

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FCC 16M-08
10539

In the Matter of)	EB Docket No. 03-152
)	
WILLIAM L. ZAWILA)	Facility ID No. 72672
)	
Permitted of FM Station KNKS, Coalinga, California)	
)	
AVENAL EDUCATIONAL SERVICES, INC.)	Facility ID No. 3365
)	
Permittee of FM Station KAAX Avenal, California)	
)	
CENTRAL VALLEY EDUCATIONAL SERVICES, INC.)	Facility ID No. 9993
)	
Permittee of FM Station KAJP, Firebaugh, California)	
)	
H. L. CHARLES D/B/A FORD CITY BROADCASTING)	Facility ID No. 22030
)	
Permittee of FM Station KZPE, Ford City, California)	
)	
LINDA WARE D/B/A LINDSAY BROADCASTING)	Facility ID No. 37725
)	
Licensee of FM Station KZPO, Lindsay, California)	
)	
In re Application of)	
)	
WESTERN PACIFIC BROADCASTING, INC.)	File No. BR-19970804YJ
)	Facility ID No. 71936
For Renewal of License for AM Station KKFO, Coalinga, California)	

ORDER

Issued: March 14, 2016

Released: March 14, 2016

Preliminary Statement

On August 21, 2015, the Enforcement Bureau filed several motions to compel, including the Motion to Compel the Estate of H.L. Charles d/b/a/ Ford City Broadcasting (“FCB”) to Provide Complete Answers to Outstanding Discovery Requests (“Compel Motion”) filed and served by the Enforcement Bureau on July 28-29, 2015. FCB responded to the discovery requests in August. Dissatisfied with FCB’s incomplete responses to the Enforcement Bureau’s First Set of Interrogatories and First Set of Requests for Production, the Enforcement Bureau seeks to compel full and complete responses and production.¹

The broad standard for Commission discovery provides:

Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

47 CFR § 1.311(b).

The Presiding Judge has reviewed the 20 interrogatories and the 13 document requests in the Enforcement Bureau’s first set of discovery requests and determines that they meet the Commission’s broad standard for discovery quoted above. FCB refused to produce information or documents in response to any request because FCB claimed, without justification or explanation, that the requests were vague, ambiguous, overbroad, not calculated to lead to discovery of admissible evidence, as well as burdensome, oppressive, and/or causing unnecessary expense, with the exception of three objections based on privilege (two in response to interrogatories, the third in response to a corresponding document request). FCB claims that most of the requested information and documents are already in the FCC’s files and can be obtained through § 1.325(b) procedures (copying and photographing Commission documents via FOIA).² Official notice is taken of the experienced fact that discovery of parties under rules of practice is usually faster and more efficient than requests made under FOIA.

Discovery Standards

Commission rules “provide discovery procedures to facilitate preparation for the hearing, eliminate surprise and promote fairness.” *In the Matter of Amendment of Part 1 of the Rules of Practice & Procedure to Provide for Discovery Procedures*, 11 F.C.C. 2d 185, 186, para. 3 (1968). *See also Hillebrand Broad., Inc.*, 1 FCC Rcd 419, 419-20, para. 3 (1986) (holding that Commission delegated broad discretion to presiding judges to regulate hearings).

¹ See similar Motion to Compel with respect to Zawila filed on August 21, 2015, and the Presiding Judge’s *Order*, FCC 15M-33, released December 23, 2015.

² The distinction that must be made is between copies of Commission documents that are already in the possession of a party and Commission documents that are solely in the possession of the Commission.

It is within the Presiding Judge's discretion to set the scope of documentary discovery. *Id.* See also 47 CFR § 1.313 ("The use of the procedures set forth in §§ 1.311 through 1.325 of this part is subject to control by the presiding officer . . ."). If after review of documents discovered and after questioning witnesses at depositions it appears to counsel that other documents have not been produced which would constitute or would probably lead to the introduction of substantial evidence on an issue to be litigated, such additional documents, if requested by motion and in the possession or control of a party, would be required to be produced. The same applies to discovery of information through interrogatories.

FCB's Objections

To illustrate "stonewalling," the Enforcement Bureau's Interrogatory No. 1 asks FCB to describe all efforts taken to construct the facilities at KZPE, including any discussions with Robert F. Turner³ about building out the KZPE facilities. The term "Discussion" is defined and the locality of the radio station is identified. Yet FCB objects because it considers the question to be vague, ambiguous, overbroad, irrelevant, not calculated to lead to the discovery of admissible evidence, burdensome, oppressive, and causing unnecessary expense. FCB further directs the Enforcement Bureau to FCC files and records for the information sought under the discovery rules. FCB's responses to interrogatories 2 through 20 and document requests 1 through 13 recite the same objections with some minor variations.

