

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

INITIAL DECISION

Issued: May 9, 2022

Released: May 9, 2022

Appearances: M. Scott Johnson, Esq., and Arthur V. Belendiuk, Esq., Smithwick and Belendiuk, P.C., on behalf of Auburn Network, Inc.; Pamela S. Kane, Esq., and Anya Baez, Esq., on behalf of the Enforcement Bureau, Federal Communications Commission

PRELIMINARY STATEMENT

1. On February 11, 2021, the Media Bureau of the Federal Communications Commission initiated this hearing proceeding pursuant to sections 309(e), 312(a)(2), 312(c), and 319 of the Communications Act to determine whether Michael G. Hubbard, the president and 100 percent shareholder of Auburn Network, Inc. ("Auburn Network"), licensee of the above-captioned stations, possesses the requisite qualifications to remain a Commission licensee in light of his felony convictions. By Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, the Media Bureau designated the following issues for resolution:

1 47 U.S.C. §§ 309(e), 312(a)(2), 312(c), and 319.

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).

- a. To determine the effects, if any, of Michael G. Hubbard's felony convictions on his qualifications and thus the qualifications of Auburn Network, Inc. to be a Commission licensee;
- b. To determine whether Michael G. Hubbard and thus Auburn Network, Inc. is qualified to be a Commission licensee;
- c. To determine whether Auburn Network, Inc.'s Commission authorizations should be revoked; and
- d. To determine whether the captioned application for original construction permit for a new FM translator station at Auburn, Alabama, should be granted, denied, or dismissed.<sup>3</sup>

The burden of proceeding with the introduction of evidence and the burden of proof regarding revocation of Auburn Network's existing licenses were assigned to the FCC's Enforcement Bureau ("the Bureau" or "EB").<sup>4</sup> Auburn Network was assigned the burden of introducing evidence and the burden of proof regarding its application for a construction permit for a new FM translator station.<sup>5</sup> Auburn Network has indicated, however, that it will not pursue that application regardless of the outcome of this proceeding.<sup>6</sup>

2. This is the first hearing proceeding conducted on a written record, rather than by live, oral hearing, under procedures adopted by the Commission in 2020.<sup>7</sup> Those procedures, codified at 47 CFR §§ 1.370 through 1.377, direct that after discovery is completed, the party with the burden of proof is to file its Affirmative Case. The opposing party then files its Responsive Case, to which the party with the burden of proof files a Reply Case. Those written submissions are to include all associated evidence. Neither additional pleadings nor oral argument are contemplated unless specifically permitted by the Presiding Judge.

3. After Mr. Hubbard was convicted, Auburn Network filed an application with the Commission for consent to assignment of his licenses to Auburn Networks, LLC, an entity wholly owned by Frank Lee Perryman. That application, along with an earlier application for renewal of Auburn Network's licenses, are being held in abeyance pending resolution of this hearing proceeding.<sup>8</sup> It appears that Auburn Network's radio stations are currently being operated by prospective assignee Auburn

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<sup>3</sup> *Auburn Network HDO* at 1290.

<sup>4</sup> *Id.* at 1291.

<sup>5</sup> *Id.*

<sup>6</sup> Auburn Network, Inc.'s Responsive Case, MB Docket No. 21-20 (filed Jan. 18, 2022) (Auburn Network Responsive Case) at 2 n.1. Auburn Network explains that the FM translator application will be dismissed regardless of the outcome of this proceeding because, even if Mr. Hubbard is found qualified to be a licensee, he is planning to dispose of his broadcasting interests, and Commission rules would not permit the assignment of the construction permit application.

<sup>7</sup> *Procedural Streamlining of Administrative Hearings*, Report and Order, 35 FCC Rcd 10729 (2020).

<sup>8</sup> *Auburn Network HDO* at 1283-84.

Networks, LLC.<sup>9</sup>

## BACKGROUND

4. Michael G. Hubbard is the former Speaker of the Alabama House of Representatives. In that capacity, he was charged with 23 counts of violating Alabama’s Code of Ethics for Public Officials, Employees, etc. (“Alabama Ethics Code”). A jury convicted Mr. Hubbard of 12 of those 23 counts.<sup>10</sup> Six of those convictions were reversed on appeal.<sup>11</sup> Accordingly, the felonies at issue in this proceeding are the remaining six for which Mr. Hubbard currently stands convicted. As detailed below, Mr. Hubbard’s crimes are based on his actions while serving as Speaker that were found to violate laws that prohibit public officials from soliciting a thing of value from a principal of a lobbyist, using an official position for personal gain, and using state property for private benefit, and that prohibit members of the legislature from representing a business entity for compensation before a state department or agency.

5. Discovery in this hearing proceeding closed on October 15, 2021,<sup>12</sup> after which a written hearing was conducted. The Enforcement Bureau filed its Affirmative Case on November 30, 2021. In general, the Bureau contends that Mr. Hubbard’s felony convictions render him, and by extension, Auburn Network, unqualified to remain a Commission licensee. EB submits that Mr. Hubbard, through licensee Auburn Network, “deliberately monetized his political office through a series of private contractual arrangements for which he personally received substantial financial compensation.”<sup>13</sup> Auburn Network filed its responsive case on January 18, 2022. Auburn Network submits that Mr. Hubbard’s felony convictions represent “an aberration in a life of exemplary public and community service.”<sup>14</sup> Auburn Network contends that the Enforcement Bureau has not shown that Mr. Hubbard’s felony convictions render him unqualified to remain a Commission licensee, and that the Bureau has therefore not met its burden of proof in this case.<sup>15</sup> In its Reply Case, filed on February 8, 2022, the Enforcement Bureau contends that, while doing business as Auburn Network, Mr. Hubbard committed “not only a knowing, criminal breach of Mr. Hubbard’s ethical obligations under the Alabama Code of Ethics, but a betrayal of the public trust.”<sup>16</sup> Because the Commission’s system of licensing depends on the truthfulness of its licensees, EB argues, Mr. Hubbard’s multiple violations of the Alabama Ethics Code should disqualify him, and therefore Auburn Network, from holding Commission licenses.<sup>17</sup>

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<sup>9</sup> See [www.aunetwork.com](http://www.aunetwork.com).

<sup>10</sup> *Auburn Network HDO* at 1283; *Ex Parte Hubbard*, 321 So.3d 70, 76 (Supreme Court of Alabama 2020).

<sup>11</sup> *Hubbard v. State*, 321 So.3d 8 (Ala. Crim. App. 2018) (reversing conviction on one count); *Ex Parte Hubbard*, 321 So.3d 70 (reversing convictions on five counts).

<sup>12</sup> *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-11, 2021 WL 3466300, at \*4 (ALJ Aug. 3, 2021) (*Third Discovery Order*).

<sup>13</sup> Enforcement Bureau’s Affirmative Case Brief, MB Docket No. 21-20 (filed Nov. 30, 2021) (EB Affirmative Case) at 22-23.

<sup>14</sup> Auburn Network, Inc.’s Responsive Case, MB Docket No. 21-20 (filed Jan. 18, 2022) (Auburn Network Responsive Case) at 3.

<sup>15</sup> *Id.* at 15-16.

<sup>16</sup> Enforcement Bureau’s Reply Case Brief, MB Docket No. 21-20 (filed Feb. 8, 2022) (EB Reply Case) at 6.

