

**Before the
Federal Communications Commission
Washington, DC 20554**

**FCC 15M-22
10343**

In the Matter of)	EB Docket No. 14-82
)	
PATRICK SULLIVAN)	FRN: 0003749041, 0006119796,
(Assignor))	0006149843, 0017196064
)	
and)	Facility ID No. 146162
)	
LAKE BROADCASTING, INC.)	File No. BALFT-20120523ABY
(Assignee))	
)	
For Commission Consent to the Assignment of)	
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

ORDER

Issued: June 11, 2015

Released: June 11, 2015

Preliminary Statement

On March 4, 2015, the Enforcement Bureau (“Bureau”) filed its Second Request for the Production of Documents to Lake Broadcasting, Inc. (“Lake”). The Bureau requested that Lake produce: (1) all documents referenced in the November 22, 2014 psychological report regarding Michael Rice prepared by Duncan-Hively Psychological Services (“DH Report”); (2) all documents, including but not limited to test results and examination reports, upon which Duncan-Hively Psychological Services relied in preparing its DH Report; (3) all examination reports and test results and notes relating thereto from the 1991 examination referenced in the DH Report; (4) all examination reports and test results and notes relating thereto from the 2014 examination referenced in the DH Report; (5) all examination reports and test results and notes relating thereto from any examination or test conducted on Mr. Rice subsequent to the preparation of the DH Report; and (6) federal income tax returns filed by or on behalf of Michael Rice from 2010 to 2014. (“Requests 1-6,” respectively).¹

On March 16, 2015, Lake filed a Response to the Bureau’s Second Request. Lake responded to Requests 2 and 4 by proposing that it would produce the specified documents under the condition that the documents would be transmitted solely to the Bureau’s expert witness, Dr.

¹ Enforcement Bureau’s Second Request for the Production of Documents to Lake Broadcasting, Inc. at 4-5 (filed March 4, 2015) (“Second Request”).

Kimberly Weitzl.² Lake also noted its understanding that the Bureau's expert would furnish a report based on these documents and the DH report at least two weeks prior to the evidentiary hearing, and that the documents would be produced in lieu of deposing Mr. Rice, Dr. Duncan, and Dr. Hively.³ In response to Request 3, Lake reported that the notes on the 1991 exam were destroyed several years ago.⁴ Lake also informed the Bureau that no documents existed pertaining to Request 5.⁵ Additionally, Lake objected to Request 6 on behalf of Mr. Rice, arguing that the contents of Mr. Rice's federal tax returns were irrelevant to his rehabilitation, irrelevant to the issues designated for hearing, and should not be disclosed.⁶

In response, on March 23, the Bureau filed its Motion to Compel Production of Documents ("Motion to Compel"), seeking an order requiring Lake to produce all documents responsive to Requests 2-6. On March 27, Lake responded with a Partial Opposition to the Bureau's Motion to Compel, and included a Request for Protective Order and for Establishment of Hearing Schedule. Lake argues that the Bureau has abused the discovery process and has no intention of concluding discovery. Lake thus requests issuance of a protective order under Section 1.313 of the Commission's Rules.⁷ On April 7, the Bureau filed an Opposition to Lake's Request for a Protective Order and Hearing Schedule, and Lake filed an unauthorized Reply to the Bureau's Opposition to Lake's Request for a Protective Order and Hearing Schedule on April 8, 2015 ("Reply"). The Bureau further responded on April 9, 2015 with a Motion to Strike Lake's Reply Brief ("Motion to Strike"). This exhaustive pleading cycle is now complete.

Discussion

Motion to Strike Lake's Reply

Sections 1.294(b) of the Commission's Rules states that "except as provided by paragraph (c) of this section . . . replies to oppositions [to an interlocutory request] will not be entertained."⁸ The exceptions set forth in paragraph (c) are not applicable to Lake's Reply.⁹ As Lake's Reply was not authorized by the Presiding Judge and is barred by rule, it shall be summarily struck from the record.

