

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

In the Matter of )
ARM & RAGE, LLC ) MB Docket No. 22-122
WJBE(AM), Powell, TN ) Facility ID No. 59693

DISCOVERY ORDER

Issued: October 20, 2022

Released: October 20, 2022

1. The above-captioned proceeding, which was initiated by the FCC’s Media Bureau on March 21, 2022, seeks to determine whether Arm & Rage, LLC, remains qualified to be a Commission licensee.1 Joseph Armstrong, the sole member of Arm & Rage, was convicted of a felony on August 8, 2016, for filing a false federal income tax return in violation of 26 U.S.C. § 7206(1). The basis for the conviction was that Mr. Armstrong, while a Tennessee state legislator, had purchased cigarette tax stamps in 2007 and sold them at a profit of approximately \$330,000 following the legislature’s increase in the state’s cigarette tax, but did not include that profit on his 2008 federal income tax return.2 The Media Bureau designated three issues for hearing: (1) the impact of the felony conviction of Joseph Armstrong on Arm & Rage’s qualifications to hold a broadcast license; (2) the effect of the failure of Arm & Rage to timely report Mr. Armstrong’s conviction, to upload required information to the station’s public inspection file, and to file timely ownership reports; and (3) whether the license for WJBE(AM) should be revoked.3 Discovery in this proceeding is currently scheduled to end on November 18, 2022.4

2. On September 29, 2022, the FCC’s Enforcement Bureau filed a motion to compel Arm & Rage to submit more complete responses to its request for production of documents.5 The Bureau notes that in its initial document request, it asked Arm & Rage to produce “all documents referring or relating to Mr. Armstrong’s criminal proceeding,” “all communications between Mr. Armstrong and his accountant, Mr. Stivers, and Mr. Stivers’s company, Bowling Branch investments, concerning his tax returns and the cigarette tax stamps in question,” and “all communications between Mr. Armstrong and Mr. Anderson, with whom he purchased the cigarette tax stamps, and Tru Wholesale, the entity to whom he sold them.”6 In response, the Bureau contends, Arm & Rage produced only the portions of the criminal proceeding that are in the public record, including pre-trial motions, proposed jury instructions, closing arguments, and letters of

1 Arm & Rage, LLC, Hearing Designation Order, Order to Show Cause, and Notice of Opportunity for Hearing, MB Docket No. 22-122, DA 22-285, 2022 WL 1077874 (MB Mar. 21, 2022) (Arm & Rage HDO).

2 Arm & Rage HDO at para. 2.

3 Id. at para. 24.

4 Arm & Rage, LLC, Order Summarizing Initial Status Conference, MB Docket No. 22-122, FCC 22M-14 (ALJ May 18, 2022) (Initial Status Conference Order).

5 Enforcement Bureau’s Motion to Compel Complete Responses to its First Set of Requests for Production, MB Docket No. 22-122 (filed Sept. 29, 2022) (EB Motion to Compel); Enforcement Bureau’s Motion for Leave to File Motion to Compel Complete Responses to its First Set of Requests for Production, MB Docket No. 22-122 (filed Sept. 29, 2022).

6 EB Motion to Compel at 1.

support from friends and family of Mr. Armstrong, as well as the transcribed testimony of two of the 14 witnesses examined during the criminal trial. The Bureau submits that Arm & Rage did not initially produce any trial exhibits or additional documents related to the trial, and that Arm & Rage objected to searching for or producing further documents as “disproportionate to the needs of the case.”<sup>7</sup> After further discussion with Arm & Rage, the Enforcement Bureau indicates that the licensee produced all but two of the exhibits introduced at trial, the presentencing reports, and some other non-public documents, but declines to review or produce the case file from Mr. Armstrong’s defense attorneys, or Mr. Armstrong’s personal case files and emails.<sup>8</sup> The Bureau further submits that Arm & Rage will only produce the entire set of pre-trial exhibits if the Bureau agrees not to seek further discovery concerning Mr. Armstrong’s trial or criminal activities.<sup>9</sup> The Bureau contends that this is inconsistent with both the Commission’s discovery rules and the Presiding Judge’s earlier order regarding the scope of discovery.<sup>10</sup> Accordingly, it asks that Arm & Rage be compelled to produce the following:

- The pre-trial exhibits exchanged between Mr. Armstrong’s criminal defense attorneys and the government;
- Non-privileged documents from the criminal case file of Mr. Armstrong’s defense attorneys, including, but not limited to, approximately 1,300 files on a thumb drive recently identified by Arm & Rage;
- Non-privileged documents from Mr. Armstrong’s personal set of files from his trial;
- Non-privileged documents from Mr. Armstrong’s personal emails; and
- Any other non-privileged responsive documents not yet identified that are related to Mr. Armstrong’s criminal case or the facts underlying his criminal activities.