<sup>17</sup> *Id.*

## FINDINGS OF FACT

**Auburn Network, Inc.**

6. Auburn Network, Inc. was established in Auburn, Alabama in 1994 by Michael G. Hubbard. It is the licensee of WANI(AM), Opelika, Alabama and WGZZ(FM), Waverly, Alabama, along with three FM translator stations that rebroadcast the signal of WGZZ(FM) -- W242AX(FX), Auburn, Alabama; W254AY(FX), Auburn Alabama; and W294AR(FX), Auburn, Alabama.<sup>18</sup> It also holds a construction permit for low-power television (LPTV) station WHBD-LD, Auburn, Alabama.<sup>19</sup> Auburn Network acquired WANI(AM) in 1997, WGZZ(FM) in 2007, the FM translators in 2010 and 2016, and the LPTV construction permit in 2012.<sup>20</sup> In addition to its broadcast properties, Auburn Network currently owns East Alabama Living Magazine and Auburn Network Creative Media, which is an advertising agency and media consulting service, and it previously owned an interest in a printing company.<sup>21</sup>

**Michael G. Hubbard**

7. Michael G. Hubbard is the sole shareholder of Auburn Network.<sup>22</sup> He received a degree in radio and television from the University of Georgia.<sup>23</sup> After graduating, he worked in media relations for the athletics department of Auburn University in Auburn, Alabama.<sup>24</sup> He created Auburn Network in 1994 to acquire the multi-media rights of the Auburn University athletics department.<sup>25</sup> In 2003, he sold those rights to International Sports Properties (ISP) and stayed on with ISP as an employee.<sup>26</sup> In 2010, ISP sold the Auburn rights to International Management Group, which terminated Mr. Hubbard's employment a few months later.<sup>27</sup>

8. Mr. Hubbard was elected to the Alabama House of Representatives in 1998, representing the 79<sup>th</sup> District in Lee County. He became minority leader of the Alabama House in 2004, chairman of the Alabama Republican Party in 2006, and Speaker of the House in 2010. He served as Speaker until his resignation from the Alabama House of Representatives in 2016.<sup>28</sup> Alabama legislators serve on a part-

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<sup>18</sup> *Auburn Network HDO* at 1283 n.7; EB Affirmative Case at 2 (citing Exh. 9).

<sup>19</sup> *Auburn Network HDO* at 1283 n.10; EB Affirmative Case at 2 (citing Exh. 9).

<sup>20</sup> Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>21</sup> EB Affirmative Case at 2 (citing Exhs. 9 and 12).

<sup>22</sup> *Auburn Network HDO* at 1282; EB Affirmative Case at 4 (citing Exh. 13); Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>23</sup> EB Affirmative Case at 4 (citing Exh. 8); Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>24</sup> EB Affirmative Case at 4 (citing Exh. 8); Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>25</sup> EB Affirmative Case at 4 (citing Exh. 8); Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>26</sup> EB Affirmative Case at 5 (citing Exh. 12).

<sup>27</sup> EB Affirmative Case at 6 (citing Exh. 8).

<sup>28</sup> EB Affirmative Case at 5 (citing Exhs. 8 & 12); Auburn Network Responsive Case at 5 (citing Exh. 1).

time basis and are permitted to engage in other employment that does not conflict with their legislative duties, consistent with the Alabama Ethics Code.<sup>29</sup> Mr. Hubbard contacted the Director of the Alabama Ethics Commission in 2012 for clarification of the guidelines he would need to follow in conducting his outside work and was reminded to avoid using his legislative position for the benefit of himself or his company.<sup>30</sup> As described below, Mr. Hubbard’s extra-legislative activities included providing consulting services to private businesses under the name of Auburn Network, Inc.

9. In 2016, Mr. Hubbard was convicted by a jury of violating 12 counts of the Alabama Ethics Code. The Court of Criminal Appeals of Alabama reversed one of those convictions on August 27, 2018, and the Supreme Court of Alabama reversed five additional convictions on April 10, 2020.<sup>31</sup> Mr. Hubbard’s petition for certiorari to the United States Supreme Court was denied on February 22, 2021.<sup>32</sup> The six felonies for which Mr. Hubbard stands convicted are based on consulting contracts between Auburn Network and three private companies. Mr. Hubbard began serving a 28-month sentence with the Alabama Department of Corrections on September 11, 2020. He is scheduled for release on January 8, 2023.<sup>33</sup> As required by the Commission’s rules, the FCC was kept apprised of the progress of the criminal case against Mr. Hubbard.<sup>34</sup>

### **Consulting Contracts Between Auburn Network and E2020, APCI, and Capitol Cups**

10. The activities that led to Mr. Hubbard’s felony convictions were related to Auburn Network’s consulting arrangements with E2020, Inc. (later Edgenuity, Inc.), American Pharmacy Cooperative, Inc. (APCI), and Capitol Cups, Inc. In his capacity as President of Auburn Network, Mr. Hubbard signed a “Consulting Services Agreement” with E2020, a developer and provider of virtual education programming, in 2012, effective January 1, 2013. E2020 agreed to pay Auburn Network \$7,500 per month for “speaking engagements on behalf of E2020 and/or public awareness and advisory Services at events or locations pre-approved by E2020.” The agreement provided that, “[f]or avoidance of doubt, Consultant’s activities will not take place within the State of Alabama, consistent with Ethics Commission guidance or directives.”<sup>35</sup> In 2014, after E2020 became Edgenuity, the parties executed a new consulting agreement with similar terms. The Edgenuity agreement was signed by Chris Hays, identified as Senior Vice President of Auburn Network.<sup>36</sup> Pursuant to these agreements, E2020/Edgenuity paid Auburn Network \$210,000 between April, 2012, and July, 2014.<sup>37</sup>

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<sup>29</sup> EB Affirmative Case at 5; Auburn Network Responsive Case at 6 (citing Ala. Code 1975 § 36-25-2(b)).

<sup>30</sup> EB Affirmative Case at 6-7 (citing Exhs. 14 and 15); Auburn Network Responsive Case at 6 (citing *Ex Parte Hubbard*, 321 S.3d at 108) and 22 (citing Trial Exh. (State’s Exh. 290-291)). Auburn Network attached to its responsive case various exhibits from Mr. Hubbard’s criminal trial that are identified only by their designation during the criminal trial rather than in relation to the responsive case.

<sup>31</sup> *Hubbard v. State* and *Ex Parte Hubbard*, respectively, *supra* n.11.

<sup>32</sup> *Hubbard v. Alabama*, 141 S.Ct. 1393, 209 L.Ed.2d 132 (2021).

<sup>33</sup> Auburn Network Responsive Case at 4 (citing Exh. 1).

<sup>34</sup> EB Affirmative Case at 3 (citing Auburn Network license applications).

<sup>35</sup> *Id.* at 7-8 (citations omitted) and Exh. 6.

<sup>36</sup> *Id.* at Exh. 6; Auburn Network Responsive Case, Trial Exh. (State’s Exh. 315).

<sup>37</sup> EB Affirmative Case at 8 (citing Exh. 6) & Exh. 16.

11. On June 8, 2012, Mr. Hubbard signed, on behalf of Auburn Network, a “Retainer Agreement for Consultant Services” with APCI, a cooperative organization representing independent pharmacies. The agreement described the services to be provided as, “from time to time the Consultant shall advise the Client and its related businesses, as well as client’s individual pharmacy shareholder members, in connection with the business and needs of the Client and its pharmacy shareholder members.” The agreement further provided that Auburn Network “shall also represent the Client regarding the Client’s interest and related businesses,” and that Auburn Network “is explicitly prohibited from providing the Services of Consultant, as defined in this agreement, within the state of Alabama.” The contract specified that Auburn Network was to receive \$5,000 per month.<sup>38</sup> Between August, 2012, and January, 2014, APCI paid Auburn Network \$95,000 pursuant to the agreement.<sup>39</sup>

12. Also in 2012, Michael Hubbard signed, on behalf of Auburn Network, a “Retainer Agreement for Consultant Services” with Capitol Cups, a manufacturer of plastic cups. Capitol Cups agreed to pay Auburn Network \$10,000 per month to advise it regarding “sales and marketing of its products.”<sup>40</sup> Between October, 2012, and July, 2014, Capitol Cups paid Auburn Network \$220,000.<sup>41</sup>

### **Felony Convictions of Michael Hubbard**

13. The six felony convictions that form the basis for this proceeding include two counts of soliciting or receiving a thing of value from a principal of a lobbyist, one count of using an official position for personal gain, two counts of representing a business entity for compensation before an executive department or agency, and one count of using public property for private benefit.<sup>42</sup> For ease of reference, this document will use the same descriptors as the criminal proceedings – Counts 6 and 10, Count 11, Counts 12 and 13, and Count 14.