² Lake Broadcasting, Inc.'s Response to Enforcement Bureau's Second Request for Production of Documents at 2 (filed March 16, 2015) ("Response to Second Request").

³ *Id.*

⁴ *See id.* at 2-3.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ Lake Broadcasting Inc.'s Partial Opposition to Enforcement Bureau's Motion to Compel Production of Documents; Request for Protective Order and for Establishment of Hearing Schedule at 5 (filed March 23, 2015) ("Lake's Opposition and Request").

⁸ 47 C.F.R. § 1.294(b).

⁹ Paragraph (c) permits replies to oppositions for "(1) Petitions to amend, modify, enlarge, or delete the issues upon which the hearing was ordered. (2) [Reserved] (3) Petitions by adverse parties requesting dismissal of an application. (4) Joint requests for approval of agreements filed pursuant to § 1.525." *Id.*

Requests 2 and 4

Section 1.325 of the Commission's Rules provides that a party to a Commission proceeding may request the production of any designated documents within another non-Commission party's possession, custody, or control that constitute or contain evidence within the scope of examination permitted by Section 1.311(b),¹⁰ which includes any non-privileged matter that is relevant to the hearing issues.¹¹ The documents that the Bureau seeks concerning Mr. Rice's psychological profile are clearly relevant to the issues related to his rehabilitation that are to be heard in this proceeding.¹² Therefore, Lake must produce forthwith the documents described by the Bureau in its Requests 2 and 4, including all documents that Lake's experts, Drs. Duncan and Hively relied upon in preparing the DH Report. Furthermore, the Commission will allow depositions of "any person,"¹³ subject to the requirement of relevancy.¹⁴ The Bureau is therefore entitled to depose Lake's witnesses and experts without making side agreements on document production.

The Bureau contends that Lake refuses to produce Mr. Rice's psychological examination reports and test results unless the Bureau agrees to restrict the scope of its expert's report and forgoes deposing Mr. Rice and Lake's experts. Lake apparently does not dispute the relevance of the documents sought in Requests 2 and 4,¹⁶ but merely argues that its Response to the Bureau's Second Request takes into account oral understandings and agreements between Lake and the Bureau.¹⁷

Lake's pleadings and supporting exhibits fail to establish that the Bureau had ever agreed to the two conditions with which the Bureau now takes issue. Rather, documentation provided by Lake establishes that both parties previously had been amenable to deposing Dr. Duncan and Mr. Rice, and were attempting to establish a schedule to hold the depositions in St. Louis.¹⁸ While the Enforcement Bureau may not have completed deposing in the timeframe presented by Lake, the Presiding Judge finds no evidence that the Bureau agreed to forego particular depositions.¹⁹

¹⁰ 47 C.F.R. § 1.325(a).

¹¹ 47 C.F.R. § 1.311(b).

¹² Lake does not argue that the documents sought by the Bureau fall outside the scope of discovery because they are subject to doctor-patient privilege. Therefore, the documents cannot be withheld on that basis. *Cf.* Fed. R. Civ. P. 26(b)(5)(A) ("when a party withholds information otherwise discoverable by claiming the information is privileged . . . the party must . . . expressly make the claim.").

¹³ 47 C.F.R. § 1.315(b).

¹⁴ 47 C.F.R. § 1.311(b).

¹⁶ *See* Motion to Compel Production of Documents at 2 ¶ 2 (filed March 23, 2015) ("Motion to Compel").

¹⁷ Lake's Opposition and Request at 2 ¶ 2.

¹⁸ *See* Opposition and Request at 4 ¶ 5.

