

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

INITIAL DECISION

Appearances: Andrew Ward, Esq., and Daniel Nelson, Esq., Institute for Justice, on behalf of Arm & Rage, LLC; Pamela S. Kane, Esq., and Anya Baez, Esq., on behalf of the Enforcement Bureau, Federal Communications Commission

Issued: September 14, 2023

Released: September 14, 2023

PRELIMINARY STATEMENT

1. The FCC’s Media Bureau initiated this hearing proceeding on March 21, 2022, by Hearing Designation Order, Order to Show Cause, and Notice of Opportunity for Hearing.1 Arm & Rage, LLC, is the licensee of WJBE(AM), Powell, Tennessee, and its sole member is Joseph Armstrong. The basis for the Arm & Rage HDO is Mr. Armstrong’s felony conviction for making a false statement on his federal income tax return, as well as violations of the Commission’s reporting requirements for broadcast stations. As described in detail below, it is Commission policy that any felony conviction of a licensee raises the question of whether that licensee possesses the requisite character to continue to hold a Commission license. The Media Bureau designated the following issues for resolution:

- (a) To determine the effects, if any, of Joseph Armstrong’s felony conviction on his qualifications and thus the qualifications of Arm & Rage, LLC to be a Commission licensee;
(b) To determine the effects, if any, of Arm & Rage, LLC’s failure to report the conviction by the April 1, 2017, due date, to upload required information to an online public inspection file, and to file timely ownership reports on its qualifications to be a Commission licensee; and
(c) To determine whether, pursuant to section 312 of the Communications Act of 1934, as amended, the license of Arm & Rage, LLC for WJBE(AM), Powell, Tennessee should be revoked.2

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. 24.

The burden of proceeding with the introduction of evidence and the burden of proof were assigned to the FCC's Enforcement Bureau, consistent with section 312(d) of the Communications Act, 47 U.S.C. § 312(d), and section 1.91(d)(1) of the Commission's rules, 47 CFR § 1.91(d)(1).<sup>3</sup>

2. This hearing proceeding was conducted on a written record pursuant to sections 1.370 through 1.377 of the Commission's rules, 47 CFR §§ 1.370 - 1.377. Those rules 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. The Enforcement Bureau filed its Affirmative Case on May 15, 2023,<sup>4</sup> licensee Arm & Rage filed its Responsive Case on June 14, 2023,<sup>5</sup> and the Enforcement Bureau filed its Reply Case on July 12, 2023.<sup>6</sup>

### BACKGROUND

3. In 2007, Joseph Armstrong, while a member of the Tennessee legislature, purchased cigarette tax stamps and sold them at a profit of approximately \$330,000 following the legislature's increase in the state's cigarette tax. He did not, however, include that profit on his federal income tax return. On August 8, 2016, a jury convicted Mr. Armstrong of violating section 7206(1) of the Internal Revenue Code, 26 U.S.C. § 7206(1), entitled "Fraud and false statements." On January 25, 2017, he was sentenced to probation, house arrest, restitution, a fine, and community service.<sup>7</sup> Arm & Rage was required by section 1.65(e) of the Commission's rules, 47 CFR § 1.65(e), to report the conviction to the Commission by April 1, 2017, but did not do so until April 14, 2017. In addition, Arm & Rage acknowledged in its application for renewal of its license for WJBE(AM) that it did not file required biennial ownership reports and did not timely upload issues/programs lists to its online public inspection file as directed by the Commission's rules.<sup>8</sup> That renewal application is being held in abeyance pending the outcome of this revocation hearing.<sup>9</sup>

4. Discovery in this proceeding closed on March 31, 2023. Neither party sought to file additional pleadings or requested an oral hearing after the written hearing was completed. As detailed below, the Enforcement Bureau urges revocation of Arm & Rage's license because Mr. Armstrong's felony conviction and the licensee's violations of FCC rules indicate that Arm & Rage does not possess the requisite character to hold an FCC license. Arm & Rage counters that Mr. Armstrong's felony conviction was a singular transgression that should not serve to disqualify it from holding a license. It further argues that its rule violations were not sufficiently serious to warrant license revocation.

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<sup>3</sup> *Id.* at para. 28.

<sup>4</sup> Enforcement Bureau's Affirmative Case Brief, MB Docket No. 22-122 (filed May 15, 2023) (EB Affirmative Case).

<sup>5</sup> Arm & Rage's Responsive Case, MB Docket No. 22-122 (filed June 14, 2023) (Arm & Rage Responsive Case).

<sup>6</sup> Enforcement Bureau's Reply Case Brief, MB Docket No. 22-122 (filed July 12, 2023) (EB Reply).

<sup>7</sup> *Arm & Rage HDO* at para. 2; EB Affirmative Case at EB Exh. 7 and Arm & Rage Responsive Case at A&R Exh. 7, Sentencing Transcript. (Both parties attached the criminal sentencing transcript as Exhibit 7.)

<sup>8</sup> *Arm & Rage HDO* at para. 3 and n.1 (citing Application File No. 0000108293 (rec. Mar. 18, 2020) (Arm & Rage Renewal Application)).

<sup>9</sup> *Id.* at n.1.

## FINDINGS OF FACT

**Arm & Rage and Joseph Armstrong**

5. Arm & Rage, LLC is a Tennessee limited liability company formed in 2012 to acquire WJBE(AM). Joseph Armstrong is its sole member.<sup>10</sup> Mr. Armstrong is a native of Knoxville, Tennessee who served in the Tennessee state legislature from 1989 to 2016. During college, he worked at another Knoxville radio station, also with the call sign WJBE (for “James Brown Enterprises”). That station eventually went dark. Many years later, Mr. Armstrong, through Arm & Rage, purchased a different Knoxville station and changed its call letters to WJBE in homage to entertainer James Brown and the defunct station.<sup>11</sup>

**WJBE(AM)**

6. The Commission initially granted the license for WJBE(AM) to Arm & Rage on April 17, 2013,<sup>12</sup> and Arm & Rage filed for renewal of its license on March 18, 2020.<sup>13</sup> WJBE(AM), which is licensed to Powell, Tennessee, serves the Knoxville area and employs a regular staff of four, plus Mr. Armstrong. Other individuals, including on-air talent, provide various volunteer services for the station. Mr. Armstrong, who does not take a salary, is responsible for keeping the station on the air and is its only advertising salesperson.<sup>14</sup> Arm & Rage states that the station’s focus is on issues important to the local community, and that it is the only black-owned station in Knoxville and is one of six black-owned stations in the state of Tennessee.<sup>15</sup>

**Joseph Armstrong’s Felony Conviction**

7. The circumstances that led to Mr. Armstrong’s conviction are that in 2007, he and another man jointly purchased Tennessee cigarette tax stamps from Tru Wholesale, a licensed tobacco stamper. After the state legislature increased the cigarette tax stamp rate, the pair sold the tax stamps back to Tru Wholesale. Once the company subtracted its stamping fee and Mr. Armstrong repaid the loan he had taken to purchase the stamps, Mr. Armstrong realized a net profit of approximately \$330,000. Tru Wholesale did not pay Mr. Armstrong directly, but sent the money to Bowling Branch Investments, a company run by Mr. Armstrong’s accountant, Charles Stivers, and it was Bowling Branch that issued payment to Mr. Armstrong. When Mr. Stivers prepared Mr. Armstrong’s 2008 federal income tax return for his client’s review, the profit from the cigarette tax stamp transaction was not included. Mr. Armstrong knew that the profit was missing but signed and submitted the return anyway.<sup>16</sup> During the criminal trial, Mr. Armstrong asserted that he believed that Bowling Branch would pay the tax on the

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<sup>10</sup> EB Affirmative Case at para. 3 (citing EB Exh. 1, Arm & Rage’s Objections and Responses to the Enforcement Bureau’s Request for Admissions, and EB Exh. 2, Declaration of Joseph Armstrong); Arm & Rage Responsive Case at A&R Exh. 1, Declaration of Joseph Armstrong.

<sup>11</sup> Arm & Rage Responsive Case at paras. 8-10 and A&R Exh. 23, Armstrong Resume.

<sup>12</sup> Consent to Assignment, File No. BAL-20121220AAA (MBAD Apr. 17, 2013).

<sup>13</sup> EB Exh. 3 and A&R Exh. 20, WJBE Renewal Application.

<sup>14</sup> EB Exh. 2 and A&R Exh. 1, Declaration of Joseph Armstrong.

<sup>15</sup> Arm & Rage Responsive Case at paras. 12-13.