#### Counts 6 and 10

14. Mr. Hubbard’s convictions on Counts 6 and 10 are for violation of the provision of the Alabama Ethics Code mandating that “no public employee or public official or family member of the public employee or family member of the public official shall solicit or receive a thing of value from a lobbyist, subordinate of a lobbyist, or principal.”<sup>43</sup> A principal in this context is defined as “[a] person or business which employs, hires, or otherwise retains a lobbyist.”<sup>44</sup> Count 6 stems from Mr. Hubbard’s paid consulting contract with APCI, and Count 10 is based on Mr. Hubbard’s paid consulting contract with E2020. Both APCI and E2020 retain lobbyists. There is an exclusion to the definition of “thing of value” for compensation from a non-government business relation that is provided “under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient’s public service as a

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<sup>38</sup> *Id.* at 9-10 (citations omitted) & Exh. 5.

<sup>39</sup> *Id.* at 10 (citations omitted) & Exh. 16.

<sup>40</sup> *Id.* at 10 (citations omitted) & Exh. 7; Auburn Network Responsive Case at 9.

<sup>41</sup> EB Affirmative Case at 11 & Exh. 16.

<sup>42</sup> *Auburn Network HDO* at 1283.

<sup>43</sup> Ala. Code 1975 § 36-25-5.1(a).

<sup>44</sup> Ala. Code 1975 § 36-25-1(24).

public official or public employee.”<sup>45</sup> The jury did not find this exclusion to be applicable to either consulting contract, and both the Court of Criminal Appeals and the Supreme Court of Alabama affirmed.<sup>46</sup>

#### Count 11

15. Mr. Hubbard’s conviction on Count 11 is for violation of the provision of the Alabama Ethics Code that, “No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law.”<sup>47</sup> This count is based on Mr. Hubbard’s solicitation of private companies pursuant to his paid consulting arrangement with Capitol Cups. The jury concluded that Mr. Hubbard unlawfully used his government title and position in seeking buyers for Capitol Cups’ products. For instance, when Mr. Hubbard reached out to representatives of Publix Super Markets on behalf of Capitol Cups, he mentioned that Capitol Cups was in his legislative district but did not disclose that he had a consulting arrangement with the cup manufacturer. The Court of Criminal Appeals and the Supreme Court of Alabama affirmed the jury’s guilty verdict.<sup>48</sup>

#### Counts 12 and 13

16. Mr. Hubbard’s convictions on Counts 12 and 13 are for violation of the provision of the Alabama Ethics Code that, “No member of the legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.”<sup>49</sup> Counts 12 and 13 involve a company with which Mr. Hubbard did not have a consulting agreement but of which Robert Abrams, the majority owner of Capitol Cups, was president and CEO. Count 12 is based on Mr. Hubbard’s directing his legislative assistant to arrange a meeting for Mr. Abrams with the Alabama Department of Commerce. Count 13 is based on Mr. Hubbard’s directing his legislative assistant to arrange a meeting for Mr. Abrams with the Governor of Alabama. The jury found that Mr. Hubbard took these actions in his official capacity to assist Mr. Abrams because of the paid consulting arrangement between Auburn Network and Capitol Cups, and both the Court of Criminal Appeals and the Supreme Court of Alabama affirmed.<sup>50</sup>

#### Count 14

17. Mr. Hubbard’s conviction on Count 14 is for violation of the provision of the Alabama Ethics Code that, “No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or

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<sup>45</sup> Ala. Code 1975 § 36-25-1(34)(b)(10).

<sup>46</sup> *Hubbard v. State*, 321 So.3d at 54-55; *Ex Parte Hubbard*, 321 So.3d at 86-91.

<sup>47</sup> Ala. Code 1975 § 36-25-5(a).

<sup>48</sup> *Hubbard v. State*, 321 So. 3d at 45-46; *Ex Parte Hubbard*, 321 So. 3d at 91-94.

<sup>49</sup> Ala. Code 1975 § 36-25-1.1.

<sup>50</sup> *Hubbard v. State*, 321 So. 3d at 46-48; *Ex Parte Hubbard*, 321 So. 3d at 96-97.

principal campaign committee ... which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy.”<sup>51</sup> Mr. Hubbard was found to have used his legislative chief of staff to help finalize a patent application filed by another company associated with Robert Abrams, the majority owner of Capitol Cups. Mr. Hubbard asked his chief of staff to contact a U.S. Congressman who sat on the congressional committee overseeing the U.S. Patent and Trademark Office (USPTO). That congressman put the chief of staff in touch with a USPTO employee, but the patent was not issued until after Mr. Hubbard contacted the USPTO employee himself. The chief of staff testified that Mr. Hubbard said that he had “100,000 reasons” to get this done. The jury accepted the argument that this referred to the fact that Mr. Hubbard had been paid \$100,000 by Capitol Cups under the consulting contract, and the Criminal Court of Appeals found no reason to overturn the jury’s verdict.<sup>52</sup> The Supreme Court of Alabama affirmed, finding that while it was not dispositive under the law that Capitol Cups and the other company had the same owner, this statement served to link the companies so as to support the conviction.<sup>53</sup>

## CONCLUSIONS OF LAW

### Regulatory Framework

18. In establishing the Federal Communications Commission in 1934, Congress, via the Communications Act, tasked the agency with granting licenses to use the radio airwaves based on the public interest, convenience, and necessity.<sup>54</sup> Despite a multitude of technological innovations that have taken place in the intervening 88 years, that objective has not changed. To define the scope of its public interest mandate, the Commission has, as directed by the Communications Act, established regulations and policies designed to assess “the citizenship, character, and financial, technical, and other qualifications” of license applicants.<sup>55</sup> Sometimes, however, potentially disqualifying circumstances are not apparent at the time a license is initially granted, or actions taken post-grant may cause the Commission to question a licensee’s qualifications. When conditions regarding an existing licensee come to the Commission’s attention that would justify it in refusing to grant an initial license, the Communications Act allows the Commission to revoke that license, after providing the licensee notice and an opportunity to be heard.<sup>56</sup>

19. The standards by which the Commission evaluates the character qualifications of licensees and applicants are detailed in its *1986 Character Policy Statement*, its *1990 Character Policy Statement*, and related orders.<sup>57</sup> The aim of these policies is to assist the Commission in determining

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<sup>51</sup> Ala. Code 1975 § 36-25-5(c).

<sup>52</sup> *Hubbard v. State*, 321 So. 3d at 48-51.

<sup>53</sup> *Ex Parte Hubbard*, 321 So. 3d at 94-96.

<sup>54</sup> 47 U.S.C. § 309(a).

<sup>55</sup> 47 U.S.C. § 308(b).

<sup>56</sup> 47 U.S.C. § 312.

<sup>57</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179 (1986) (*1986 Character Policy Statement*), *recon. dismissed/denied*, 1 FCC Rcd 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990)



whether a licensee or applicant possesses qualities sufficient to demonstrate that it will deal truthfully with the Commission and comply with all applicable rules and policies.<sup>58</sup> In an effort to more succinctly define the types of non-FCC misconduct that it would consider evidence of a licensee's potentially disqualifying character, the Commission in the *1986 Character Policy Statement* highlighted fraudulent statements to government agencies, certain criminal convictions, and violations of broadcast-related anti-competitive and antitrust statutes.<sup>59</sup> With respect to criminal convictions, the Commission concluded in the *1986 Character Policy Statement* that convictions not involving fraudulent conduct would not generally be relevant to character "unless it can be demonstrated that there is a substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies."<sup>60</sup> It also indicated that only adjudicated felony convictions would generally be considered, but recognized that it might consider unadjudicated misconduct that is "so egregious as to shock the conscience and evoke almost universal disapprobation."<sup>61</sup>

20. Four years later, however, the Commission in the *1990 Character Policy Statement* deemed it appropriate to consider a broader range of criminal conduct as probative of character. It found that a licensee's propensity to comply with the law generally bears on the likelihood that it will conform to FCC rules and policies. The Commission reasoned that felonies are such serious crimes that they should be probative of a licensee's qualifications, although it recognized that some felonies are more relevant to character than others. It also indicated that it may consider serious misdemeanors where warranted. Accordingly, the Commission held that adjudicated, non-FCC-related crimes would be pertinent in assessing character, but refrained from creating a "hierarchy" of felonies that would cause it to conclude that a licensee does not possess the requisite character to hold an FCC license.<sup>62</sup> Rather, the Commission expressed a preference for case-by-case review that takes mitigating factors into account.<sup>63</sup> Thus, when a licensee is convicted of any felony, it is the Commission's usual practice to open a hearing proceeding for further consideration of that licensee's character qualifications. In the case of a licensee seeking Commission action, such as renewal or assignment of its license, the burden of proving that the felony is not disqualifying falls on the licensee. In cases for which the Commission initiates a revocation action, as here, the burden of proving that the felony is disqualifying rests with the Commission.<sup>64</sup> Since 1990, the Commission has revoked licenses for a variety of felony convictions, including drug offenses, child molestation, burglary, and murder.<sup>65</sup>

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(*1990 Character Policy Statement*), recon. granted in part, 6 FCC Rcd 3448 (1991), further recon. granted in part, 7 FCC Rcd 6564 (1992). These character policies have been specifically incorporated by reference into the Commission's rules governing broadcasting. 47 CFR § 73.4280.