¹⁹ Even assuming that "oral understandings" existed between the parties, the Motion to Compel must still be granted, as there is no indication that either party attempted to perform under the terms of such agreements or that Lake otherwise relied on any such agreements to its detriment. If any party has relied on a discovery agreement to its detriment, it is the Bureau. In an e-mail dated January 20, 2015, Lake informed the Bureau that it would be willing to provide the Bureau's expert with Dr. Duncan's test results and notes if the Bureau demonstrated to Dr. Duncan that the Bureau's expert was qualified to handle that information. Opposition and Request at 3 ¶ 4. Although the Bureau demonstrated the qualifications of its expert to Dr. Duncan's satisfaction, Lake breached its agreement by requiring that additional qualifications had to be met before the test results and notes were produced. *Id.*

Without tangible evidence of a firm discovery agreement, Lake's basis for opposing to the Motion to Compel consists only of a conditional "offer" to provide the Bureau with the documents that it seeks.²⁰ The mere existence of such an offer cannot defeat a motion to compel. Lake is certainly free to negotiate the conditions under which documents are produced. However, the Bureau is not obligated to accept or negotiate conditions. The Bureau is entitled to these discovery documents under the Commission's Rules and has timely moved for production to be compelled. Lake is in possession of the documents and must produce them, regardless of any conditional offers that may be left on the table.

Requests 3 and 5

Lake argues that it cannot comply with Requests 3 and 5. In the case of Request 3, Lake explains that the documents were destroyed under a protocol that required retention of such documents for only 12 years.²² Lake represents that it is unable to comply with Request 5 because Drs. Hive and Duncan did not perform any examinations or tests subsequent to the preparation of the DH Report,²³ and thus no such documents exist. The Presiding Judge accepts these representations at face value, as the Bureau has not provided any reason to doubt their authenticity. Thus, Lake has provided sufficient justification for not producing those particular documents and the Bureau's Motion to Compel must be denied as to Requests 3 and 5.

Request 6

The Bureau further moves to compel the production of Mr. Rice's federal income tax returns from 2010 to 2014, arguing that they are probative of the truthfulness of his responses to interrogatories regarding his employment. The Bureau also argues that tax information may provide insight into his compliance with Missouri's sex offender laws, which require truthfully reporting places of employment.²⁴ Lake opposes the production of tax returns, arguing that the requested documents will provide no information regarding the identity of Mr. Rice's employers.²⁵ Lake further argues that Rice acted properly in reporting his employment as required on his sex offender registrations.²⁶

The federal income tax returns sought by the Bureau are relevant to the issues to be tried in this proceeding. The Presiding Judge is required to determine the effects, if any, of Mr. Rice's felony convictions on his and/or Lake's qualifications to be a Commission licensee.²⁷ The Commission has found that "any conviction provides indication of an applicant's or licensee's propensity to obey the law" and adhere to the Commission's Rules.²⁸ The Presiding Judge must examine whether Mr. Rice has been sufficiently rehabilitated by examining evidence on whether

²⁰ *Id.* at 6 ¶ 8.

²² Response to Second Request at 2-3.

²³ *Id.* at 3.

²⁴ See Motion to Compel at 4.

²⁵ *Id.* at 7 ¶ 11.

²⁶ *Id.* at 6-7 ¶¶ 9-10.

²⁷ *Patrick Sullivan and Lake Broadcasting, Inc.*, Hearing Designation Order, MB Docket No. 14-82 at 29 FCC Rcd 5421, 5429 ¶ 22(a) (MB 2014).

²⁸ *Id.* at 5424 ¶ 10 (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd. 3252, 3252 ¶ 4 (1990) ("1990 Policy Statement")).

the applicant has been involved in any significant wrongdoing since his felony convictions and evidence of applicant's reputation in the community.²⁹ Any documents that are reasonably calculated to provide information about Mr. Rice's past and current employment are relevant to identifying the community in which Mr. Rice's reputation can be assessed, and in determining whether Mr. Rice has met his obligations as a convicted sex offender, *i.e.* fully complied with the reporting laws.

Lake notes that the Internal Revenue Service's Form 1040 does not require an individual to list his places of employment. Lake also notes that Mr. Rice does not possess W-2 forms that would identify an employer.³⁰ However, tax returns may disclose information as to the sources and types of income received by Mr. Rice, including income as an investor, property manager, and/or consultant, which may or may not corroborate his responses to the Bureau's interrogatories.