<sup>16</sup> EB Affirmative Case at paras. 7-9 (citing EB Exh. 6, Trial Transcript 8/5/16, EB Exh. 7, Sentencing Transcript, EB Exh. 8, Arm & Rage’s Objections and Responses to the Enforcement Bureau’s Interrogatories, and EB Exh. 9, Trial Transcript 8/4/16).

profit, but also admitted that he understood that it was not appropriate for Bowling Branch to do so. Bowling Branch did not pay the tax.<sup>17</sup>

8. Despite the fact that Mr. Armstrong was a state legislator at the time, it was not against the law for him to take advantage of the legislature's action by trading in cigarette tax stamps.<sup>18</sup> He was charged with three federal felonies, however, because he did not include the tax stamp profit as income on his federal income tax return. Those charges were conspiring to defraud the United States under 18 U.S.C. § 371 (Count 1), attempting to evade and defeat a tax under 26 U.S.C. § 7201 (Count 2), and filing a false and fraudulent tax return with the Internal Revenue Service under 26 U.S.C. § 7206 (Count 3), specifically subsection (1), which criminalizes willfully making and subscribing a tax return under penalty of perjury when the subscriber does not believe the return to be true and correct as to every material matter.<sup>19</sup> He was tried by jury and acquitted of the first two charges. He was convicted of the third charge and on January 25, 2017, was sentenced to three years' probation, including six months' house arrest, was ordered to pay \$99,943 in restitution to the federal government and a \$40,000 fine, and was required to perform 300 hours of community service.<sup>20</sup> Mr. Armstrong has satisfied these obligations.<sup>21</sup> This sentence reflects downward adjustments made by the trial judge in accordance with the sentencing guidelines based upon the trial judge's determination that Mr. Armstrong had committed a single criminal transaction of limited duration, without significant planning, that represented a marked deviation in an otherwise law-abiding life, that Mr. Armstrong had a history of public service, and that Mr. Armstrong was unlikely to commit another crime in the future.<sup>22</sup>

### Arm & Rage's FCC Rule Violations

9. Section 1.65(c) of the Commission's rules, 47 U.S.C. § 1.65(c), requires a licensee to report an adverse finding to the Commission by the anniversary of the due date for license renewal applications. The *Arm & Rage HDO* indicates that pursuant to that rule, Mr. Armstrong's conviction should have been reported to the Commission by April 1, 2017, but was not reported until April 14, 2017.<sup>23</sup> The *Arm & Rage HDO* also points out that Arm & Rage acknowledged in its application to renew its license, filed on March 18, 2020, that it had failed to submit the biennial ownership reports required by section 73.3615 of the Commission's Rules, 47 CFR § 73.3615, and that it did not timely upload issues/programs lists as required by 73.3526 of the Commission's rules, 47 CFR § 73.3526.<sup>24</sup> As discussed in detail below, the Enforcement Bureau alleges that Arm & Rage committed additional reporting violations.

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<sup>17</sup> Arm & Rage Responsive Case at para. 14 (citing A&R Exh. 8, Armstrong Testimony Transcript).

<sup>18</sup> *Id.* See also EB Affirmative Case at EB Exh. 7 and Arm & Rage Responsive Case at A&R Exh. 7, Sentencing Transcript, at A&R 0645.

<sup>19</sup> EB Affirmative Case at para. 5; Arm & Rage Responsive Case at para. 15.

<sup>20</sup> EB Affirmative Case at para. 10 (citing EB Exh. 11, Criminal Judgment); Arm & Rage Responsive Case at para. 17 (citing A&R Exh. 7, Sentencing Transcript).

<sup>21</sup> Arm & Rage Responsive Case at para. 18 (citing A&R Exh. 15, Restoration of Rights, and A&R Exh. 1, Armstrong Declaration) and para. 49 (citing A&R Exh. 22, Community Service Records).

<sup>22</sup> *Id.*, A&R Exh. 7, Sentencing Transcript, at A&R 0639-0643.

<sup>23</sup> *Arm & Rage HDO* at para. 3.

<sup>24</sup> *Id.*

## CONCLUSIONS OF LAW

**Effect of Joseph Armstrong's Felony Conviction on Licensee Qualifications**The FCC's Character Qualifications Policy

10. Pursuant to the mandate of the Communications Act, the Commission has established regulations and policies designed to assess “the citizenship, character, and financial, technical, and other qualifications” of applicants for FCC licenses.<sup>25</sup> When an existing licensee does not satisfy those policies or violates those regulations, the Communications Act allows the Commission to revoke that license, after providing the licensee notice and an opportunity to be heard.<sup>26</sup> 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>27</sup> The aim of these policies is to assist the Commission in determining whether a licensee or applicant possesses qualities sufficient to show that it will deal truthfully with the Commission and comply with all applicable rules and standards.<sup>28</sup>

11. Misconduct not related to FCC matters has long been part of the Commission's assessment of a licensee's character. In 1951, the Commission concluded that violations of federal law warrant consideration, but should be evaluated on a case-by-case basis that takes into account circumstances such as whether the violation was inadvertent, whether it was an isolated incident, and whether it happened recently. Particular emphasis was placed on violations of antitrust law.<sup>29</sup> Three decades later, the Commission's *1986 Character Policy Statement* more succinctly defined the types of non-FCC misconduct that would provide evidence of a licensee's potentially disqualifying character. The Commission determined that relevant misconduct would include making fraudulent statements to government agencies, certain criminal convictions, and violations of broadcast-related anti-competitive and antitrust statutes.<sup>30</sup> It concluded that convictions not involving fraudulent conduct would not normally be part of a character inquiry “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>31</sup>

12. The Commission broadened its analysis a few years later, however, such that any adjudicated felony committed by a principal of a licensee would be considered in making a character determination. The Commission reasoned in its *1990 Character Policy Statement* that all felonies are

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<sup>25</sup> 47 U.S.C. § 308(b).

<sup>26</sup> 47 U.S.C. § 312.

<sup>27</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) (*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>28</sup> *1986 Character Policy Statement* at 1183.

<sup>29</sup> *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 of 1934*, 42 F.C.C.2d 399 (1951) (*1951 Uniform Policy Report*).

<sup>30</sup> *1986 Character Policy Statement* at 1195-1203.

<sup>31</sup> *Id.* at 1197.

serious crimes, and that a licensee's propensity to comply with the law generally bears on the likelihood that it will conform to FCC rules and policies. Consistent with its prior analysis of character issues, the Commission adopted a policy of case-by-case review that recognizes that there may be circumstances that mitigate the effect of a licensee's felony conviction on its qualifications to hold a license.<sup>32</sup> The mitigating factors cited in the 1986 policy that continue to be relevant under the 1990 policy are: (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 participation of managers or owners in the misconduct; (6) efforts made to remedy the wrong; (7) overall record of FCC compliance; and (8) rehabilitation.<sup>33</sup> The 1990 policy also continued to follow the 1986 decision limiting consideration of non-FCC behavior to adjudicated felony convictions, unless particular unadjudicated misconduct exists that is "so egregious as to shock the conscience and evoke almost universal disapprobation."<sup>34</sup>

13. The 1990 *Character Policy Statement* remains in effect. Under the Commission's current character policy, then, when a principal of 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>35</sup> Since 1990, the Commission has revoked licenses for a variety of felony convictions, including drug offenses, child molestation, burglary, and murder.<sup>36</sup> There has not been a revocation solely due to tax crimes, but such offenses have historically been considered in assessing a licensee's character qualifications, as discussed below.

#### Contentions of the Parties

14. The Enforcement Bureau submits that Mr. Armstrong "deliberately signed and filed with the IRS, under penalty of perjury, a federal tax return that he knew to be false."<sup>37</sup> As such, EB argues, Mr. Armstrong knowingly certified that his return was complete and accurate when he knew that it was not. EB notes that Mr. Armstrong claimed during his criminal trial, as he does in this hearing case, that he relied on the advice of his accountant, but was convicted despite the criminal judge's instruction to the jury that Mr. Armstrong did not act willfully if he had a good-faith belief that he was acting within the law.<sup>38</sup> EB asserts that the criminal judge concluded that Mr. Armstrong's argument was "simply not credible," and that there was circumstantial evidence that Mr. Armstrong wanted to hide the tax stamp income.<sup>39</sup> In particular, EB points to the fact that the tax stamps were not invoiced to Mr. Armstrong, that the proceeds from the sale were not paid directly to Mr. Armstrong, and that Mr. Armstrong did not include the tax stamps or the profits from the sale thereof on the financial disclosure forms that he filed as

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<sup>32</sup> *1990 Character Policy Statement*, at 3252-53.

<sup>33</sup> *Id.* at 3252 (citing *1986 Character Policy Statement* at 1227-29).

<sup>34</sup> *Id.* at n.5 (citing *1986 Character Policy Statement* at 1204-1205 & n.60).

<sup>35</sup> 47 U.S.C. §§ 309(e), 312(d).

<sup>36</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*, 214 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).

<sup>37</sup> EB Affirmative Case at para. 32.

<sup>38</sup> *Id.* at paras. 36-38 (citing EB Exh. 6, Trial Transcript 8/5/16).

<sup>39</sup> *Id.* at para. 38 & n.109 (quoting EB Exh. 7, Sentencing Transcript, at A&R 0639).

a Tennessee legislator.<sup>40</sup>

15. The Enforcement Bureau argues that the felony of which Mr. Armstrong was convicted is rooted in criminally dishonest conduct such that he, and by extension Arm & Rage, does not possess the requisite character to remain a Commission licensee. By knowingly lying to a government agency, EB contends, Mr. Armstrong exhibited behavior that would have violated even the narrower *1986 Character Policy Statement*. Specifically, the Bureau indicates that the 1986 policy recognized a “nexus between fraudulent misrepresentations to another governmental unit and the possibility that an applicant might engage in similar behaviors in its dealings with the Commission.”<sup>41</sup> It submits that “fraud” in the parlance of the *1986 Character Policy Statement* encompasses making false statements and a failure to be fully forthcoming, and thus covers the actions underlying the felony of which Mr. Armstrong was convicted.<sup>42</sup> Further, the Enforcement Bureau argues, Mr. Armstrong’s felony conviction involved a false statement and dishonesty, which was separately cited in the *1986 Character Policy Statement* as the type of non-FCC felony that could be considered in assessing a licensee’s character, and that the crime of which Mr. Armstrong was convicted can be disqualifying even if there is no prior Commission decision finding this crime to be disqualifying.<sup>43</sup> It also asserts that the mitigating factors considered in reviewing a licensee’s misconduct under the Commission’s character qualifications policy reveal Mr. Armstrong’s actions to be of the type that should be grounds for disqualification.<sup>44</sup>

16. Arm & Rage responds that Mr. Armstrong’s single felony, which was committed almost 15 years ago, before he, through Arm & Rage, acquired the license for WJBE(AM), does not negatively affect its or Mr. Armstrong’s qualifications to continue to hold a Commission license. With respect to the mitigating factors, Arm & Rage concedes that willfulness was an element of the crime of which Mr. Armstrong was convicted, and that his situation evinces managerial participation in the misconduct. It argues that the other mitigating factors, however, are strongly in its favor. The criminal trial judge, Arm & Rage submits, found that Mr. Armstrong’s crime “was of limited duration and represented a marked deviation by the defendant from an otherwise law-abiding life.”<sup>45</sup> Accordingly, Arm & Rage argues, it was not frequent. Arm & Rage further contends that the felony cannot be considered current. It cites the *1986 Character Policy Statement* for the principle that a ten-year limitation applies to character inquiries and argues that the time calculation should run from the date of the misconduct (2008) and not the date of conviction (2016).<sup>46</sup> Even measuring from the seven-year-old conviction, however, Arm & Rage contends that the Commission precedent would not consider Mr. Armstrong’s felony to be recent.<sup>47</sup>

17. In addition, Arm & Rage asserts that the felony was not so serious as to warrant revocation. It submits that Mr. Armstrong was convicted of “the ministerial act” of filing a tax return that

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<sup>40</sup> *Id.* at para. 39 (citing EB Exh. 4, Order on Defense Motions, at A&R 0431).