<sup>58</sup> *1986 Character Policy Statement*, 102 F.C.C.2d at 1183.

<sup>59</sup> *Id.* at 1195-1203.

<sup>60</sup> *Id.* at 1197.

<sup>61</sup> *Id.* at 1204-1205 & n.60.

<sup>62</sup> *1990 Character Policy Statement*, 5 FCC Rcd at 3252.

<sup>63</sup> *Id.* at 3252-53.

<sup>64</sup> 47 U.S.C. §§ 309(e), 312(d).

<sup>65</sup> See, e.g., *Augusta Radio Fellowship*, 6 FCC Rcd. 4823 (1991) (cocaine trafficking); *Contemporary Media, Inc.*, 13 FCC Rcd. 14437 (1998), *aff'd sub nom. Contemporary Media, Inc. v. FCC*, 21 F.3d 187 (DC Cir. 2000), cert. denied 532 U.S. 920 (2001) (child molestation); *Roger Thomas Scaggs*, 19 FCC Rcd. 7123 (EB 2004) (murder); *David Edward Cox*, 21 FCC Rcd. 14153 (EB 2006) (burglary and firearms violations).

## Character Qualifications of Michael Hubbard

### Contentions of the Parties

21. The Enforcement Bureau submits that Mr. Hubbard's crimes involved intentional deception and omission of information before his staff, colleagues, the Alabama State Ethics Commission, the Alabama legislature, and the public. As a result, the Bureau contends, Mr. Hubbard's conduct calls into question the likelihood that he will be honest and forthcoming with the FCC and that he will comply with Commission rules and policies.<sup>66</sup> In particular, EB deems it significant that the structure of Mr. Hubbard's consulting agreements are between the client and Auburn Network, "a media company with no history in offering business or political consulting services,"<sup>67</sup> despite the fact that it was clear that the consulting work was to be performed by Mr. Hubbard.<sup>68</sup> EB notes that a draft version of the agreement with E2020 had listed Auburn Network as a party but named Mr. Hubbard as the "consultant," and included a provision whereby Mr. Hubbard averred that he would not "use his legislative office or any facilities or equipment provided to him in his role as an Alabama legislator in the performance of his work."<sup>69</sup> The final agreement did not list Mr. Hubbard as the consultant, and language regarding use of his legislative position was excised.<sup>70</sup>

22. In conjunction with the draft and final E2020 agreements, EB points to an email Mr. Hubbard sent to Ferrell Patrick, who represented E2020 as a lobbyist, that forwarded the final version of the agreement and indicated that Mr. Hubbard made the contract with Auburn Network rather than himself "so I only have to list Auburn Network as my employer."<sup>71</sup> The Bureau puts forth, as did prosecutors in the Alabama criminal case, that Mr. Hubbard worded his consulting contracts in this way to conceal from the Alabama Ethics Commission and the public the income he received from his outside clients. Indeed, the Bureau argues, in filing the annual financial disclosure statement required of Alabama elected officials, Mr. Hubbard listed only Auburn Network as his employer and did not mention any of his consulting contracts.<sup>72</sup> The Bureau submits that Auburn Network has continued to perpetuate what it describes as a "half-truth" in this hearing proceeding by citing Auburn Network as Mr. Hubbard's only employer.<sup>73</sup>

23. The Enforcement Bureau posits that, "Mr. Hubbard's deceptive use of the licensee to hide his criminal activity, and evade his obligations as a public official to identify the sources of his income to the Ethics Commission (and the public he was elected to serve), is tantamount of a 'lack of

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<sup>66</sup> EB Affirmative Case at 23-24.

<sup>67</sup> *Id.* at 8.

<sup>68</sup> *Id.* at 24-26.

<sup>69</sup> *Id.* at 8 (quoting draft consulting contract provided to E2020, Exh. 18).

<sup>70</sup> *Id.* at 9 (citing final consulting contract with E2020, Exh. 19).

<sup>71</sup> *Id.* (citing email from Michael Hubbard to Ferrell Patrick dated March 8, 2012, also part of Exh. 19).

<sup>72</sup> *Id.* at 26.

<sup>73</sup> *Id.* at 26-27 (citing Auburn Network, Inc.'s Response to Enforcement Bureau's Third Set of Interrogatories (filed Oct. 8, 2021) (Exh. 10)).

candor’ violation before the Commission.”<sup>74</sup> Like the FCC, EB argues, the Alabama Ethics Commission relies on the completeness and accuracy of information submitted to it. It contends, therefore, that Mr. Hubbard’s intentional omission of his potential conflicts of interest before the Ethics Commission “has the same effect as if Mr. Hubbard had provided incomplete and incorrect information to the FCC.”<sup>75</sup> The fact that Mr. Hubbard did not reveal the existence of his consulting contracts to his own legislative staff, EB argues, is additional evidence of his disqualifying behavior. EB submits that, as a result, Mr. Hubbard cannot be trusted to deal honestly with the FCC and therefore he, and by extension Auburn Network, does not possess the basic character qualifications to remain a Commission licensee.<sup>76</sup>

24. Auburn Network disputes the Enforcement Bureau’s assertion that Mr. Hubbard intentionally and improperly concealed his outside consulting by directing that the consulting contracts be with Auburn Network rather than with him personally. Auburn Network argues that this issue is outside of the scope of discovery in this proceeding, which was limited to consideration of Mr. Hubbard’s six felony convictions.<sup>77</sup> It contends that by raising this argument, the Bureau introduces an unadjudicated claim of non-FCC misconduct, i.e., submission of improper financial disclosures, which is inconsistent with the Commission’s *1990 Character Policy Statement*.<sup>78</sup>

25. Moreover, Auburn Network takes issue with the Bureau’s reliance on arguments made by prosecutors in the criminal proceeding to support the notion that Mr. Hubbard structured the consulting agreements with an intent to obfuscate his outside activities and income.<sup>79</sup> Auburn Network submits that the Bureau does not cite to any section of the Alabama Ethics Code or any relevant case that makes clear that Mr. Hubbard inaccurately reported his consulting business.<sup>80</sup> Auburn Network reiterates, as it stated during discovery in response to an interrogatory from EB, that Mr. Hubbard operated his businesses through Auburn Network because it was simpler for accounting and tax reporting purposes. Auburn Network notes that it is a Subchapter S corporation, such that business income, losses, deductions, and credits may be consolidated in one tax return.<sup>81</sup> Further, Auburn Network points out, Mr. Hubbard was not charged with any violation related to how he filed his financial disclosure statements, nor were his financial disclosures admitted into evidence at his criminal trial.<sup>82</sup>

### Discussion

26. This hearing proceeding does not relitigate Mr. Hubbard’s guilt; the starting point for

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<sup>74</sup> *Id.* at 27.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Id.* at 28-29.

<sup>77</sup> Auburn Network Responsive Case at 14.

<sup>78</sup> *Id.* at 14-15.

<sup>79</sup> *Id.* at 16-22 (asserting, inter alia, that several of EB’s exhibits in this proceeding are arguments of prosecutors in the criminal trial rather than evidence adduced during the criminal trial).

<sup>80</sup> *Id.* at 16.