Further, to the extent that Arm & Rage asserts that some responsive documents are privileged, the Bureau requests that the licensee be required to provide a privilege log.<sup>11</sup>

3. Arm & Rage filed its response to the Enforcement Bureau’s motion to compel on October 11, 2022.<sup>12</sup> It presents three arguments in opposition. First, Arm & Rage argues that the requested material mostly concerns counts – conspiracy to defraud the United States and attempted tax evasion – for which Mr. Armstrong was acquitted, which makes that material irrelevant, and that some of the documents requested have minimal evidentiary value in that they contain little information about Mr. Armstrong’s conviction or the conduct underlying that conviction.<sup>13</sup> As part of its argument, A&R offers a summary of the trial exhibits it already has produced, many of which it asserts are irrelevant, and offers a few examples of other requested documents to help support its assertion that they are even less relevant and probative than the trial

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<sup>7</sup> *Id.* at 2 (quoting Arm & Rage’s Objections and Responses to the Enforcement Bureau’s Requests for Production of Documents and Things (filed Aug. 5, 2022) at Response to Request No. 1).

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 4, Exhibit D (email from Andrew H. Ward, counsel for Arm & Rage, to Pamela Kane, Enforcement Bureau, dated Sept. 22, 2022).

<sup>10</sup> *Id.* at 5-8.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> Arm & Rage’s Response to the Enforcement Bureau’s Second Motion to Compel, MB Docket No. 22-122 (filed Oct. 11, 2022) (A&R Opposition to Motion to Compel).

<sup>13</sup> A&R Opposition to Motion to Compel at 5-9, Exhibits 2-8.

exhibits. Second, Arm & Rage asserts that because much of the record of the criminal trial is irrelevant, the requested material that was not part of the trial record is less likely to be relevant, and that producing those items would be duplicative or disproportionately burdensome. More specifically, it asserts that the requested documents include thousands of pages that will require significant time to review and produce while being of little value in this proceeding.<sup>14</sup> Third, Arm & Rage, while admitting that the Commission “did not amend the discovery rules specifically” when it adopted rules to allow for written hearings, argues that broad discovery is inconsistent with the purpose of streamlining hearings and that the Enforcement Bureau’s “scorched-earth” approach to discovery goes in the wrong direction.<sup>15</sup>

4. Taking Arm & Rage’s last point first, that the Commission implicitly intended to curtail discovery when it adopted written hearing procedures, the Presiding Judge rejected substantially the same argument in another proceeding, stating:

In its opposition to the Bureau’s document request, [licensee] contends that requiring it to respond to the discovery requests as currently posed will entail significant time and expense, contrary to the goal of the Commission’s procedures for written – rather than oral – hearings. It is notable that the Commission did not choose to substantially revise longstanding discovery rules in the proceeding that culminated in the 2020 *Written Hearings Report and Order*. As such, the Commission’s preference for a written hearing in this case does not in itself provide a basis for limiting discovery. It is always the goal of the Presiding Judge to conduct hearings as efficiently as possible, and the rulings set forth below are made with that aim in mind.<sup>16</sup>

That rationale applies equally here. And Arm & Rage itself recognizes that the Commission did not change the discovery rules when it adopted rules to allow for written hearings.

5. With respect to Arm & Rage’s assertions that some of the requested documents are irrelevant and/or that searching through them will be unnecessarily burdensome, the Presiding Judge previously had occasion to comment on the parameters of discovery in this case in an order addressing various preliminary requests for admission.<sup>17</sup> Mr. Armstrong was acquitted of conspiracy to defraud the government and tax evasion, but was convicted of making a false statement in a tax return. The Presiding Judge reiterates that, while the crimes of which Mr. Armstrong was acquitted will not be relitigated, it is impractical to limit discovery so as to exclude reference to those offenses because all three charges stemmed from the same activities and circumstances.<sup>18</sup> Moreover, the Commission’s general discovery rule indicates that information is discoverable regardless of its ultimate admissibility as long as it “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>19</sup> The information requested by the Enforcement Bureau in its Motion to Compel is consistent with that principle.

6. Regardless of whether a hearing is conducted orally or in writing, the Presiding Judge has a responsibility to ensure that it proceeds in an efficient manner. She has therefore considered Arm & Rage’s assertion that the burden of producing certain documents outweighs the likelihood that they will ultimately

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<sup>14</sup> *Id.* at 9-12, Exhibits 5, 9.

<sup>15</sup> *Id.* at 12-14.

<sup>16</sup> *Auburn Network, Inc.*, Discovery Order, MB Docket No. 21-20, FCC 21M-06 (ALJ May 12, 2021) at para. 3 [footnotes omitted].

<sup>17</sup> *Arm & Rage, LLC*, Order, MB Docket No. 22-122, FCC 22M-21 (ALJ July 12, 2022) (*July 12 Order*).

<sup>18</sup> *July 12 Order* at para. 6.