<sup>41</sup> *Id.* at para. 43 (quoting *1986 Character Policy Statement* at 1196).

<sup>42</sup> *Id.* at paras. 44-45.

<sup>43</sup> *Id.* at paras. 46-48.

<sup>44</sup> *Id.* at paras. 51-68.

<sup>45</sup> Arm & Rage Responsive Case at para. 31 (quoting A&R Exh. 7, Sentencing Transcript, at A&R 0642-3).

<sup>46</sup> *Id.* at paras. 33-35.

<sup>47</sup> *Id.* at para. 36 (citing, *inter alia*, *Sunshine Wireless*, 72 F.C.C.2d 739 (1979) (labor law violations committed five years prior not considered recent in assessing renewal application); *Catamount Broadcasting*, 70 F.C.C.2d 913 (Rev. Bd. 1976) (misdemeanor conviction seven years prior not disqualifying in comparative broadcast hearing case); *Katy Communications*, 87 F.C.C.2d 764 (1981) (consent judgments in securities matter six years prior did not prevent transfer of broadcast station); *Kevin David Mitnick*, 17 FCC Rcd 27028 (ALJ 2002) (computer hacking felonies committed seven years earlier not a bar to renewal of amateur radio license)).

he knew failed to include the cigarette tax stamp profits, and was acquitted of the more serious felonies of conspiracy to defraud the United States and of tax evasion.<sup>48</sup> As such, Arm & Rage contends, Mr. Armstrong was not found to have deceptive intent. Mr. Armstrong's crime, the licensee argues, was a low-level felony that was not violent, did not involve significant planning, was of limited duration, did not include preying on others, did not implicate Mr. Armstrong's political office, and did not result in incarceration.<sup>49</sup> Arm & Rage also points to the Commission's lack of urgency in investigating Mr. Armstrong's crime, observing that the Commission released the *Arm & Rage HDO* almost five years after it reported Mr. Armstrong's felony conviction to the Commission.<sup>50</sup> Moreover, Arm & Rage asserts that the crime necessarily had no relation to the radio station since Mr. Armstrong didn't yet own it.<sup>51</sup> It further argues that Mr. Armstrong has remediated his misconduct by hiring a new accountant, and that his rehabilitation is apparent in his fulfillment of his criminal sentence, good reputation, and his ongoing record of good conduct.<sup>52</sup> While the licensee has violated some Commission rules, Arm & Rage submits that its violations have been minor and that it has a good record of FCC compliance, particularly when viewed in comparison to previous character cases.<sup>53</sup>

18. The Enforcement Bureau replies that while Mr. Armstrong's crime may have been a singular event, that fact does not hold the significance that Arm & Rage attaches to it. It points out that the majority of the decisions cited by Arm & Rage that credit the infrequency of underlying misconduct were decided before the 1986 and 1990 character qualifications policies, and not all of them were Commission-level rulings.<sup>54</sup> The Bureau also contends that with respect to the currentness of the misconduct, Arm & Rage is not correct that the age of the crime should be measured from the date it occurred and is thus beyond the Commission's stated 10-year lookback. Rather, the Bureau argues, the relevant date is that of conviction, as the character policy only allows consideration of adjudicated crimes.<sup>55</sup> Moreover, it contends, the Commission has ruled that no felony conviction is "too old to matter."<sup>56</sup>

19. The Enforcement Bureau also disputes Arm & Rage's assertion that Mr. Armstrong's crime stemmed from a ministerial act that was not as serious as the crimes for which he was acquitted. The Bureau notes that the *1990 Character Policy Statement* concluded that all felonies are serious. It points out that because the Internal Revenue Service, like the Commission, relies on honest, voluntary compliance, Mr. Armstrong committed a serious offense by intentionally filing a tax return that he knew to be false. It further argues that the seriousness of Mr. Armstrong's felony conviction is not lessened merely because he was acquitted of the other crimes charged. It does not affect the seriousness of Mr. Armstrong's actions, the Bureau asserts, that Mr. Armstrong was not shown to have had an intent to deceive because that was not an element of the crime. It contends that the cases cited by Arm & Rage regarding seriousness as a mitigating factor are inapposite in that they predate the current character policy, held that the underlying crimes justified revocation, or, in the case of *Herbert L. Schoenbohm*, was predicated on the observation that a person who had a previous license revoked would be unlikely to re-

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<sup>48</sup> Arm & Rage Responsive Case at paras. 39-41 (quoting A&R Exh. 7, Sentencing Transcript, at A&R 0642).

<sup>49</sup> *Id.* at para. 40.

<sup>50</sup> *Id.* at para. 42.

<sup>51</sup> *Id.* at para. 48.

<sup>52</sup> *Id.* at paras. 49-52 and 57-69.

<sup>53</sup> *Id.* at paras. 53-56 and 69-76.

<sup>54</sup> EB Reply at paras. 6-8.

<sup>55</sup> *Id.* at paras. 9-12.

<sup>56</sup> *Id.* at para. 12 (quoting A&R Responsive Case at para. 37; citing *David Titus*, 29 FCC Rcd 14066 (2014)).



offend.<sup>57</sup> The Bureau additionally argues that Mr. Armstrong has not personally shown remediation, rehabilitation, or remorse, and that in light of the licensee's numerous FCC rule violations, the station cannot be said to have a good record of FCC compliance.<sup>58</sup>

### Discussion

20. This hearing proceeding explores both whether violation of Section 7206(1) of the Internal Revenue Code is the type of felony that would disqualify a licensee based on character, and whether the specific circumstances of Mr. Armstrong's conviction warrant such disqualification. While any felony conviction is relevant to character under current policy per the *1990 Character Policy Statement*, the Commission therein specifically declined "to establish a 'hierarchy' of felonies that may arise in individual cases."<sup>59</sup> Dishonesty before another government entity has, however, traditionally been cited as predictive of how a licensee is likely to behave with respect to Commission rules and policies. In its 1951 analysis of the relation between non-FCC misconduct and licensee character, the Commission indicated that its authority to consider violation of federal law other than the Communications Act, specifically mentioning Internal Revenue Service regulations, is "well-established."<sup>60</sup> The *1986 Character Policy Statement* similarly affirmed that a licensee's deceptive behavior before another government agency "may be considered as having a potential bearing on character qualifications" to hold an FCC license.<sup>61</sup>

21. The Commission's previous consideration of income tax violations *vis-à-vis* character occurred in the context of comparative broadcast hearings, which was the former method used by the Commission to choose among multiple applicants for the same license. That process evaluated character as one of several relevant factors in selecting the applicant that would best serve the public interest. In one case decided after adoption of the *1990 Character Policy Statement*, an FCC ALJ held that a principal's 20-year-old misdemeanor violation of the Internal Revenue Code, which had resulted in his incarceration, was not disqualifying.<sup>62</sup> The principal had been convicted for failing to properly structure employee tax withholding. The ALJ noted that the activities in question "were misdemeanors which occurred many years ago, have not recurred, and did not include an element of fraud, antitrust, unfair competition, or discrimination," and that the principal's subsequent conduct evidenced remediation and rehabilitation.<sup>63</sup> Older cases also concluded that underlying tax violations did not rise to the level of disqualification. For instance, in 1962, a Commission Hearing Examiner gave weight to testimony regarding "character and reputation of the individual members" of the applicant and noted "the fact that a single instance is involved" in concluding that a principal's conviction for a tax felony did not adversely affect that licensee's renewal application, although renewal was denied on other grounds.<sup>64</sup> In 1975, the Commission's Review Board held that a principal's violation of section 7206(1) was not relevant to the applicant's character qualifications. That decision, however, was premised less on the crime itself and instead found probative the fact that the principal held a very small share of the applicant, 0.4 percent, and

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<sup>57</sup> *Id.* at paras. 14-23 (citing *Herbert L. Schoenbohm*, 17 FCC Rcd 20076 (ALJ 2002)).

<sup>58</sup> *Id.* at paras. 27-32.

<sup>59</sup> *1990 Character Policy Statement* at 3252.

<sup>60</sup> *1951 Uniform Policy Report* at 400-401.

<sup>61</sup> *1986 Character Policy Statement* at 1196.

<sup>62</sup> *Radio Representatives, Inc.*, 7 FCC Rcd 2224 (ALJ 1992).

<sup>63</sup> *Id.* at 2225.