<sup>81</sup> *Id.* at 17 (citing Auburn Network, Inc.’s response to Enforcement Bureau’s Third Set of Interrogatories (filed Oct. 8, 2021) at Interrogatory No. 1).

<sup>82</sup> *Id.* at 17-18.

analysis is to acknowledge that he is guilty of the six violations of the Alabama Ethics Code that form the basis for this proceeding. This case turns on whether those felonies are of a nature that disqualifies him, and by extension Auburn Network, from holding FCC licenses. The answer to the questions posed in the *Auburn Network HDO* are dependent on that issue.

27. The Enforcement Bureau stakes much of its case on the way that Mr. Hubbard structured his consulting agreements and omitted them from his financial disclosures, arguing that, “[a]t the core of Mr. Hubbard’s deceptive criminal scheme are the consulting arrangements that he engineered between Auburn and APCI, E2020, and Capitol Cups.”<sup>83</sup> The Presiding Judge does not agree with Auburn Network that EB’s discussion of financial disclosure is outside the scope of inquiry in this proceeding. As stated several times in interlocutory orders in this docket, the issue at the center of this case is whether Mr. Hubbard’s conviction on six felonies renders him, and by extension his company, Auburn Network, unqualified to hold an FCC license based on the Commission’s character qualifications policy.<sup>84</sup> To answer this question, it is necessary to delve into the circumstances that led to those felony convictions. All six felonies relate to Mr. Hubbard’s use of his official position for personal benefit. EB alleges that in furtherance of that goal, and in furtherance of his felonies, Mr. Hubbard concealed his outside business connections by, among other things, not individually reporting his consulting arrangements on his financial disclosure forms. Rather than representing an additional, unadjudicated claim of non-FCC misconduct, the way Mr. Hubbard reported his outside income is sufficiently tied to his felony convictions to be probative as to whether those crimes affect his propensity, and that of Auburn Network, to be forthcoming when interacting with the Commission.

28. It is well-established that “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.”<sup>85</sup> As the Enforcement Bureau correctly states, the Commission’s “entire system of licensing, which for broadcasters encompasses both delivery of content in the public interest and strict adherence to specified technical standards, depends heavily on our being able to trust licensees to tell us the truth on an ongoing basis without prevarication.”<sup>86</sup> The Bureau has not shown, however, that an intent to obfuscate was inherent in Mr. Hubbard’s actions. What EB has submitted is conjecture rather than evidence. Public officials in Alabama are permitted by the Alabama Ethics Code to conduct outside business, and Mr. Hubbard consulted ethics officials for advice in that regard. While there were obvious flaws in the way he followed the advice that he was given, the fact that he reached out arguably belies an effort to deceive. EB notes that Auburn Network did not respond to interrogatories asking whether Mr. Hubbard would have had to individually list the consulting clients on his financial disclosure form if the contracts had been made with him personally rather than with his company.<sup>87</sup> The answer to that question isn’t dispositive; even if disclosure would have been

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<sup>83</sup> EB Affirmative Case at 24.

<sup>84</sup> *Auburn Network, Inc.*, Discovery Order, MB Docket No. 21-20, FCC 21M-06, 2021 WL 1945046 (ALJ May 12, 2021) at paras. 9-10; *Auburn Network, Inc.*, Second Discovery Order, MB Docket No. 21-20, FCC 21M-09, 2021 WL 3115886 (ALJ July 20, 2021) (*Second Discovery Order*) at para. 9; *Third Discovery Order, supra* n.12, at paras. 8-9; *Auburn Network, Inc.*, Fourth Discovery Order, MB Docket No. 21-20, FCC 21M-12, 2021 WL 3929695 (ALJ Aug. 31, 2021) (*Fourth Discovery Order*) at para. 13.

<sup>85</sup> *Contemporary Media v. FCC*, 214 F.3d at 193 (citing *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (DC Cir. 1980)).

<sup>86</sup> EB Affirmative Case at 29.

<sup>87</sup> *Id.* at n.187. Auburn Network argued that such questions were hypothetical and called for a legal conclusion. See Auburn Network, Inc.’s Response to Enforcement Bureau’s Third Set of Interrogatories to Auburn Network, Inc., MB Docket No. 21-20 (filed Oct. 8, 2021) at Interrogatories 6, 14, 21, and 28. EB did not file a motion to compel

required in that situation, the Enforcement Bureau has not made the case that Mr. Hubbard unlawfully or improperly structured his consulting contracts to avoid disclosure. Businesspeople routinely consider regulatory requirements in their dealings; doing so does not prove ill intent. Notably, Mr. Hubbard was not charged with or convicted of filing false or otherwise unlawful disclosures.

29. More importantly, there are legitimate reasons why a businessperson would choose to provide consulting services through a business entity rather than in a personal capacity. For example, similarly to how Mr. Hubbard structured his consulting contracts, attorneys routinely – and ethically – ask clients to contract with their law firm even though it is clear that the client is seeking to be represented by a particular lawyer. Auburn Network indicates that Mr. Hubbard’s aim in operating through Auburn Network was simplicity of accounting and tax reporting. EB’s position is that Mr. Hubbard’s purpose was instead to “set Auburn up as the ‘dummy’ consultant and financial beneficiary” to justify omitting the consulting companies from his financial disclosure forms.<sup>88</sup> EB makes much of the fact that the initial draft contract with E2020 referred to Mr. Hubbard as the “consultant” but the final contract used that term to refer to Auburn Network. It is true that the draft used “consultant” to refer to Mr. Hubbard and “Network” to refer to Auburn Network, while the final contract referred to Mr. Hubbard as the “employee” and to Auburn Network as the “consultant.” That change was non-substantive, however, having no impact on the parameters of the contractual arrangement or on Mr. Hubbard’s role. Both the draft and final versions of the contract are clear that the contracting parties are Auburn Network and E2020, that Mr. Hubbard is an employee of Auburn Network, and that Auburn Network would assign Mr. Hubbard to provide the contracted-for services. The change in terminology was merely a modification of the short-form references to Mr. Hubbard and Auburn Network. Under any reasonable reading of the two versions of the contract, it was clear that these short-form references were used for the convenience of the parties and were not intended to substantively alter how the work would be carried out.<sup>89</sup>

30. Moreover, Auburn Network had been in existence for almost two decades before the consulting contracts at issue were executed and had served as the umbrella under which Mr. Hubbard had operated a number of other businesses, including an advertising and media consulting agency, a printing company, and a magazine publishing company. It is quite plausible that Mr. Hubbard’s conduct of these additional consulting activities through Auburn Network was merely a continuation of his prior business practices, which predated his election to public office. The Enforcement Bureau has not proved otherwise.

31. Rather than concealment of his consulting clients, what got Mr. Hubbard into trouble, and ultimately convicted of six felonies, was his failure to properly separate his official state position and his extra-official business activities. The determination to be made in this case, then, is whether, when a government official breaches his duty to the public by mingling government business with his own, and is convicted of felonies as a result, that misconduct warrants license revocation pursuant to the Commission’s character qualifications policy. The aim of the policy is predictive, i.e., it purports to enable the decisionmaker to consider past behavior in assessing the likelihood that a licensee, or potential licensee, will deal openly and honestly with the Commission going forward. In that regard, the *1990 Character Policy Statement* builds on conclusions reached in 1986 and earlier that it is appropriate to

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Auburn Network to respond.

<sup>88</sup> EB Affirmative Case at 27.

<sup>89</sup> See EB Affirmative Case at Exhs. 18 & 19.

look at “mitigating factors” in deciding whether a particular felony conviction should be disqualifying.<sup>90</sup> Auburn Network submits that it is not necessary to consider mitigation in this case because the Enforcement Bureau has not met its burden of proof.<sup>91</sup> It is true that the mitigating factors can be treated as akin to affirmative defenses to a crime, especially when assigning the burden of proof in a case.<sup>92</sup> The Commission has also, however, viewed these mitigating factors as part of the ultimate assessment of the impact of a felony conviction on a licensee’s propensity to obey the law.<sup>93</sup> In other words, they can inform the overall analysis of whether a licensee’s bad behavior, for the most part unrelated to stewardship of FCC licenses, reveals a character deficiency that warrants disqualification of that individual or entity from holding an FCC license.