<sup>19</sup> 47 CFR § 1.311(b).

be relevant to the goal of discovery in this proceeding, which is to ensure that the record fully and accurately describes the conduct underlying Mr. Armstrong's conviction. Balancing these factors, the Presiding Judge finds that pre-trial exhibits exchanged by the parties for the criminal trial, even if not actually used during the trial, are relevant and reasonably expected to lead to admissible evidence. The parties to a criminal case are unlikely to prepare and exchange exhibits that they believe to be irrelevant or immaterial to the matters at issue during that trial. And, as the Presiding Judge previously has stated and reiterated above, all three criminal counts arose out of the same set of facts and circumstances. It therefore is impractical, if not impossible, and very well might improperly limit discovery in this proceeding, to attempt at the discovery stage to parse which materials are probative solely of the counts for which Mr. Armstrong was acquitted. At a minimum, such exhibits are sufficiently relevant to expect that they will lead to the discovery of evidence that will be admissible here. Further, the burden of production appears quite low. The motion to compel therefore is granted as to pre-trial exhibits exchanged by the parties to the criminal trial.

7. The Presiding Judge similarly finds that non-privileged documents from the criminal defense attorneys' case file, including the thumb drive containing approximately 1,300 files, should be produced. The Presiding Judge presumes that defense counsel would not spend time and resources amassing in the case file a significant volume of irrelevant documents. Discovery of these documents appears reasonably calculated to lead to admissible evidence, and the burden of separating out privileged materials should be relatively low, being a customary and expected activity during litigation. The motion to compel therefore is granted as to these documents.

8. On the other hand, while items included in Mr. Armstrong's personal file on his criminal trial may be pertinent to this hearing, requiring production of these documents runs a substantial risk of duplication with defense counsels' file, which is apt to contain the most relevant and probative documents. Broad discovery generally is consistent with the Commission's rules, and it is necessary to permit discovery sufficient to ensure that the record here accurately reflects the facts and circumstances of the felony of which Mr. Armstrong was convicted. On balance, though, the Presiding Judge is not convinced that the likelihood of uncovering admissible evidence beyond that to be gleaned from defense counsels' case file is so significant as to outweigh the burden of searching Mr. Armstrong's personal file for responsive documents and assessing whether a privilege applies. The Presiding Judge believes that the record from the criminal trial as well as the other documents Arm & Rage is being ordered to produce provide the Enforcement Bureau a full and fair opportunity to develop admissible evidence to demonstrate the facts and circumstances underlying Mr. Armstrong's conviction without delving into whatever trial-related documents Mr. Armstrong chose to keep for his own purposes. The motion to compel is therefore denied as to Mr. Armstrong's personal trial file.

9. Conversely, Mr. Armstrong's non-privileged emails related to the criminal trial or the facts and circumstances underlying his criminal conviction should be produced. Discovery of these emails is reasonably likely to lead to the discovery of admissible evidence and appears to raise fewer concerns about duplication or undue burdens given that these files can be searched electronically. The burden of production is thus outweighed by the likely relevance and probity of these documents. The motion to compel is granted as to Mr. Armstrong's emails.<sup>20</sup>

10. Arm & Rage must provide a privilege log listing documents for which a privilege is claimed. The privilege log must identify each document with sufficient specificity to enable the Enforcement Bureau and the Presiding Judge to understand the character of the document and the basis for

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<sup>20</sup> The Enforcement Bureau's final category of requested documents, "[a]ny other non-privileged responsive documents not yet identified that are related to Mr. Armstrong's criminal case or the facts underlying his criminal activities" is already within the scope of Arm & Rage's ongoing document production responsibilities, so production of such documents need not be compelled by this Order.

the claim of privilege, the identity of the person who produced it, the date it was produced, the number of pages, and the particular privilege or privileges being asserted as to that document. For correspondence, including email messages, the privilege log also must identify each addressee. Where a document contains attachments, the same information must be provided for each attachment.

11. Finally, the Presiding Judge recognizes that production of these additional documents and their review by the Enforcement Bureau necessitates an extension of the discovery period for this proceeding, currently scheduled to conclude on November 18, 2022. Accordingly, Arm & Rage is directed to produce the required documents on or before December 1, 2022, and the discovery period will now end on January 18, 2023. The due dates for the parties' written hearing submissions are correspondingly extended, as follows:

Enforcement Bureau's Affirmative Case Due	March 6, 2023
Arm & Rage's Responsive Case Due	April 3, 2023
Enforcement Bureau's Reply Case Due	April 17, 2023
Deadline to File Motion to Request Oral Hearing and/or Submit Additional Pleadings	May 1, 2023

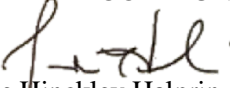
This revised schedule affords ample additional time to both parties such that no additional extensions are anticipated.

12. Accordingly **IT IS ORDERED** that the Enforcement Bureau's Motion to Compel Complete Responses to its First Set of Requests for Production, filed on September 29, 2022, **IS GRANTED** to the extent indicated herein and otherwise **IS DENIED**.

13. **IT IS FURTHER ORDERED** that Arm & Rage, LLC, **SHALL PRODUCE** the documents ordered to be produced herein, and **SHALL FILE** a privilege log as directed herein, on or before **DECEMBER 1, 2022**.

14. **IT IS FURTHER ORDERED** that the end date for discovery in this proceeding and the due dates for submitting written hearing documents **ARE EXTENDED** as detailed above.

FEDERAL COMMUNICATIONS COMMISSION

  
Jane Hinckley Halprin  
Administrative Law Judge