<sup>64</sup> *Gila Broadcasting Co.*, 33 F.C.C. 855, 884 (Hearing Ex. 1962).

that he was removed from the entity shortly after being convicted.<sup>65</sup>

22. In other instances, misconduct related to federal income tax matters, which were apparently resolved without criminal charges, had negative consequences for applicants in comparative hearing proceedings. A 1982 FCC ALJ decision found an applicant for an FM construction permit unqualified based in part on the repeated, apparently intentional, failure of its principal's prior non-broadcasting business ventures to timely pay taxes and file required tax forms.<sup>66</sup> The decision emphasized that, "[t]his Commission, like the IRS, must depend upon the voluntary and timely compliance with the Communications Act, and the Rules and policies, applicable to its licensees."<sup>67</sup> It also noted that, although the delinquent taxes and penalties were ultimately paid after the IRS imposed liens, "the IRS and the Commission simply cannot function if it requires repeated enforcement proceedings to obtain required information."<sup>68</sup> Another case assessed a demerit to an applicant in a comparative hearing based on the majority shareholder's failure to file personal income taxes for multiple years.<sup>69</sup> The Commission in that matter concluded that the individual's tax deficiencies "demonstrate a degree of negligence with respect to compliance with applicable laws and regulations, raising questions regarding his future attitude of responsibility as an important figure in a broadcast licensee."<sup>70</sup>

23. Of course, those cases involve an obsolete regulatory process and, except for one instance, predate the current character qualifications policy. But they illustrate that a licensee or its principals' interactions with another government agency, in particular the Internal Revenue Service, have been viewed as indicative of how that licensee would deal with the Commission. The *1986 Character Policy Statement* and the *1990 Character Policy Statement* did nothing to change that; indeed, the 1986 policy and the 1981 Notice of Inquiry that initiated it specifically followed that rationale.<sup>71</sup> The Commission in 1986, intending to define and limit the types of non-FCC behavior that would be considered in a character inquiry, deemed relevant to character, as separate, independent considerations, adjudicated misconduct involving "fraudulent representations to another governmental unit" and "criminal convictions involving false statement or dishonesty."<sup>72</sup>

24. By opening all felony convictions to consideration, the *1990 Character Policy Statement* broadened the universe of criminal misconduct relevant to character, but that update did not render the 1986 distinctions obsolete. The Commission made clear in 1991 that adjudicated findings of dishonesty before another agency, even if not criminal, remain an important measure of character, indicating, "as to civil matters, we continue to believe that judgments relating to fraudulent misrepresentations to a governmental unit . . . bear most directly on an applicant's qualifications to be a broadcast licensee."<sup>73</sup> In

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<sup>65</sup> *G.F. Abendroth*, 56 F.C.C.2d 191 (Rev. Bd. 1975).

<sup>66</sup> *Country Broadcasting Co.*, 93 FCC2d 91 (ALJ 1982). The principal was also found to have misrepresented the facts surrounding the tax delinquencies in testimony before the Commission. *Id.* at 121-122.

<sup>67</sup> *Id.* at 120-121.

<sup>68</sup> *Id.* at 121.

<sup>69</sup> *Indianapolis Broadcasting, Inc.*, 22 FCC 421 (1957).

<sup>70</sup> *Id.* at 513.

<sup>71</sup> See *Policy Regarding Character Qualifications*, Notice of Inquiry, 87 F.C.C.2d 836, 850 (1981) (*Character Qualifications Notice of Inquiry*) ("Areas of potential relevance might include misrepresentation or lack of candor to other regulatory agencies").

<sup>72</sup> *1986 Character Policy Statement* at 1196.

<sup>73</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 6 FCC Rcd 3448, 3448 (1991).

this sense, “fraud” refers to “perjury, falsification, concealment, misrepresentation.”<sup>74</sup> Section 7206(1) of the Internal Revenue Code provides that it is a felony for a person to “[w]illfully make[ ] and subscribe[ ] any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.”<sup>75</sup> A felony conviction under this section therefore has the distinction of satisfying both the 1990 policy and the more restrictive 1986 policy. While “not all convictions for serious crimes are equally probative” of character,<sup>76</sup> it follows that violation of section 7206(1) is properly considered to be predictive of whether a licensee will deal honestly with the Commission and could provide a basis for license revocation, depending on the circumstances of the misconduct.

25. Arm & Rage correctly observes that the Commission indicated in the *1986 Policy Statement* that “[o]nly in the most egregious case need termination of all rights be considered.”<sup>77</sup> That passage, however, speaks to the deterrent effect on a licensee’s potential future misbehavior of “a range of sanctions short of revocation or failure to renew a license.”<sup>78</sup> Those other sanctions, such as forfeiture or short-term renewal, are intended to address FCC-related misconduct. When a case is designated for revocation hearing due to non-FCC misconduct, the ultimate question is whether the covered license or licenses should be revoked in light of the circumstances underlying that particular transgression. Arm & Rage’s observation is therefore inapposite, although the licensee is correct that revocation is the most serious sanction imposed by the Commission. The Enforcement Bureau characterizes as “hyperbolic” Arm & Rage’s description of the potential loss of its station as the “death penalty.”<sup>79</sup> On the contrary, license revocation does indeed represent the demise of a broadcast station. The facts of the case must therefore be sufficiently grave to warrant such a stringent penalty.

26. The character qualifications policy 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.”<sup>80</sup> Both parties appropriately structure their arguments around the eight mitigating factors of the character qualifications policy, which, in addition to acting as a type of “defense” for the licensee, “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.”<sup>81</sup> Those factors are individually reviewed with respect to the facts of this case as follows.

27. *Willfulness.* Arm & Rage concedes that Mr. Armstrong’s crime was willful. Not only is willfulness an element of the crime of violating section 7206(1), but the Communications Act considers an act to be willful if it was done on purpose, regardless of an intent to violate the law.<sup>82</sup>

28. *Frequency.* The Enforcement Bureau acknowledges that Mr. Armstrong’s crime was a

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<sup>74</sup> *1986 Character Policy Statement* at n.39 (internal citations omitted).

<sup>75</sup> 26 U.S.C. § 7206(1).

<sup>76</sup> *1990 Character Policy Statement* at 3252.

<sup>77</sup> Arm & Rage Responsive Case at para. 83 (citing *1986 Character Policy Statement* at 1228).

<sup>78</sup> *1986 Character Policy Statement* at 1228.

<sup>79</sup> EB Reply at para. 4.

<sup>80</sup> *Auburn Network, Inc.*, Initial Decision, MB Docket No. 21-20, FCC 22D-01 (ALJ May 9, 2022), 2022 WL 1528628 (*Auburn Network Initial Decision*) at para. 31.

<sup>81</sup> *Id.*

<sup>82</sup> 47 U.S.C. § 312(f)(1).

singular event and thus was infrequent, as Arm & Rage argues. The Bureau protests, however, that it was limited by the Presiding Judge from exploring whether Mr. Armstrong had committed additional misconduct in her orders denying its February 27, 2023, Motion to Compel and follow-up Motion in Limine and/or Motion for Clarification.<sup>83</sup> The Bureau had posed interrogatories to Arm & Rage that asked it to “[i]dentify any federal tax returns other than his 2008 return on which Mr. Armstrong did not include earned income and/or profits from investments,” and to “[s]tate whether Mr. Armstrong has ever failed to pay any taxes to the Internal Revenue Service other than the circumstances that led to his conviction.”<sup>84</sup> It also asked for information regarding tax liens that may have been filed against him.<sup>85</sup>

29. Mr. Armstrong was convicted based upon a singular action. As such, his conduct was not frequent. In pursuing wide-ranging discovery regarding other tax issues, the Enforcement Bureau essentially asked Arm & Rage to perform a self-audit to identify other potential federal income tax violations. The Bureau’s previous rationale for seeking additional tax information was that it aimed to contradict Arm & Rage’s statement that Mr. Armstrong’s felony was an anomaly that was not likely to be repeated.<sup>86</sup> It did not raise until its Affirmative Case, long after discovery had closed, that the record of the criminal proceeding included testimony of an IRS agent regarding prior liens against Mr. Armstrong’s property for nonpayment of taxes.<sup>87</sup> This argument is untimely; the Bureau cannot now be heard to complain that discovery was unduly truncated when it failed during the discovery process to present for consideration what it deems to be material, persuasive information to support its requests. It is impossible to know at this point what, if any, admissible evidence relevant to the conviction might have been produced had the Bureau adequately explained this line of discovery and tailored its requests accordingly such that further discovery was granted. In particular, the Bureau does not say whether the testimony was offered with respect to the crime of which Mr. Armstrong was convicted or to the two counts for which he was acquitted. In any event, the Bureau faces a very high hurdle to achieve its goal of rebutting an argument that does nothing more than repeat findings of the trial court regarding the conviction.<sup>88</sup> This proceeding is not intended to relitigate the crime or second-guess the trial court’s findings. It therefore is difficult to see what prejudice the Bureau suffered as a result of not being able to pursue this line of inquiry.

30. Further, as the Presiding Judge pointed out and the Bureau has acknowledged, the consideration of whether non-FCC misconduct renders a licensee unfit is limited to adjudicated matters. The Bureau contends that in seeking information regarding previous, unadjudicated tax issues, it did not mean to provide an independent basis for revocation but sought to gauge the frequency of the licensee’s misconduct as part of its analysis of the mitigating factors.<sup>89</sup> While the mitigating factors can be useful to

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<sup>83</sup> EB Affirmative Case at paras. 54-55 & n.135; EB Reply at n.16 (citing *Arm & Rage, LLC*, Order Re Motion to Compel, MB Docket No. 22-122, FCC 23M-05, 2023 WL 2523602 (ALJ March 13, 2023) (*First Order Re Motion to Compel*); *Arm & Rage, LLC*, Order Re Motion in Limine and/or Motion for Clarification, MB Docket No. 22-122, FCC 23M-07, 2023 WL 2706195 (ALJ March 28, 2023) (*Second Order Re Motion to Compel*)).