Under the expansive allegations of the *Hearing Designation Order*⁴ ("HDO"), the Enforcement Bureau opposes all proposed assignments of broadcast properties related to KZPE and owned or controlled by FCB. There are complicated questions of fact involved and complex character issues which must be resolved before any favorable action can be taken on the assignment application requests. Thus, for evident reasons, it is in FCB's interest to cooperate in the Enforcement Bureau's discovery in order to obtain necessary evidence to reach a resolution of these questions.

Stonewalling

FCB's consistency in refusing to answer even obvious fact interrogatories shows its inclination to stonewall. In its Opposition to Enforcement Bureau's Compel Motion, FCB offers not much more than *ad hominem* quips which fail to advance serious discovery. As a permittee, FCB has obligations to provide clearly relevant information and data that are responsive to the requests of the Enforcement Bureau. For example, Enforcement Bureau asks FCB to:

4. Describe the facilities that currently exist at KZPE, including but not limited to, the antenna structure and whether there exists a staffed main studio.

³ Robert F. Turner ("Turner") is identified as an engineer from Bakersfield, CA who in 1999 volunteered information on Zawila properties to the FCC. Mr. Turner was contacted by Zawila and Jay Stevens and was asked to construct at certain stations (including KZPE) unauthorized antennas mounted on utility poles that would be using portable power generators to broadcast *sans* main studios. See *Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order* ("HDO"), FCC 03-158, 18 FCC Rcd 14938 (July 16, 2003), at 3, para. 8, & 14, para. 51.

⁴ See n. 3, *supra*.

5. Explain whether the KZPE antenna was ever mounted or connected.

17. Explain whether KZPE is currently operating, and if not, explain why it ceased operations and the date on which it ceased operations.

In the Joint Opposition to the Enforcement Bureau's Motions to Compel filed by FCB and the other parties that Zawila claims to represent (collectively, "Zawila parties"), they devote nearly a page discussing the *HDO* which the Zawila parties recognize as making "serious allegations against the respondents and their attorney." Opposition at 2. There the Zawila parties complain that the Enforcement Bureau should have "developed evidence to support the allegations "of the *HDO* before its issuance. *Id.* But as Zawila should be well aware, the matters in the *HDO* are mainly allegations, not proven facts. Hence, the argument of the Zawila parties pinpoints the discovery needed by the Presiding Judge to actually decide the issues, which is evidence that is in the possession or under the control of Zawila, *et al.*

Discussion

FCB is in the best position to provide answers to fact questions regarding the KZPE station as directed in the Enforcement Bureau's discovery requests. Thus, merely providing the Enforcement Bureau with timely information through controlled written answers would be in FCB's best interest. Contrariwise, continued refusals and stonewalling could eventually result in adverse inferences and assumptions that would justify resolving certain *HDO* allegations against FCB.

In another context, consider the Zawila parties' statement in their opposition:

The discovery [questions and documents] served by the enforcement bureau [*sic*] suggest that the enforcement bureau [*sic*] knows little or nothing about the stations that are subject to this proceeding.

Id. Assuming the accuracy of this conclusion, it would at least support granting a compel motion for purposes of bringing Enforcement Bureau and the Presiding Judge *up to speed* if – as it appears – FCB knows more relevant facts beyond those alleged in the *HDO*. In other words, FCB must share its knowledge.

The Zawila parties further object that Enforcement Bureau's requests for answers to interrogatories:

are not limited to the relevant time periods in the *HDO* or specific facts or circumstances within the relevant time periods in the *HDO*.

Id. at 3. Such objections can be readily cured by specifying the time periods which FCB deems relevant and providing answers and responsive documents limited to on or about those time

periods.⁵ Of course, that assumes that FCB could and would get it right as to those elastic time periods. But at least it would be a good faith start by FCB, on the principle that some reliable discovery is better than none. And the parties are capable of seeking compel orders.

Documents

The Zawila parties repeat essentially the same arguments for not responding to Enforcement Bureau's request for documents. Without giving even one tangible example, they repeat their *mantras* that document discovery requests are burdensome, oppressive, unnecessarily expensive, and cover an unreasonably excessive expanse of 30 years. But nowhere does FCB or any other Zawila party argue impossibility or contend that they have neither possession nor control over the requested documents.

