listed in its Privilege Log were attorneys or their representatives but subsequently did so. See Auburn Network Inc.’s Opposition to Enforcement Bureau’s Motion to Compel, MB Docket No. 21-20 (filed Aug. 12, 2021) at 2-4.

2016, from attorney Mark Lipp to attorney Anna Buckner entitled “Need to notify the FCC of convictions.” The attorney work product privilege “shields materials ‘prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).’”¹⁰ The referenced email appears to be a communication from ANI’s FCC attorney to an attorney associated with the criminal proceedings against Mr. Hubbard regarding the requirement that the FCC be informed of Mr. Hubbard’s felony convictions.¹¹ As failure to so notify the agency could result in adjudicatory consequences, the Presiding Judge is satisfied that this document is properly withheld based on the attorney work product privilege.

6. Finally, on September 3, 2021, the Enforcement Bureau served its second set of interrogatories on ANI.¹² ANI objected to the interrogatories on several grounds, primarily that the answer to most of the questions is contained within the documents that ANI already produced.¹³ On September 24, 2021, the Enforcement Bureau filed a motion to compel ANI to submit more comprehensive responses to its interrogatories.¹⁴ ANI supplemented its previous responses on September 29, 2021.¹⁵ On September 30, the Enforcement Bureau moved to withdraw its motion to compel as moot.¹⁶ That request is hereby granted.

7. Accordingly, **IT IS ORDERED** that the Enforcement Bureau’s Motion to Withdraw its Motion to Compel Complete Responses to its Second Set of Interrogatories, filed September 30, 2021, **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION


Jane Halprin
Administrative Law Judge

¹⁰ *Judicial Watch, Inc. v. Dept. of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting Fed.R.Civ.P. 26(b)(3)).

¹¹ See 47 CFR § 1.65 (requirement to update pending applications regarding change in circumstances; requirement that broadcast licensees report adjudicated misconduct to the Commission).

¹² Enforcement Bureau’s Second Set of Interrogatories to Auburn Network, Inc., MB Docket No. 21-20 (filed Sept. 3, 2021).

¹³ Auburn Network, Inc.’s Response to Enforcement Bureau’s Second Set of Interrogatories to Auburn Network, Inc., MB Docket No. 21-20 (filed Sept. 17, 2021).

¹⁴ Enforcement Bureau’s Motion to Compel Complete Responses to its Second Set of Interrogatories, MB Docket No. 21-20 (filed September 24, 2021).

¹⁵ Auburn Network, Inc.’s Response to Motion to Compel and Supplement to Enforcement Bureau’s Second Set of Interrogatories, MB Docket No. 21-20 (filed Sept. 29, 2021).

¹⁶ Enforcement Bureau’s Motion to Withdraw its Motion to Compel Complete Responses to its Second Set of Interrogatories, MB Docket No. 21-20 (filed Sept. 30, 2021).