<sup>84</sup> *First Order re Motion to Compel*, Attachment, at EB Interrogatory Nos. 9 and 21.

<sup>85</sup> *Id.* at EB Document Request No. 16.

<sup>86</sup> Enforcement Bureau’s Motion to Compel Complete Responses to its Second Set of Discovery Requests to Arm & Rage, LLC, MB Docket No. 22-122 (filed Feb. 27, 2023) (EB Motion to Compel) at para. 8.

<sup>87</sup> EB Affirmative Case at para. 54.

<sup>88</sup> At several points when pronouncing Mr. Armstrong’s sentence, the trial judge referred to Mr. Armstrong’s crime as an anomaly. *See, e.g.*, Arm & Rage Responsive Case, A&R Exh. 7, Sentencing Transcript, at A&R 0640 (“[T]here appears to be no dispute this offense was a marked deviation from the defendant’s otherwise law-abiding life”).

<sup>89</sup> EB Affirmative Case at para. 55.

both sides in a hearing proceeding, care must be taken not to nullify the Commission's express decision to consider only adjudicated non-FCC misconduct in evaluating character. The requested discovery went far beyond asking about adjudicated tax violations, and far beyond asking about past tax liens. Moreover, it does not necessarily follow that the imposition of a tax lien results from malevolent behavior – a lien may be imposed after an honest misinterpretation of the law, inaccurate mathematical calculations, or even an IRS mistake.

31. *Currentness.* With respect to the currentness of the misconduct, both parties discuss the Commission's indication in the *1986 Character Policy Statement* that, "even as to consideration of past conduct indicating a flagrant disregard of the Commission's regulations and policies, a ten year limitation should apply."<sup>90</sup> The parties differ over how this ten-year lookback should be measured – Arm & Rage contends that the triggering date should be the date the crime was committed, in this case 2008, while the Enforcement Bureau submits that the relevant date should be the date of the felony conviction, in this case 2016.<sup>91</sup> The distinction is irrelevant in this case. In *David L. Titus*, the Commission considered crimes that were more than 15 years old and made clear that the ten-year guideline only applies to FCC-related misconduct. That case cites the *1990 Policy Statement* for the proposition that "evidence of *any* conviction for misconduct constituting a felony will be relevant to our evaluation of an applicant's or licensee's character," regardless of age.<sup>92</sup> Even so, that simply shows that there is not a de facto statute of limitations with respect to felony convictions; it does not obviate the mitigating factor of currentness. In this case, Mr. Armstrong committed the felony 13 years ago and was convicted seven years ago. That is sufficient time to allow for a meaningful evaluation of Mr. Armstrong's proclivity to re-offend, unlike the situation in *Auburn Network, Inc.*, where the principal was still incarcerated for his felonies.<sup>93</sup> In this regard, the Presiding Judge notes that in sentencing Mr. Armstrong, the trial judge concluded based on the record that Mr. Armstrong was unlikely to commit the same or any other crime again.<sup>94</sup>

32. *Seriousness.* Both parties acknowledge that the *1990 Character Policy Statement* makes clear that all felonies are serious but that some crimes are more relevant to character than others. The Enforcement Bureau emphasizes that Mr. Armstrong's acquittal on other charges does not render his crime non-serious. Indeed, it argues, Mr. Armstrong's crime of swearing to a statement that he knew to be false has particular relevance to the Commission's processes because, like the Internal Revenue Service, the Commission depends on individuals and entities under its jurisdiction to be fully forthcoming.<sup>95</sup> Arm & Rage asserts, on the other hand, that unlike the crimes for which he was acquitted, Mr. Armstrong's violation of section 7206(1) does not indicate deceptive intent but was instead predicated on the ministerial act of signing a document. It submits that, as a result, "[t]his is not good evidence that Mr. Armstrong would mislead the Commission."<sup>96</sup>

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<sup>90</sup> *1986 Character Policy Statement* at 1229 (internal citations omitted).

<sup>91</sup> Arm & Rage Responsive Case at paras. 33-35; EB Reply at paras. 9-12.

<sup>92</sup> *David L. Titus*, 29 FCC Rcd 14066, 14071 (2014) (quoting *1990 Character Policy Statement* at 3252); *see also* n.52 ("The ten-year statute of limitations on which the ALJ relied applies to allegations of FCC-related misconduct").

<sup>93</sup> *Auburn Network Initial Decision* at para. 34.

<sup>94</sup> *See* Arm & Rage Responsive Case, A&R Exh. 7, Sentencing Transcript, at A&R 0639 ("I do not find that the defendant is likely to commit this or any other criminal offense in the future").

<sup>95</sup> The Enforcement Bureau notes the statement of the criminal trial judge that "our tax system relies on citizens' voluntary compliance and truthful reporting of their income." EB Reply at para. 15 (quoting EB Exh. 7, Sentencing Transcript, at A&R 0639).

<sup>96</sup> Arm & Rage Responsive Case at para. 41.

33. The Presiding Judge allowed broad discovery regarding Mr. Armstrong's crime, including requests that were relevant to Counts 1 and 2, because "the felony of which he was convicted stems from the same activities and circumstances as the felonies of which he was acquitted."<sup>97</sup> She also held, however, that she would assess "the admissibility and probative value of such evidence while keeping in mind the specific crime for which Mr. Armstrong was convicted and those of which he was acquitted."<sup>98</sup> Considering that the focus of the character policy is on adjudicated conduct, the relevant, material facts to be weighed in this proceeding are those surrounding Mr. Armstrong's filing of a false tax return. The judge in Mr. Armstrong's criminal trial ruled that much of the evidence, particularly with respect to planning the various transactions involved in Mr. Armstrong's purchase and sale of the cigarette tax stamps, was introduced as to Counts 1 and 2 – conspiracy to defraud the United States and tax evasion – for which Mr. Armstrong was acquitted, and that little evidence was introduced as to Count 3 – filing a false tax return – for which Mr. Armstrong was convicted. Despite the prosecution's arguments to the contrary, the trial judge did not consider the overall structure and complexity of the underlying transactions when sentencing Mr. Armstrong for the conviction under Count 3.<sup>99</sup> As a result, the trial judge found that the crime did not involve significant planning and was of limited duration, characterizing it as "essentially a ministerial act of filing a tax return when he knew that he was not reporting income on his tax return that should have been included, and failed to pay the correct amount of tax thereon."<sup>100</sup>

34. Additionally, in denying defense motions for acquittal and a new trial, the trial judge rejected the defense's argument that convicting Mr. Armstrong under Count 3 was inconsistent with acquitting him under Count 2 such that the conviction under Count 3 must be thrown out.<sup>101</sup> The trial court found no inconsistency because the intent required under each count was different.<sup>102</sup> This ruling further reinforces the need to be vigilant in identifying the conduct for which Mr. Armstrong was convicted and to not conflate it with the conduct that the trial court determined to be irrelevant to that conviction, i.e., the facts of how Mr. Armstrong obtained the unreported income. Consistent with the Presiding Judge's discovery ruling, those facts may provide context by describing the criminal trial, but they are not of decisional significance when considering the effect of the conviction on Mr. Armstrong's character qualifications. In other words, it would be inappropriate to consider the conviction under Count 3 to suggest that Mr. Armstrong had the kind of fraudulent intent or intent to evade taxes that are part and parcel of Counts 1 and 2.

35. Nonetheless, although intent to defraud the government or evade a tax were not elements of Mr. Armstrong's felony, that does not make his conviction inconsequential to the question of character. Mr. Armstrong swore to the United States government under penalty of perjury that his tax return was accurate when he knew it to be false. As the U.S. Court of Appeals for the District of Columbia has recognized, "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."<sup>103</sup> There may have been reasons other than tax avoidance that prompted Mr. Armstrong to sign the tax form when he knew that it didn't include taxable income from sale of the cigarette tax stamps. Arm & Rage reiterates the explanation offered at trial that Mr. Armstrong believed that his accountant would attribute the income to a holding company that would pay the taxes, which the

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<sup>97</sup> *Arm & Rage*, Order, MB Docket No. 22-122, FCC 22M-21, 2022 WL 2785804 (ALJ July 12, 2022) at para. 6.

<sup>98</sup> *Id.*

<sup>99</sup> *Arm & Rage Responsive Case*, A&R Exh. 7, Sentencing Transcript, at A&R 0640-0642.

<sup>100</sup> *Id.* at A&R 0642.

<sup>101</sup> These motions are not in the record here, but the trial court's order denying them is Exhibit 4 to the Enforcement Bureau's Affirmative Case.

<sup>102</sup> *EB Affirmative Case*, Exh. 4, Order on Defense Motions, at A&R 0435-0436.

<sup>103</sup> *Contemporary Media v. FCC*, 214 F.3d at 193.

jury appears to have discounted and the trial judge found “not credible.”<sup>104</sup> Whatever the rationale, the fact remains that Mr. Armstrong willfully attested to a declaration that he knew was untrue. Discussing misrepresentation in the *1986 Policy Statement*, the Commission, quoting the Supreme Court, repeated the truism that, “The fact of concealment may be more significant than the facts concealed.”<sup>105</sup> Mr. Armstrong’s felony is therefore appropriately characterized as serious.<sup>106</sup>

36. *Participation of station management.* Mr. Armstrong is the sole member of Arm & Rage, LLC. The crime in question was committed before he acquired the station. The Enforcement Bureau contends that this mitigating factor examines the culpability of high-level station officials in the underlying misconduct and thus it is not of consequence that Mr. Armstrong was not yet an FCC licensee at the time of the crime. In other words, the Bureau contends that because Mr. Armstrong is the alter ego of Arm & Rage, this mitigating factor weighs against him. The Commission does not appear to have ever fully explained what it means by this factor, which was first proposed in 1981.<sup>107</sup> The Enforcement Bureau’s interpretation has some plausibility, particularly in the case of a corporate licensee. It must at least be acknowledged, however, that the underlying misconduct in this case necessarily had no relation to Mr. Armstrong’s stewardship of WJBE because he did not yet own the station.