32. The *1990 Character Policy Statement* lists eight potential mitigating factors: (1) the willfulness of the misconduct; (2) the frequency of the misconduct; (3) the currentness of the misconduct; (4) the seriousness of the misconduct; (5) the nature of the participation of managers or owners; (6) efforts made to remedy the wrong; (7) overall record of compliance with FCC rules and policies; and (8) rehabilitation.<sup>94</sup> The Enforcement Bureau asserts that there are no factors that mitigate the effect of Mr. Hubbard’s crimes on his character to hold a Commission license. EB acknowledges that Auburn Network has a history of compliance with FCC rules and regulations, but asserts that none of the other mitigating factors favor the licensee. The Bureau points out that the felonies each include the element of intent, are recent and serious, that Mr. Hubbard committed the crimes through the licensee entity, Auburn Network, and that Mr. Hubbard has not accepted responsibility or otherwise evidenced that he has been rehabilitated.<sup>95</sup>

33. Auburn Network asserts that several mitigating factors exist. It argues that Mr. Hubbard’s consulting of Alabama ethics officials regarding his outside business activities demonstrates that he did not intend to break the law.<sup>96</sup> It also submits that both the Court of Criminal Appeals and the Supreme Court of Alabama raised concerns that the law is unclear.<sup>97</sup> Auburn Network additionally contends that the activity for which Mr. Hubbard was convicted was an isolated incident and that there has been no other evidence of criminal or dishonest behavior in the several years since that activity took place.<sup>98</sup> Further, Auburn Network characterizes the felonies as less serious than, for instance, bribery,

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<sup>90</sup> *1990 Character Policy Statement*, 5 FCC Rcd at 3252; *1986 Character Policy Statement*, 103 F.C.C.2d at 1225-26. See also *Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations Cases in Connection With Violations By an Applicant of Laws of the U.S. Other Than the Communications Act*, Report, 42 F.C.C. 2d 399, 402 (1951) (“there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest”).

<sup>91</sup> Auburn Network Responsive Case at 26.

<sup>92</sup> See, e.g., *David Titus*, 29 FCC Rcd 14066, 14071 (2014).

<sup>93</sup> *Id.*; see also *Contemporary Media, Inc.*, 13 FCC Rcd at 14442 (“in weighing the impact of a felony conviction on a licensee’s requisite propensity to obey the law, we said we would consider traditional mitigating factors”).

<sup>94</sup> *1990 Character Policy Statement*, 5 FCC Rcd at 3252 (citing *1986 Character Policy Statement*, 102 F.C.C.2d at 1227-29).

<sup>95</sup> EB Affirmative Case at 30-31.

<sup>96</sup> Auburn Network Responsive Case at 29.

<sup>97</sup> *Id.* at 27-29.

<sup>98</sup> *Id.* at 29-33.

fraud, or perjury.<sup>99</sup> It notes that Mr. Hubbard acted alone, so neither his stations nor station employees were involved.<sup>100</sup> Indeed, Auburn Network argues, the stations have a record of FCC compliance and good service.<sup>101</sup> It submits that to remedy the effects of his convictions, Mr. Hubbard resigned from the legislature, and that he has expressed embarrassment and remorse for his actions.<sup>102</sup>

34. Some but not all of the mitigating factors are useful to evaluation of this case. The definition of “willful” in the Communications Act is “the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate” the law.<sup>103</sup> Any felony with an element of intent would therefore satisfy the definition of willful, and Mr. Hubbard’s convictions are no exception. The assessment of whether his crimes were “frequent” isn’t terribly probative in this situation either, as he made the same contractual arrangement several times but it was part of a single pattern of doing business. The original convictions occurred six years ago and Mr. Hubbard exhausted his appeal remedies just over a year ago, so it is fair to deem his felonies “current” in this context. Moreover, it, it is difficult to say that Mr. Hubbard has made remedial efforts or that he has been “rehabilitated” given the progress of the criminal case and the fact that he is currently incarcerated. On the other hand, while the stations’ management technically participated in the felonies because Mr. Hubbard is the sole shareholder of licensee Auburn Network, there is no evidence that the stations themselves were involved. The Enforcement Bureau submits that the Commission need not consider whether the radio stations or station personnel were complicit in the criminal actions, as “[t]he fact that the sole owner of the licensee orchestrated and participated in the criminal misconduct is sufficient.”<sup>104</sup> The argument that the stations’ involvement is demonstrated by the mere fact that the consulting contracts were entered through the same umbrella business entity that owns the stations is unconvincing. Further, it is undisputed that the stations have a continuous record of FCC compliance.<sup>105</sup>

35. The remaining mitigation consideration is the seriousness of the misconduct. The *1990 Character Policy Statement* deems all felonies to be serious crimes; in this respect, the Commission’s definition of felony does not defer to the standards of individual states but instead uses the federal definition, which is an offense punishable by a maximum term of imprisonment of more than one year.<sup>106</sup> Mr. Hubbard’s crimes are therefore appropriately characterized as serious. It is also notable that Mr. Hubbard did not commit a victimless crime. The Alabama Ethics Code is based on the principles that public officials should be independent and impartial, that public office should not be used for private gain, and that it is important for the public to have confidence in the integrity of government.<sup>107</sup> Finding that

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<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.* at 33-34.

<sup>101</sup> *Id.* at 34-39.

<sup>102</sup> *Id.* at 39-45.

<sup>103</sup> 47 U.S.C. § 312(f)(1).

<sup>104</sup> EB Reply Case at 17.

<sup>105</sup> EB Affirmative Case at 30 (“the Bureau acknowledges that, overall, Auburn has a record of compliance before the FCC”).

<sup>106</sup> *1990 Character Policy Statement* at n.2; 18 U.S.C. § 3156(a)(3).

<sup>107</sup> Ala. Code 1975 § 36-25-2(a).

those principles are compromised when the private interests of a public official conflict with his or her governmental duties, the Alabama Legislature, under Mr. Hubbard's leadership, adopted rules to guard against self-dealing and attached strict penalties. In violating these rules, Mr. Hubbard betrayed the trust of the public that he was elected to serve. The Alabama Ethics Code may have ambiguities, especially with respect to part-time legislators likely to be engaged in private business. But Mr. Hubbard was clearly advised by ethics officials that applicable law prohibited him from using his official position or "the mantle of [his] office" for personal benefit or for the benefit of Auburn Network.<sup>108</sup>

36. No persuasive evidence has been introduced, however, to show that Mr. Hubbard's conviction on public corruption felonies logically leads to the conclusion that he is likely to behave dishonestly with the Commission. While the appropriate method of analysis remains case-by-case, such that there is still no defined "hierarchy" of disqualifying felonies, a logical continuum can be extrapolated from felony cases decided since 1990. As noted above, the Commission has recognized that some crimes are "so egregious as to shock the conscience and evoke almost universal disapprobation," and thus can provide *prima facie* evidence of deficient character, even when the misconduct has not been formally adjudicated, and even if there is no connection to the underlying FCC license.<sup>109</sup> It follows, then, that when such activities result in adjudicated felonies, the licensee faces a very high bar in attempting to demonstrate countervailing evidence sufficient to show good character. Crimes such as child molestation and murder fall into this category. For instance, in *Contemporary Media v. FCC*, the District of Columbia Circuit upheld the FCC's determination that an FM radio owner who was convicted of sexually abusing children had not provided evidence that lessened the effect of his "patently criminal behavior."<sup>110</sup> Similarly, the Commission held in *David Titus* that an amateur radio licensee convicted of sexually molesting children did not show indicia of rehabilitation that would forestall revocation of his license, given that his misconduct fit the description of "so egregious as to shock the conscience."<sup>111</sup>

37. Further along the continuum are crimes that are very serious but might not so clearly be said to "shock the conscience and evoke almost universal disapprobation." In *David Edward Cox*, for example, the license of an amateur operator was revoked for "egregious criminal misconduct" resulting in felony convictions for burglary and firearms offenses.<sup>112</sup> In *Augusta Radio Fellowship*, the Commission upheld the revocation of an AM radio license where the licensee's controlling stockholder was convicted of drug-related felonies. The Commission concluded that the individual demonstrated "systemic devotion to a criminal enterprise and callous disregard for the welfare of fellow citizens."<sup>113</sup> The Commission also gave weight to the fact that the stockholder lied to the judge in the criminal case and bribed law enforcement officials, activities that "obviously have a material bearing on [his] propensity to be candid in communications with the Commission and to obey its rules and policies."<sup>114</sup> Notably, before the Commission expanded its character policy to include all felony convictions in the *1990 Character Policy*

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<sup>108</sup> EB Affirmative Case at Exh. 14 (Letter from James L. Sumner, Jr., Director, State of Alabama Ethics Commission, to Michael Hubbard, dated Jan. 27, 2012).

