

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

In the Matter of)	EB Docket No. 07-13
)	
DAVID L. TITUS)	FRN No. 0002074797
)	
Amateur Radio Operator and Licensee of Amateur Radio Station KB7ILD)	File No. EB-06-IH-5048
)	

To: Marlene H. Dortch, Secretary
Attn: The Commission

**ENFORCEMENT BUREAU'S
OPPOSITION TO PETITION FOR RECONSIDERATION**

I. INTRODUCTION

The Petition for Reconsideration filed by David L. Titus should be denied because the Commission's ruling appropriately resolved the issues presented, and the Petition does not present any material errors, omissions or facts which would warrant a different result.

II. BACKGROUND

On November 6, 2014, the Commission released its ruling in *David L. Titus*, Decision, FCC 14-177 (rel. Nov. 6, 2014) ("Decision") reversing the Initial Decision of the Chief Administrative Law Judge,¹ revoking the captioned amateur radio license held by Mr. Titus, and terminating this proceeding. On December 5, 2014, David L. Titus ("Titus" or "Petitioner") filed a Petition for Reconsideration ("Petition") of the Decision.

¹ *David L. Titus*, Initial Decision, 25 FCC Rcd 2390 (ALJ 2010) ("Initial Decision").

III. DISCUSSION

The Commission has held that a petition for reconsideration is appropriate only when the petitioner demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters or the Commission determines that consideration of the facts is required in the public interest.² As discussed below, the Decision appropriately resolved the Exceptions presented, and the Petition has not presented any material errors, omissions or facts which would warrant a different outcome. Accordingly, the Petition should be denied.³

A. The Decision Comports with Applicable Procedural Rules

The Petition initially argues that the Decision should be vacated because the Commission did not rule on all key factual and legal issues in the underlying hearing.⁴ In support, the Petition

² See 47 C.F.R. § 1.106(c); *General Motors Corp. and Hughes Electronics Corp.*, Order on Reconsideration, 23 FCC Rcd 3131, 3137, para. 17 (2008); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (Enf. Bur. 2000) (citing *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)). See also *Ely Radio, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 7608, 7610, para. 6 (Enf. Bur. 2012) (providing standard of review for petitions for reconsideration).

³ As an initial matter, the Petition should be dismissed for relying on arguments not previously included in this proceeding. Section 1.106(c) of the Commission's rules provides that only under unusual circumstances, none of which is present here, may a party rely on facts or arguments not previously raised before the Commission. 47 C.F.R. § 1.106(c). The Petition seeks consideration of facts and arguments unsuccessfully raised earlier in Petitioner's untimely reply to the Bureau's Exceptions. Indeed, the Petition's fact-intensive narrative reads very much like the procedurally-defective reply to the Bureau's Exceptions that the Commission previously rejected. Mr. Titus briefly mentions in his Petition that Mr. Titus's sex offender status recently was reduced from Level 3 to Level 2. See Petition, at p. 11. This reclassification has no material impact on the Decision, given the Commission's pronouncement that its legal analysis "would not differ significantly if Titus were judged a Level 2 offender rather than a Level 3 offender." Decision, at n. 64. The Petition goes even further by challenging the Hearing Designation Order itself. See Petition, at pp. 9-10. Although Petitioner would prefer the Commission to conduct a broad review of the record at this stage, the Commission has no lawful obligation to do so, and Petitioner has not requested any special relief warranting such a departure from the Commission's procedural rules.

⁴ Petition, at pp. 1-3.

relies on Section 1.282 of the Commission's Rules⁵ which provides that a final order of the Commission shall recite findings of fact and conclusions upon all "material issues of fact, law, or discretion presented on the record." This argument lacks merit.

Section 1.282 must be read in context with Section 1.279 of the Rules, which provides that the Commission "may, in its discretion, limit the issues to be reviewed to those findings and conclusions to which exceptions have been filed"⁶ Thus, the Commission is not required to conduct an exhaustive evaluation of each and every factual finding and conclusion in the record below. Rather, it may in the exercise of its discretion review those portions of the Initial Decision which are the subject of any exceptions that may have been filed. To do otherwise would be administratively inefficient, particularly when various facts and conclusions reached in the Initial Decision are not contested.