37. *Record of FCC Compliance.* The parties differ on the licensee’s overall compliance with FCC rules and policies, which is discussed below with respect to the effect of Arm & Rage’s reporting violations on its fitness to remain a licensee. The Enforcement Bureau asserts that the licensee committed more reporting violations than are identified in the *Arm & Rage HDO* and contends that it was foreclosed from discovery regarding additional potential violations.<sup>108</sup> Arm & Rage argues that other licensees have committed far more numerous and serious rule violations but did not have their licenses revoked.<sup>109</sup> It also submits articles, local commendations, and letters of support to demonstrate that the station is viewed as important to its listeners and the local community.<sup>110</sup> The trial court similarly noted that Mr. Armstrong enjoys strong community support.<sup>111</sup>

38. *Efforts made to remedy the wrong.* Mr. Armstrong has fully satisfied all aspects of his criminal sentence. Arm & Rage notes that he has also cut ties with his former accountant and has not been charged with any crime in the intervening years. In any character case, the assessment of remedial efforts is necessarily going to be dependent on the misconduct at issue. For instance, in the case of a prolific computer hacker seeking an amateur radio license, the Administrative Law Judge hearing the case found remediation not just because the felon had served his sentence and made restitution, but also because he demonstrated significant efforts to use his technical knowledge to battle computer hacking.<sup>112</sup>

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<sup>104</sup> Arm & Rage Responsive Case at para. 14; EB Affirmative Case at n.109 (citing EB Exh. 7, Sentencing Transcript, at A&R 0639).

<sup>105</sup> *1986 Character Policy Statement* at n.77 (quoting *FCC v. WOKO*, 329 U.S. 223, 227 (1946)).

<sup>106</sup> The trial court similarly found the crime to be serious when sentencing Mr. Armstrong. EB Affirmative Case and Arm & Rage Responsive Case, EB Exh. 7 and A&R Exh. 7, Sentencing Transcript, at A&R 0639.

<sup>107</sup> *Character Qualifications Notice of Inquiry* at 854 (suggests as relevant “the level of knowledge and involvement of management and significant stockholders in the misconduct, and whether prompt corrective action has been taken”).

<sup>108</sup> EB Reply at paras. 29-36.

<sup>109</sup> Arm & Rage Responsive Case at paras. 88-97.

<sup>110</sup> *Id.* at A&R Exh. 3, News Articles About WJBE, A&R Exh. 21, Character Letters, A&R Exh. 24, Awards.

<sup>111</sup> *Id.*, A&R Exh. 7, Sentencing Transcript, at A&R 0636.

<sup>112</sup> *Kevin David Mitnick*, 17 FCC Rcd 27028 (ALJ 2002).

In Mr. Armstrong's situation, it is persuasive that he has not only satisfied his criminal sentence but has disassociated from the person most directly involved in the transactions that earned him the unreported income. The Enforcement Bureau again protests in this regard that the Presiding Judge did not allow additional discovery to probe whether Mr. Armstrong had any other delinquencies with the Internal Revenue Service or had committed other tax crimes. As a result, the Bureau contends, the only evidence in the record indicating that he did not commit other crimes is Mr. Armstrong's statement that he did not. The Bureau postulates that, "[i]t is an absurd outcome for the Commission, in considering rehabilitation of a convicted felon under its Character Policy, to be limited to only the evidence provided by that felon."<sup>113</sup> For the reasons outlined above regarding frequency, the Presiding Judge continues to believe that the information sought by the Bureau was not likely to lead to admissible evidence. Moreover, if Mr. Armstrong had committed additional crimes, it would not only be a matter of public record, but, given his prominence in the local community, it would have likely received press attention.

39. *Rehabilitation.* It is difficult not to interchange remediation of the wrong and rehabilitation of the individual in a case such as this in which the convicted felon is the sole member of the entity that holds the license. The *1990 Character Policy Statement* lists as relevant to rehabilitation (1) whether the applicant has not been involved in any significant wrongdoing since the misconduct occurred; (2) how much time has elapsed since the misconduct; (3) the applicant's reputation for good character in the community; and (4) meaningful measures taken by the applicant to prevent the future occurrence of misconduct.<sup>114</sup> To a certain extent, those issues have already been discussed above and determined to be in Mr. Armstrong's favor. Arm & Rage has submitted additional credible evidence of Mr. Armstrong's rehabilitation, including several letters of support from the Knoxville community, one of which is from the Chief Probation Officer to whom Mr. Armstrong's probation officer reported.<sup>115</sup>

40. With respect to remediation, but probably more applicable to rehabilitation, the Enforcement Bureau contends that Mr. Armstrong has not expressed remorse and "seems unwilling to accept responsibility publicly" for his crime.<sup>116</sup> It cites an interview Mr. Armstrong gave to National Public Radio in which he is quoted as saying, "There's a lot of people out here that have made a mistake or have been falsely accused and punished for something . . . But when people make restitution, when they've done everything that they're supposed to do – paid their fine[s], completed the community service – they've shown that their character, if whatever they did, it was a mistake."<sup>117</sup> As Arm & Rage points out, the Commission in 1986 declined to specifically enumerate among the mitigating factors whether the wrongdoer is "contrite or unrepentant," finding that to be an unduly subjective consideration.<sup>118</sup> The Enforcement Bureau correctly observes, however, that the Commission has positively viewed wrongdoers' expressions of remorse when evaluating character.<sup>119</sup> Taken together, these Commission actions show that a statement of remorse can provide evidence of rehabilitation, but the absence of such a statement does not necessarily show that the individual has not been rehabilitated. This situation is a good example of how subjective such an analysis can be. The Enforcement Bureau points to the National Public Radio interview as demonstrating that Mr. Armstrong hasn't taken responsibility for his crime and is not sufficiently apologetic. It is not unusual, however, for a person to refer to a misdeed as a "mistake"

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<sup>113</sup> EB Reply at para. 26.

<sup>114</sup> *1990 Character Policy Statement* at n.4.

<sup>115</sup> Arm & Rage Responsive Case at A&R Exh. 21 (Letter of Tony V. Anderson, Chief U.S. Probation Officer (retired)).

<sup>116</sup> EB Reply at para. 28.

<sup>117</sup> *Id.* at EB Reply Exh. 1, June 25, 2023, National Public Radio article.

<sup>118</sup> *1986 Character Policy Statement* at 1228.

<sup>119</sup> EB Reply at para. 27.



despite the underlying act being intentionally committed. And Mr. Armstrong's allusion to being falsely accused is without context – he may be referring to the crimes of which he was acquitted. He has asserted in the record of this proceeding that he regrets his conduct and “would absolutely not do again what I did then.”<sup>120</sup> This is consistent with the trial judge's finding that Mr. Armstrong was unlikely to commit the same or another crime in the future.

41. The Enforcement Bureau reiterates its argument that limitations on discovery in this case deprived it of the opportunity to investigate further as to whether Mr. Armstrong has been involved in other wrongdoing since his criminal conviction, which, as noted above, the Commission considers among the indicia of rehabilitation. The Bureau contends that the only evidence in the record on this point is Mr. Armstrong's statement that he has “not been indicted for, charged for, or convicted of any criminal misconduct” since his felony conviction.<sup>121</sup> The Bureau questions the reliability of Mr. Armstrong's statement, despite being declared under penalty of perjury, given that he was convicted of attesting to a false tax return under penalty of perjury. The Presiding Judge has taken that into account, but, as explained above, does not agree that as a result the Bureau is entitled to discovery regarding other unadjudicated tax issues. The Bureau cites the 1991 ALJ decision in *Big Country Communications* for the proposition that the assessment of whether a licensee has been involved in other non-FCC wrongdoing should include both adjudicated and unadjudicated misconduct.<sup>122</sup> On the contrary, that ruling, which resulted from an unopposed motion for summary decision, simply observed that the licensee and principal in that particular case “haven't been involved in any non-FCC related wrongdoing since the misconduct” described in the proceeding and that, “[t]his includes both adjudicated and unadjudicated non-communications misconduct such as violations of criminal statutes or serious civil misconduct involving moral turpitude.”<sup>123</sup> That unchallenged observation does not reverse the Commission's clear holding in the *1990 Character Policy Statement* that “it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated by another agency or court.”<sup>124</sup>

42. Considering the foregoing, the Presiding Judge finds that the Enforcement Bureau has not satisfied its burden to prove, by a preponderance of the evidence, that the felony of which Joseph Armstrong was convicted renders him, and by extension Arm & Rage, LLC, unfit to be a Commission licensee. The federal crime of violating section 7206(1) of the Internal Revenue Code, 26 U.S.C. § 7206(1), is a serious felony of the type that could be considered indicative of an individual's propensity to deal with the Commission in a less than forthright manner. The evidence and arguments presented in this case, however, persuade the Presiding Judge, like the trial court, that Mr. Armstrong's crime, while willful, was an isolated occurrence that does not suggest a likelihood of future violations. Although the crime is not so old as to be disregarded, enough time has elapsed to show that Mr. Armstrong has remediated his wrong by completely satisfying his criminal sentence and by employing a new tax preparer. It also appears that Mr. Armstrong has been rehabilitated in light of his significant support from the Knoxville community and the lack of additional adjudicated criminal behavior since his conviction. Finally, although the licensee has committed the documented reporting violations discussed in detail below, the station has an overall positive record of public service and the evidence suggests a sincere commitment to its listeners. As a result, the Presiding Judge finds that Mr. Armstrong's felony conviction does not warrant revocation of Arm & Rage's license for WJBE.