<sup>109</sup> *1990 Character Policy Statement*, at n.5 (quoting *1986 Character Policy Statement* at 1205 n.60).

<sup>110</sup> *Contemporary Media v. FCC*, 214 F.3d at 193.

<sup>111</sup> *David Titus*, 29 FCC Rcd at 14070.

<sup>112</sup> *David Edward Cox*, 21 FCC Rcd 14153, 14155 (EB 2006).

<sup>113</sup> *Augusta Radio Fellowship*, 6 FCC Rcd 4823, 4823-4824 (1991).

<sup>114</sup> *Id.* at 4824.



*Statement*, it issued a Public Notice in 1989 indicating that it would regard convictions for drug trafficking “as a matter of the gravest concern” that could lead to initiation of revocation proceedings.<sup>115</sup>

38. The crimes of which Mr. Hubbard is guilty are not trivial; indeed, he is currently incarcerated as a result. But the *1990 Character Policy Statement* is clear that not every felony is disqualifying.<sup>116</sup> Further, the facts surrounding Mr. Hubbard’s felonies do not neatly compare to those considered disqualifying in other hearing cases. His activities do not represent the kind of moral turpitude that would make them of the “shock the conscience” variety. Nor do they involve fraud, bribery, perjury, or bodily injury. Moreover, there is no evidence of FCC misconduct that would provide a nexus between Mr. Hubbard’s criminal behavior and Auburn Network’s FCC licenses. While that is not a requirement under the *1990 Character Policy Statement* for finding a felony conviction disqualifying, it would provide a stronger justification for license revocation.<sup>117</sup> In short, a careful review of the criminal record and all the evidence submitted fails to persuade the Presiding Judge that Mr. Hubbard does not possess the character to remain a Commission licensee. The goal of the Commission’s character qualifications policy “is not to pass moral judgment on applicants but, instead, to determine whether the public interest will be served.”<sup>118</sup> The misdeeds of a public servant may indeed be relevant in gauging that person’s ability to serve the public interest as an FCC licensee, but in this particular case and under these particular circumstances, the evidence presented does not satisfy the burden of proof. Accordingly, the licenses of Auburn Network will not be revoked.

## Other Issues

### Standard of Proof

39. Auburn Network contends that because this case concerns the potential revocation of licenses, it should be judged on a “clear and convincing” standard of proof rather than by the less strict “preponderance of the evidence” standard.<sup>119</sup> As support, it cites *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342 (Rev Bd 1988). That case, however, as noted by the Enforcement Bureau, reached precisely the opposite conclusion.<sup>120</sup> Indeed, the FCC’s Review Board took time to address the issue despite finding that it didn’t need to because the parties didn’t raise it and because either standard of proof led to the same result. The Review Board stated that, “the proper standard of proof in [revocation] cases is the ‘preponderance of the evidence’ standard, and not the ‘clear and convincing’ standard.”<sup>121</sup> On review, the Commission agreed, concluding, “For the reasons stated by the Board, the preponderance of the evidence standard – not the clear and convincing standard – generally applies to Commission

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<sup>115</sup> *Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking*, Public Notice, 4 FCC Rcd 7533 (1989).

<sup>116</sup> *Contemporary Media*, 214 F.3d at 193 (citing *1990 Character Policy Statement*).

<sup>117</sup> See, e.g., *Schoenbohm v. FCC*, 204 F.3d 243 (DC Cir. 2000) (felony of fraudulently using counterfeit long distance access codes considered in combination with misrepresentation and lack of candor before the FCC).

<sup>118</sup> *Richard Richards*, 10 FCC Rcd. 3950, 3955 (Rev. Bd. 1995).

<sup>119</sup> Auburn Network Responsive Case at 14 n.67.

<sup>120</sup> EB Reply Case at 1 n.7.

<sup>121</sup> *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6348 (Rev Bd 1988).

revocation proceedings.”<sup>122</sup> More recently, the Commission again indicated that, consistent with applicable law, the appropriate standard of proof in administrative hearings is the preponderance of the evidence standard and not the clear and convincing standard.<sup>123</sup> Accordingly, the Presiding Judge has considered the evidence presented by the Enforcement Bureau in this proceeding pursuant to the preponderance of the evidence standard.

#### Evidentiary Issues

40. Both Auburn Network and the Enforcement Bureau challenge some of the evidence submitted. Auburn Network contends that the only evidence that EB cites to support its claim with respect to Mr. Hubbard’s financial disclosures are prosecutorial statements from the criminal proceeding, which are opinion and not fact.<sup>124</sup> Accordingly, Auburn Network requests that EB Exhibits 1, 2, 3, 8, and 11, and all references thereto, should be stricken from the record or given no weight.<sup>125</sup> The Enforcement Bureau contends that the 17 declarations that Auburn Network has submitted as exhibits to its Responsive Case should be disregarded or excluded from the record of this proceeding. EB indicates that the declarations “were apparently purposefully prepared after the close of discovery in what appears to be a calculated effort to unfairly disadvantage the Bureau,” which shows both a lack of respect for the rules of this proceeding and a lack of candor, providing additional support for the conclusion that Auburn Network does not possess the qualifications to remain a Commission licensee.<sup>126</sup> EB submits that it asked Auburn Network during discovery to identify individuals from whom it was planning to seek supporting statements and to produce those statements, but notes that Auburn Network responded that it had not at that time decided from whom it would submit statements and did not subsequently produce any of the declarations included with its Responsive Case.<sup>127</sup> The Bureau argues that Auburn Network has deprived it of the opportunity to examine the declarants, and points out that if this had been a live hearing, Auburn Network would have been required to submit a list of witnesses and documents on which it intended to rely prior to the start of the hearing.<sup>128</sup>

41. The Commission’s rules for hearings on a written record provide for the introduction of evidence along with the parties’ written case submissions. As a result, evidentiary objections, if any, are necessarily raised as part of the Responsive Case and the Reply Case. Eliminating the contemporaneous back-and-forth arguments that take place in an oral hearing or an oral session for the admission of evidence undoubtedly streamlines a hearing, consistent with the decision to conduct that hearing in writing. The Enforcement Bureau raises a valid point, however, that we may still have some work to do in developing procedures for the consideration of evidentiary arguments in written hearings. EB cautions against “establishing a dangerous precedent for future proceedings whereby any party to a hearing on a written record could wait to introduce evidence until its written case submissions in an attempt to

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<sup>122</sup> *Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905, 6907 n.3 (1991).

<sup>123</sup> *China Telecom (Americas) Corporation*, GN Docket No. 20-109, FCC 21-114, 2021 WL 5161884 (rel. Nov. 2, 2021) at para. 15.

<sup>124</sup> Auburn Network Responsive Case at 18-21.

<sup>125</sup> *Id.* at 22.

<sup>126</sup> EB Reply Case at 22-23.

<sup>127</sup> *Id.* at 24-25.