Summary of Status

As previously rejected in *Order*, FCC 15M-33 regarding Zawila, the rest of the Zawila parties have built their stone wall and simply refuse to cooperate to any degree in providing discovery. And notwithstanding their fortified stonewall, they advance the ultimate *non sequitur*:

It appears that the enforcement bureau [*sic*] lacks sufficient evidence to sustain its burden of proof on the allegations asserted in the subject HDO and is therefore attempting to re-shape this proceeding into a general inquiry into the entire almost 30 year history of each station subject to this proceeding.

Id. at 5. FCB has no basis for knowing the evidence which is in the possession of the Enforcement Bureau. But FCB does know the scope of the information and the documents sought. FCB also knows the universe of the information and documents it possesses or controls that relate to the KZPE station. Thus, FCB knows beyond question what evidence within its possession or control, including documents, the Enforcement Bureau is seeking.

Inapposite FOIA Rule

Finally, FCB and the other Zawila parties continue to misapply an inapplicable discovery rule, *i.e.*, Section 1.325(b):

Any party seeking the production of Commission records should proceed under § 0.460 or § 0.461 of this chapter. See §§ 0.451 through 0.467.⁶

⁵ Zawila has not suggested that he has misplaced or lost relevant documents and it is assumed that he has possession, control and ready access to relevant documents which pertain to the stations' businesses. There is nothing untoward in Enforcement Bureau requests. Nor will Zawila be unduly challenged or inconvenienced. If there are relevant documents as to which Zawila claims privilege, he should identify such documents, summarize or paraphrase contents, and identify the person(s) who have copies. If good reason is shown, the Presiding Judge will review *in camera* documents claimed privileged.

In their Opposition, the Zawila parties do not quote the language of the above rule; they simply cite it. If they had quoted the language, and if they considered the rules used in hearing proceedings, they would have seen the obvious: that Section 1.325 and the other FCC discovery rules move discovery outside the parameters of FOIA. There is no application of FOIA to the circumstances of this discovery. The Zawila parties do not cite one decided case authority that supports their argument, and do not identify one instance of a Commission Bureau employing FOIA in enforcement litigation.

To review, discovery in litigation cases that have been set for hearing before an administrative law judge is conducted under Part 1, Subpart A – General Rules of Practice and Procedure and The Discovery and Preservation of Evidence §§ 1.311 to 1.340. There is no expectation that the Enforcement Bureau use FOIA § 1.325(b) to obtain documents that, as a party, it can more efficiently obtain from another party to the case having a duty to retain and produce relevant documents. To repeat for emphasis, discovery by document request under Commission rules is faster and less expensive than proceeding under FOIA. Obviously, FOIA is mainly used by private parties to obtain Commission records for which judicial notice is sought, or when a party claims it does not have a copy of a record that it should have, or when the same party has not obtained the same copy directly from the Commission. In any event, as the Commission has repeatedly held, parties are expected to know the discovery rules and cooperate in production, particularly when directed to do so by the Presiding Judge, who has sole discretion to manage discovery. *See* 47 FCC § 1.243 (authority of presiding judge).

Rulings

FCB shall revisit all interrogatories and requests to produce documents that were served by the Enforcement Bureau, as well as any requests for admissions, and FCB is ordered to simultaneously provide positive and cooperative responses.

FCB's responses which deny all or part of a question or document request, must clearly state specific reasons to justify giving no response, or giving only partial responses, or providing anything less than full responses and production.

If necessary, FCB shall in good faith negotiate its incomplete responses to interrogatories and documents with the Enforcement Bureau counsel before reporting to the Presiding Judge that only an incomplete response can be provided to the Enforcement Bureau. FCB must certify to such good-faith negotiations in a declaration document.

A Status Conference on-the-record shall be held in Washington, D.C. on **Tuesday, March 29, 2016 at 9:30 am** to take inventory of discovery completed and discovery needed, and to consider and rule on any unresolved or outstanding or future discovery issues. The status

⁶ 47 CFR § 1.325(b). *See also* FCC FOIA rules cited in § 1.325: § 0.460 (Request for inspections of records which are routinely available for public inspection); § 0.461 (Request for inspection of materials not routinely available for public inspection). The reference to § 0.451 *et seq.* concerns inspection of FCC records generally (public reference room, other locations; definitions; fees charged for searches).

conference shall be held in OALJ's Courtroom, TW A-363, 445 12th Street, S.W., Washington, DC 20554.⁷

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION⁸



Richard L. Sippel
Chief Administrative Law Judge

⁷ If there is substantial discovery completed or agreed by **March 23, 2016**, the parties shall file appropriate pleadings alerting the Presiding Judge and proposing agreed-upon alternatives to the upcoming discovery status conference on March 29, 2016.

⁸ Courtesy copies of this Order shall be provided by email to all counsel.