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<sup>120</sup> EB Affirmative Case at EB Exh. 2, Arm & Rage Responsive Case at A&R Exh. 1, Declaration of Joseph Armstrong.

<sup>121</sup> EB Reply at para. 39 (quoting EB Affirmative Case at EB Exh. 2, Declaration of Joseph Armstrong).

<sup>122</sup> *Id.* at para 40 (citing *Big Country Communications*, 6 FCC Rcd 1247 (ALJ 1991)).

<sup>123</sup> *Big Country Communications* at 1248.

<sup>124</sup> *1990 Character Policy Statement* at 3252.

## Effect of Arm & Rage's Violations of FCC Rules on Licensee Qualifications

### Contentions of the Parties

43. As noted above, the *Arm & Rage HDO* indicates that the licensee violated the Commission's rules by (1) being late in reporting Mr. Armstrong's conviction to the Commission (due on April 1, 2017 but filed on April 14, 2017); (2) neglecting to submit required biennial ownership reports; and (3) failing to upload issues/programs lists to the online site hosted by the Commission.<sup>125</sup> The Enforcement Bureau contends that in addition to the rule violations mentioned in the *Arm & Rage HDO*, the licensee was late in uploading its public inspection files for 2013 through 2017 to the Commission's online public file database, that it either was late or did not file at all with respect to more recent quarterly issues/programs lists, and that it did not update its license renewal application to reflect these continuing violations.<sup>126</sup> The Bureau also argues that Arm & Rage violated section 73.3526(b)(2)(ii) of the Commission's rules, 47 CFR § 73.3526(b)(2)(ii), by failing to provide a link on its website to its public inspection file as hosted on the Commission's website and by not including contact information to assist listeners with disabilities regarding the content of the public files.<sup>127</sup> The Bureau posits that this is just a "limited snapshot" of the rule violations committed by Arm & Rage and that it would have delved further had the Presiding Judge not limited discovery.<sup>128</sup>

44. Arm & Rage acknowledges the violations identified in the *Arm & Rage HDO*, which it self-reported, but contends that they were inadvertent oversights that are not of a magnitude to justify license revocation. To that end, it indicates that it reviewed the 2020 renewal applications for every AM station in Tennessee and found that at least one in three reported similar filing errors.<sup>129</sup> Arm & Rage submits that its untimely reporting of Mr. Armstrong's conviction to the Commission -- 13 days late -- was a de minimis error attributable to the station's small staff and Mr. Armstrong's poor health at the time following completion of the criminal trial.<sup>130</sup> For the same reasons, it asserts, it neglected to properly file its ownership reports and has since changed its practices to delegate responsibility for those reports to FCC counsel.<sup>131</sup> Arm & Rage further indicates that, like a lot of other small stations, it had not been aware that the Commission's rules changed in 2018 to require stations with fewer than five full-time employees to make their issues/programs lists available online in addition to maintaining paper copies (which it had done). The licensee states that it has rectified this error.<sup>132</sup> The other violations alleged by the Enforcement Bureau, it argues, are outside the scope of this proceeding, and, in any event, Arm & Rage avers that it did upload its later issues/programs lists.<sup>133</sup>

45. The Enforcement Bureau replies that Arm & Rage committed 22 known violations of the Commission's reporting rules. It contends that the *Arm & Rage HDO* identifies 13 violations -- one

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<sup>125</sup> *Arm & Rage HDO* at para. 3.

<sup>126</sup> EB Affirmative Case at paras. 15-21, 61-63.

<sup>127</sup> *Id.* at n.155.

<sup>128</sup> *Id.* at paras. 64-65.

<sup>129</sup> Arm & Rage Responsive Case at para. 91. It attaches several of those applications as A&R Exh. 29.

<sup>130</sup> *Id.* at paras. 85-88.

<sup>131</sup> *Id.* at paras. 89-91.

<sup>132</sup> *Id.* at paras. 92-94.

<sup>133</sup> *Id.* at paras. 79-80, 95, and n.258. The Enforcement Bureau responds that the third and fourth quarter 2022 and first quarter 2023 lists were not uploaded to the correct folder. EB Reply at n.91.

violation of section 1.65 for being late in reporting Mr. Armstrong's conviction, three violations of section 73.3615 by failing to file ownership reports for 2015 and 2017 and for filing its 2019 ownership report late, and nine violations of section 73.3526 by failing to upload issues/programs lists to its online public inspection file for 2013-2019.<sup>134</sup> It argues that Arm & Rage continued to violate section 73.3526 nine more times by failing to timely upload quarterly issues/programs lists for 2020, 2021, and the first quarter of 2022. It disputes Arm & Rage's claim that these additional nine violations are outside the scope of this proceeding because they were not specifically identified in the *Arm & Rage HDO*.<sup>135</sup> Further, the Bureau submits that instead of confirming that it had, to its knowledge, not failed to comply with any additional Commission rules or policies, Arm & Rage stated that, "[o]ther than the current proceeding, it is unaware of any investigations, citations, or complaints."<sup>136</sup> That does not necessarily mean, the Bureau argues, that the licensee has an overall record of compliance. It suggests that this represents the licensee's reluctance to be fully transparent with the Commission and thus raises the concern that Arm & Rage has committed additional rule violations that it is not willing to report.<sup>137</sup>

### Discussion

46. The *Arm & Rage HDO* includes among the issues to be considered in this hearing, "the effects, if any, of Arm & Rage, LLC's failure to report [Mr. Armstrong's] conviction by the April 1, 2017 due date, to upload required information to an online public inspection file, and to file timely ownership reports on its qualifications to be a Commission licensee."<sup>138</sup> In denying further discovery sought by the Enforcement Bureau, the Presiding Judge stated that in addition to Mr. Armstrong's felony, this proceeding focusses on "the three specific reporting violations specified in the *Arm & Rage HDO*."<sup>139</sup> Arm & Rage contends that this refers only to the reporting violations that it self-identified and does not include the nine additional violations of section 73.3526 cited by the Enforcement Bureau. There is no need for such a pedantic analysis in this case. Because the licensee's overall FCC compliance, as one of the mitigating factors, is relevant to the evaluation of the designated issues, it was not inappropriate for the Enforcement Bureau to bring up other violations of section 73.3526 and similar reporting rules that were revealed during discovery.<sup>140</sup>

47. It does not follow, however, that virtually unlimited discovery regarding other potential violations of the Commission's rules was warranted. One of the interrogatories posed by the Enforcement Bureau directed Arm & Rage to "identify all other instances in which Arm & Rage failed to comply with any Commission rule or policy."<sup>141</sup> The Presiding Judge deemed that inquiry overly broad, concluding that the mitigating factor regarding a licensee's overall FCC compliance "does not justify discovery that

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<sup>134</sup> The Enforcement Bureau specifies that Arm & Rage was required to upload its issues/programs lists for 2013 through 2017 by March 1, 2018, and that thereafter it was to file its issues/programs lists quarterly. EB Affirmative Case at paras. 14-16. By citing nine violations, it appears that it counts the initial failure to upload as a single violation and then each of the missed quarterly deadlines for 2018 and 2019 as separate violations.

<sup>135</sup> EB Reply at paras. 30-31.

<sup>136</sup> *Id.* at para. 32 (quoting EB Affirmative Case, EB Exh. 8, Arm & Rage's Objections and Responses to the Enforcement Bureau's Interrogatories, at No. 53).

<sup>137</sup> *Id.* at paras. 33-35.

<sup>138</sup> *Arm & Rage HDO* at para. 24.

<sup>139</sup> *First Order re Motion to Compel* at para. 5.

<sup>140</sup> See, e.g., *Snake River Radio, LLC*, Initial Decision, MB Docket No. 22-53, FCC 23D-02, 2023 WL 2833341 (ALJ Apr. 5, 2023) (*Snake River Initial Decision*) at para. 12 (rule violations revealed during discovery considered in license renewal proceeding).

<sup>141</sup> *First Order re Motion to Compel*, Attachment at EB Interrogatory No. 6.

generally asks the licensee to admit any possible rule violations previously unknown to the Commission.”<sup>142</sup> In its Affirmative Case, the Enforcement Bureau asserts before the Presiding Judge for the first time that “Arm & Rage’s counsel admitted in conversation with counsel for the Bureau that Arm & Rage committed additional violations of the Rules that it has not reported to the Commission,” which Arm & Rage denies having admitted.<sup>143</sup> The Bureau contends that it was foreclosed from further investigating this assertion because the Presiding Judge limited discovery. It asserts that her decision led to the “Kafkaesque” result that FCC violations not uncovered by the designating Bureau (the Media Bureau in this case) will be disregarded when evaluating a licensee’s overall record of FCC compliance.<sup>144</sup>

48. The Enforcement Bureau misunderstands the Presiding Judge’s decision to disallow the requested discovery. The Commission’s hearing rules permit broad discovery that is “relevant to the hearing issues,” and the information requested in discovery does not itself need to be admissible as long as it “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>145</sup> Had the Enforcement Bureau indicated in its Motion to Compel that counsel for Arm & Rage acknowledged other rule violations, that might have provided a sufficient basis to allow some additional, narrower, inquiry into those potential undisclosed violations. But by simply asking an exceedingly broad question about other rules the licensee may have broken without indicating any reason for suspecting that to be true, the Enforcement Bureau failed to satisfy even the expansive justification for discovery permissible under the Commission’s rules. That does not mean that any newly discovered rule violations are off-limits with respect to consideration of Arm & Rage’s application for renewal, which is being held in abeyance. But the Bureau’s *post hoc* explanation is too little, too late, for purposes of this revocation proceeding. As with its failure to present information about other tax liens mentioned in the record of the criminal trial, the Enforcement Bureau should have raised during the discovery process information in its possession that might have supported the requested discovery and cannot now be heard to complain about discovery rulings made without the benefit of information that it did not disclose.<sup>146</sup>

49. Absent Mr. Armstrong’s felony conviction, it is doubtful that this matter would have been designated for hearing. The *Arm & Rage HDO* makes clear that the reporting violations are not separate grounds for revocation but are “considered along with the felony,” and that Mr. Armstrong’s conviction, “separately, and together with A&R’s admitted rule violations,” form the basis for the

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<sup>142</sup> *Second Order re Motion to Compel* at para. 4.