<sup>128</sup> *Id.* at 25.

preclude any other party from investigating that evidence and prejudice its ability to make its case,” which would effectively nullify the discovery process.<sup>129</sup>

42. For some written hearings, it may be beneficial to conduct a separate oral admissions session for particularly controversial, cumbersome, or voluminous submissions. If a party believes that a live discussion of evidentiary matters would be useful, the Commission’s rules provide for a deadline after the parties have filed their case submissions by which to request an oral hearing on certain issues.<sup>130</sup> The utility of an oral admissions session can be evaluated at that juncture. Alternatively, the parties may seek to present evidentiary arguments via additional written pleadings to be approved by the Presiding Judge.<sup>131</sup> Further argument is not necessary in this case, however. Rather than strike any submissions, the Presiding Judge has considered each party’s evidentiary challenges and has weighed the disputed information accordingly. It is clear that the statements of the criminal prosecutor submitted by the Enforcement Bureau were arguments made in the criminal case that EB used to bolster its similar theory of the case. The Presiding Judge has not weighed those statements as factual evidence that Mr. Hubbard structured his consulting agreements to conceal his activities, but views them as further illustration of the Bureau’s argument.

43. With respect to the statements attached to Auburn Network’s Responsive Case, the Enforcement Bureau has not shown that Auburn Network engaged in an intentional effort to misuse the evidentiary process. One submission is from Mr. Hubbard himself. Certainly, a statement from Mr. Hubbard describing his background and defending his character was to be expected, and no decisional information is included that was not disclosed via discovery. Of the other 16 statements, 14 are expressions of support from personal and business associates of Mr. Hubbard and from family members. The Presiding Judge did not find it necessary to consider those statements in determining that revocation is not called for in this case. The other two statements, one from an accountant of whom Mr. Hubbard is a client, and the other from an Alabama attorney who has experience with the Alabama Ethics Code, relate to the basis for EB’s argument that Mr. Hubbard’s consulting arrangements and financial disclosures were deceptive. As that issue is at the core of EB’s case and EB did not have the opportunity to cross-examine those declarants or further investigate their specific assertions, the Presiding Judge, as a matter of fundamental fairness and considering that this matter can be decided without reference to those affidavits, has given those statements no weight in reaching her decision.

#### Ex Parte Allegations Raised by Auburn Network

44. Finally, Auburn Network claims that the Enforcement Bureau has violated the FCC’s *ex parte* rules and has concealed evidence. Specifically, it contends that EB has admitted that it had 200 or more *ex parte* contacts with the Media Bureau concerning Mr. Hubbard and/or Auburn Network.<sup>132</sup> Auburn Network argues that the Bureau’s failure to disclose these contacts violates the Administrative Procedure Act and is evidence that the information contained therein is harmful to its case.<sup>133</sup> As a result,

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<sup>129</sup> *Id.* at 26.

<sup>130</sup> 47 CFR § 1.376.

<sup>131</sup> 47 CFR § 1.375. Auburn Network filed a motion pursuant to § 1.375 seeking to file a surreply, but the Presiding Judge determined that additional pleadings were not necessary in this case. *Auburn Network, Inc.*, Order Denying Motion for Additional Pleading, MB Docket No. 21-20, FCC 22M-04 (ALJ Feb. 24, 2022).

<sup>132</sup> Auburn Network Responsive Case at 46.

<sup>133</sup> *Id.* at 46-48.

Auburn Network submits, EB's Affirmative Case is tainted and must be disregarded or dismissed.<sup>134</sup> The Enforcement Bureau characterizes Auburn Network's *ex parte* allegations as groundless. EB points out that, in response to the *Second Discovery Order* in this proceeding, it indicated that it possessed a number of emails that predated the February 11, 2021, designation of this matter for hearing.<sup>135</sup> EB contends that those communications are not *ex parte*, and notes the previous conclusion of the Presiding Judge that an examination of the Bureau's activities prior to designation of this case for hearing are outside the scope of this proceeding.<sup>136</sup> It argues that this failure of Auburn Network to be candid and truthful with the Commission is further evidence that it does not have the character to be a Commission licensee.<sup>137</sup>

45. Auburn Network's *ex parte* allegations are without merit. The Presiding Judge has already addressed this matter twice in the course of this proceeding, and will do so again for the sake of clarity. The *Second Discovery Order* directed EB to provide a list of all documents in its possession that "refer to or reference Michael Hubbard's felony convictions." The purpose of the list was to provide Auburn Network with sufficient information to determine whether to file a Freedom of Information Act request, which, pursuant to the Commission's rules, is the only way that the non-public FCC information that Auburn Network sought could be released. EB in response indicated that it identified between 150 and 200 emails that were either between its staff and staff of other FCC Bureaus and Offices, or were emails sent internally within EB that included such communications on the email chain. EB also identified as responsive 15 attachments to some of those emails. All the emails and attachments were dated prior to the release of the *Auburn Network HDO*, i.e., February 11, 2021.<sup>138</sup>

46. The Presiding Judge concluded in the *Third Discovery Order* and again in the *Fourth Discovery Order* that Auburn Network's allegation that improper *ex parte* communication occurred between the Enforcement Bureau and the Media Bureau prior to designation of this proceeding for hearing is, in essence, a request for review of the *Auburn Network HDO*. Not only is that review not within the authority of the Presiding Judge, but it is outside the scope of the questions referred to her by the Media Bureau in this proceeding.<sup>139</sup> Moreover, the Commission's *ex parte* rules indicate that "restricted" proceedings, i.e. those in which *ex parte* presentations are prohibited, include "all proceedings that have been designated for hearing."<sup>140</sup> Because the communications to which Auburn Network objects took place before this matter was designated for hearing, the *ex parte* rules did not yet

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<sup>134</sup> *Id.* at 48.

<sup>135</sup> EB Reply Case at 26-27 (citing *Second Discovery Order*, *supra* n.84).

<sup>136</sup> *Id.* at 27-28 (citing *Fourth Discovery Order*, *supra* n.84).

<sup>137</sup> *Id.* at 29.

<sup>138</sup> Enforcement Bureau's Response to *Second Discovery Order*, MB Docket No. 21-20 (filed Aug. 3, 2021) at 3-4 nn.5&6. As explained in the *Second Discovery Order*, the Enforcement Bureau inadvertently included a Media Bureau employee on an email message sent to Auburn Network's counsel after release of the *Auburn Network HDO*. The Bureau instructed the MB employee to disregard the email and provided a copy of that instruction to Auburn Network's counsel. EB avers that there have been no additional communications between it and other FCC personnel concerning Auburn Network, Michael Hubbard, or this hearing proceeding. *Second Discovery Order* at para. 6 (citing 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 (filed June 21, 2021) at 10).

<sup>139</sup> *Third Discovery Order*, *supra* n.12, at para. 8; *Fourth Discovery Order*, *supra* n.84, at para. 9.

<sup>140</sup> 47 CFR § 1.1208.

apply. It does not follow, however, that Auburn Network's persistently inaccurate interpretation of the *ex parte* rules is evidence of its inability to deal honestly with the Commission. It is simply a failed argument.

#### CONCLUDING STATEMENT

47. The *Auburn Network HDO* tasked the Enforcement Bureau with proving that Michael Hubbard's felony convictions render him, and by extension Auburn Network, unqualified to be a Commission licensee such that Auburn Network's licenses should be revoked. Based on the foregoing, the Presiding Judge concludes that the Enforcement Bureau has not satisfied its burden of proof. Accordingly, the above-captioned licenses of Auburn Network, Inc., will not be revoked.

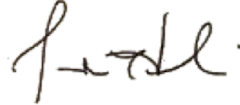
#### ORDERING CLAUSES

48. **ACCORDINGLY, IT IS ORDERED** that the above-captioned licenses of Auburn Network, Inc., **SHALL NOT BE REVOKED** as a result of the felony convictions of its president and 100 percent shareholder, Michael G. Hubbard, for the reasons detailed herein.

49. **IT IS FURTHER ORDERED** that the application of Auburn Network, Inc., for a construction permit for a new FM translator station at Auburn, AL, **IS DISMISSED WITH PREJUDICE** for failure to prosecute.

50. **IT IS FURTHER ORDERED** that this license revocation proceeding, MB Docket No. 21-20, **IS DISMISSED WITH PREDJUDICE** on the merits.<sup>141</sup>

FEDERAL COMMUNICATIONS COMMISSION



Jane Hinckley Halprin  
Administrative Law Judge

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<sup>141</sup> This Initial Decision shall become effective and this proceeding shall be terminated 50 days after release if exceptions are not filed within 30 days after release, unless the Commission elects to review the case on its own motion. 47 CFR § 1.276.