Lake also argues that Mr. Rice has met his sex offender reporting requirements under Missouri law.³¹ That argument is self-serving and premature at this stage of the proceeding: the question here is only whether Mr. Rice's tax returns are relevant to making such a determination. Tax returns are relevant insofar as they can directly or indirectly corroborate Mr. Rice's answers to interrogatories regarding his employment. Lake is therefore required to provide Mr. Rice's 2010-2014 tax returns to the Bureau.

Request for Protective Order

Section 1.313 of the Commission's Rules authorizes the Presiding Judge to issue any order which is appropriate and just for purposes of protecting parties and deponents.³² Lake argues that the Bureau has violated prior oral understandings regarding depositions and the production of documents and has demonstrated an unwillingness to end the discovery phase.³³ The Bureau replies that Lake has not shown that a protective order is warranted. The Bureau argues that it is common for lengthy discovery, by its nature, to cause disputes on its appropriate scope.³⁴ Furthermore, the Bureau contends that delays in the discovery process and the extension of the discovery phase are due, in large part, to Lake's failure to provide requested documents.³⁵ The Bureau contends that it is premature to set a date for the close of discovery.³⁶

The Bureau appears to have been tardy in responding to Lake with regard to the scheduling its depositions in January. But there is no evidence that the Bureau intends to extend discovery indefinitely. As the Bureau argues, delays are common in the course of discovery and much of the delay was caused by Lake's reluctance to timely provide basic information.³⁷

²⁹ *Id.* at ¶ 11 (citing 1990 Policy Statement at n.4).

³⁰ See Opposition and Request at 7-8 ¶ 11.

³¹ *Id.* at 6-7 ¶¶ 9-10.

³² See 47 C.F.R. § 1.313.

³³ See Opposition and Request at 5 ¶ 6.

³⁴ See Enforcement Bureau's Opposition to Lake's Request for a Protective Order and Hearing Schedule at 2-3 ¶ 3 (filed April 7, 2015).

³⁵ *Id.* at 3 ¶ 4.

³⁶ *Id.* at 3-4 ¶ 5.

³⁷ *Order*, FCC 14M-35 at 1 (rel. Nov. 20, 2014).

Regardless of such routine delays, the parties must complete discovery in order to be able to develop a record suitable for an efficient, effective hearing and a reasoned initial decision. Accordingly, there is no need for a protective order, and Lake's Request for a Protective Order must be denied.

Notwithstanding all of the above, the Presiding Judge must ensure that discovery is moving towards a conclusion. Therefore, the parties are ordered to propose a schedule that specifies the discovery tasks that remain, including the production of documents and the taking of depositions, and that sets dates certain on which those tasks will be completed.

Rulings

For the foregoing reasons and considerations, **IT IS ORDERED** that Lake Broadcasting, Inc.'s unauthorized Reply to Enforcement Bureau's Opposition to Lake's Request for a Protective Order and Hearing Schedule, filed April 9, 2015 **IS STRUCK**.

IT IS FURTHER ORDERED that the Enforcement Bureau's Motion to Compel Production of Documents **IS GRANTED** as to the production of documents relevant to **Requests 2, 4 and 6**.

IT IS FURTHER ORDERED that the Motion to Compel the Production of Documents **IS DENIED** in all other respects.

IT IS FURTHER ORDERED that Lake Broadcasting, Inc.'s Request for Protective Order and for Establishment of Hearing Schedule **IS DENIED**.

IT IS FURTHER ORDERED that the Enforcement Bureau and Lake Broadcasting, Inc. shall jointly propose a Discovery Schedule **by 12 noon on June 24, 2015**, which shall include specific dates for production of documents, dates and places for the taking of depositions and a date for completion of all discovery.

FEDERAL COMMUNICATIONS COMMISSION³⁸



Richard L. Sippel
Chief Administrative Law Judge

³⁸ Courtesy copies of this *Order* were sent by e-mail on date of issuance to each counsel.