<sup>143</sup> EB Affirmative Case at para. 64 (emphasis omitted). Arm & Rage denies that its counsel admitted additional, unreported, violations and argues that the attorney was speaking hypothetically. Arm & Rage Responsive Case at para. 81. The Enforcement Bureau counters that the alleged admission was not made in the context of a hypothetical. EB Reply at n.102.

<sup>144</sup> *Id.* at paras. 65-66.

<sup>145</sup> 47 CFR § 1.311(b).

<sup>146</sup> The Enforcement Bureau also takes issue with the Presiding Judge’s denial of further inquiry into the licensee’s filings with the Tennessee Secretary of State. EB Affirmative Case at n.156. The Bureau had noted in interrogatories to Arm & Rage that the LLC’s publicly-available filings with the state had in some years indicated that it had one member and at other times that it had two members, and it requested that the licensee provide documents regarding its incorporation. *First Order re Motion to Compel*, Attachment, at EB Interrogatory Nos. 42-45. The Bureau indicated that its aim was “to reconcile apparent factual discrepancies between the documents Arm & Rage has previously filed with the Commission concerning its ownership and the Tennessee Secretary of State records and to determine if there were unreported rule violations.” EB Motion to Compel at para. 4. The Presiding Judge found that these discovery requests were not sufficiently relevant to the designated issues to warrant further inquiry. *First Order re Motion to Compel* at para. 6. Notably, Arm & Rage indicates in its Responsive Case that the variation in its Tennessee corporate filings was caused by confusion about the ownership status of Mr. Armstrong’s now former wife under Tennessee marital property law. Arm & Rage Responsive Case at para. 81.

character inquiry.<sup>147</sup> The Enforcement Bureau concedes as much, indicating that the specific failures cited in the *Arm & Rage HDO* “would not generally rise to the level of revocation.”<sup>148</sup> Certainly notifying the Commission of Mr. Armstrong’s felony conviction 13 days late was *de minimis* and, given that this case was not designated for hearing until almost five years later, is appropriately characterized as harmless error. And while the licensee’s failure to file biennial ownership reports for 2015 and 2017 and its late filing of the 2019 report might warrant some penalty, it would be unprecedented for a station license to be revoked for such relatively minor rule violations. Moreover, Arm & Rage’s confusion regarding the new rule requiring it to upload issues/programs lists is credible, as is its assertion that it took action immediately upon learning of its obligation.

50. The Enforcement Bureau contends, however, that the licensee’s failure to upload later issues/programs lists, after it ostensibly put procedures in place to ensure compliance, “raises significant doubts as to whether Arm & Rage is capable of complying – or willing to comply – fully with Commission rules.”<sup>149</sup> Perhaps these additional alleged violations warrant further scrutiny, but they do not provide a basis for license revocation. That is not to say that maintenance of a stations’ public inspection file, including current issues/programs lists, is not important. Quarterly issues/programs lists, which describe programming that responds to community issues, have long been required of radio broadcasters.<sup>150</sup> They provide information necessary for listeners to determine whether a station is consistently responsive to local needs.<sup>151</sup> At most, though, licensees with issues/programs list deficiencies tend to be assessed a monetary penalty and/or renewal for a shortened license term. For instance, in 2019, the Audio Division of the FCC’s Media Bureau found an FM licensee liable for a \$15,000 forfeiture and a short-term renewal for failing to prepare and upload any issues/programs lists during the license term. It specified that, “although we are concerned with Licensee’s failure to create required quarterly issues and programs lists, and to upload those lists into the Station’s [online public inspection file], we find that Licensee’s violations of the Rules do not rise to such a level that designation for evidentiary hearing on the issue of whether to deny renewal for the Station is warranted.”<sup>152</sup> Similarly, in 2013, before lists were required to be uploaded, an FM station was assessed a \$12,000 forfeiture and a short-term renewal for missing five years’ worth of issues/programs lists (21 in total) but the matter was not designated for hearing, nor was the license revoked despite the licensee’s “cavalier attitude toward creating and retaining” those lists.<sup>153</sup> Notably, Arm & Rage avers that it had properly created and maintained paper lists but failed to upload them to the online file.<sup>154</sup> Several other recent rulings have imposed penalties for failing to upload issues/programs lists but concluded that the violations did not warrant designation for hearing.<sup>155</sup>

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<sup>147</sup> *Arm & Rage HDO* at para. 6.

<sup>148</sup> EB Affirmative Case at para. 69.

<sup>149</sup> *Id.* at para. 70.

<sup>150</sup> *See Deregulation of Radio*, Memorandum Opinion and Order, 104 F.C.C.2d 505 (1986).

<sup>151</sup> *Snake River Initial Decision* at para. 30.

<sup>152</sup> *Seaview Communications, Inc.*, 34 FCC Rcd 9340, 9343-44 (MBAD 2019).

<sup>153</sup> *Gallup Public Radio*, 28 FCC Rcd 13847, 13850 (MBAD 2013).

<sup>154</sup> *Arm & Rage Responsive Case* at para. 92 (citing A&R Exh. 1, Armstrong Declaration).

<sup>155</sup> *See, e.g., Gray Television*, 36 FCC Rcd 16567 (MBVD 2021) (\$6,000 forfeiture for late filing of nine issues/programs lists); *Prairie Public Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, DA 22-610, 2022 WL 2072029 (MBVD June 7, 2022) (\$6,000 forfeiture for late filing of 11 issues/programs lists plus \$3,000 for failure to disclose violations in renewal application); *Gendreau Broadcast LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 23-466 (MBAD May 31, 2023) (\$8,000 forfeiture for failure to upload at least 17 issues/programs lists, among other reporting violations); *Durlyn Broadcasting Co.*,

(continued....)

51. The Presiding Judge finds that the Enforcement Bureau has failed to prove by a preponderance of the evidence that licensee Arm & Rage has demonstrated an inclination to avoid following Commission rules such that its license should be revoked. Based on the above survey of how the Commission's staff generally handles the types of rule violations committed by Arm & Rage, it is clear that license revocation is not warranted. Even accepting the additional rule violations alleged by the Enforcement Bureau, there is nothing in the record of this proceeding to indicate that Arm & Rage's actions were intentional, resulted from a wanton disregard of agency regulations, or were markedly different from the actions of similarly situated licensees whose licenses were not revoked or, in the case of a renewal proceeding, were renewed. To be sure, it is incumbent on any Commission licensee, regardless of size, to keep current with its regulatory responsibilities. But it would be inconsistent with past treatment of similar violations to revoke Arm & Rage's license.

#### CONCLUDING STATEMENT

52. The *Arm & Rage HDO* designated for hearing a determination of (1) the effects, if any, of Joseph Armstrong's felony conviction on his qualifications and thus the qualifications of Arm & Rage, LLC to be a Commission licensee; (2) the effects, if any, of Arm & Rage, LLC's failure to report the conviction to the Commission by the April 1, 2017, due date, to upload required information to an online public inspection file, and to file timely ownership reports on its qualifications to be a Commission licensee; and (3) whether, pursuant to section 312 of the Communications Act of 1934, as amended, the license of Arm & Rage, LLC for WJBE(AM), Powell, Tennessee should be revoked. Based on the foregoing, the Presiding Judge concludes that the FCC's Enforcement Bureau has not proved by a preponderance of the evidence that the felony of which Joseph Armstrong was convicted on August 8, 2016, specifically, violating 26 U.S.C. § 7206(1), disqualifies him and, by extension, Arm & Rage, LLC, from being a Commission licensee. The Presiding Judge also concludes that the Enforcement Bureau has not proved by a preponderance of the evidence that Arm & Rage's violations of the Commission's rules identified in the *Arm & Rage HDO*, as well as the additional violations alleged by the Enforcement Bureau, considered alone or in tandem with Joseph Armstrong's felony, disqualify Arm & Rage from being a Commission licensee. As a result, the Presiding Judge concludes that, pursuant to section 312 of the Communications Act of 1934, as amended, the license of Arm & Rage, LLC, for WJBE(AM) should not be revoked.

#### ORDERING CLAUSES

53. Accordingly, **IT IS ORDERED** that the above-captioned license of Arm & Rage, LLC, **SHALL NOT BE REVOKED** as a result of the felony conviction of its sole member, Joseph Armstrong, and rule violations, for the reasons detailed herein.

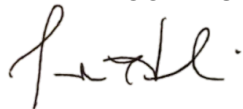
54. **IT IS FURTHER ORDERED** that this license revocation proceeding, MB Docket No. 22-122, **IS DISMISSED WITH PREJUDICE** on the merits.<sup>156</sup>

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Order, DA 23-540, 2023 WL 4635297 (MBAD July 18, 2023) (\$500 forfeiture pursuant to consent decree for uploading no issues/programs lists during license term).

<sup>156</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.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Jane Halprin".

Jane Hinckley Halprin  
Administrative Law Judge