In the instant case, the Bureau timely filed narrowly-tailored Exceptions to the Initial Decision⁷ asserting that the Presiding Judge had not considered all of the relevant offenses committed by Mr. Titus or given appropriate weight to the Seattle Police Department's assessment of Mr. Titus as a continuing risk to the community because of his status as a registered sex offender. The Bureau also correctly asserted that the Initial Decision gave undue weight to the opinion of Mr. Titus's paid expert (who conducted a very limited medical examination of Mr. Titus) and to the testimony of various character witnesses. Notably, Mr. Titus did not file exceptions to the Initial Decision which might have had the effect of expanding

⁵ 47 C.F.R. § 1.282.

⁶ 47 C.F.R. § 1.279.

⁷ Enforcement Bureau's Exceptions to Initial Decision, filed April 8, 2010 ("Exceptions").

the scope of the Commission's review of the Initial Decision. Nor did he timely file a reply to the Bureau's Exceptions.⁸

Since Section 1.279 affords the Commission the discretion to limit its decisions to arguments advanced in exceptions to a Presiding Judge's initial decision, and the Commission thoroughly considered the Bureau Exceptions in the instant case, it is plain that the Commission acted in a manner that was consistent with its obligations under Section 1.279. Accordingly, the claim in the Petition that the Commission violated its own rules should be rejected.

The Petition also claims that the Commission violated the Administrative Procedure Act ("APA") by failing to conduct a more extensive review of the evidentiary record.⁹ However, the APA, like the Commission's rules, requires a reviewing body to examine each "finding, conclusion *or* exception presented."¹⁰ (emphasis added). In this case, the Commission thoroughly reviewed each of the Bureau's Exceptions and was under no obligation to engage in a protracted examination of every finding and conclusion below. Commission and court precedent support this approach.¹¹

⁸ Mr. Titus filed a pleading in this proceeding entitled "Reply to Exceptions to Initial Decision" on April 26, 2010. The Commission disallowed that filing because it was untimely. *See* Decision, at para. 7.

⁹ *See* Petition at pp. 1-2.

¹⁰ 5 U.S.C. § 557(c)

¹¹ *See Proposals to Reform Commission Comparative Hearing Process to Expedite the Resolution of Cases*, Notice of Proposed Rulemaking, 5 FCC Rcd 4050, 4054, para. 32 (1990) (APA requires ruling body to rule on each exception presented); *Colonial Communications*, Memorandum Opinion and Order, 5 FCC Rcd 3797, para. 3 (Rev. Bd. 1990) (the Commission's rules and APA require the Commission to rule on all decisionally significant exceptions, and the Commission has the discretion to dismiss remaining exceptions without specific reasons); *see also Citizens State Bank of Marshfield, Mo. v FDIC*, 718 F 2d 1444, 1446 (8th Cir. 1983) (APA requires FDIC to rule on each exception presented).

B. The Commission Properly Interpreted Its Character Policy Statements

The Petition also argues that the Commission violated its own policy statements on the factors that should be considered in evaluating a licensee's character¹² by finding that the Initial Decision failed to consider Mr. Titus's two juvenile adjudications of sexual misconduct.¹³ The Petition claims, that under the Character Policy Statements, the Initial Decision properly discounted the significance of his two juvenile adjudications because they were not technically "felonies" about which the Commission should be concerned, and they occurred a long time ago.¹⁴

As the Commission properly explained in its Decision, under its Character Policy Statements, evidence of any conviction constituting a felony – regardless of when the adjudication occurred -- is relevant in evaluating a licensee's character.¹⁵ In determining whether an adjudication is a felony for the purpose of evaluating a licensee's character, the Commission looks to whether the behavior is punishable by death or imprisonment for more than one year.¹⁶ It is uncontested that Mr. Titus's two juvenile adjudications satisfied this standard, given that he was confined for more than one year for each of his youthful offenses.

The Decision reached an appropriate balance in considering the weight to be placed on the two juvenile offenses. The Commission clearly articulated that Mr. Titus's juvenile offenses served to demonstrate that his single adult conviction was not an isolated offense, thereby

¹² See *Character Qualifications*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986) (*1986 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*), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992) (collectively, "Character Policy Statements").

¹³ Petition, at pp. 3-9.

¹⁴ *Id.*

¹⁵ Decision, at p. 6.

¹⁶ *Id.*

making it “all the more egregious and disqualifying.”¹⁷ Additionally, the Commission found in the alternative that his adult conviction, standing alone, was disqualifying without any reliance on his two juvenile adjudications.¹⁸ Therefore, the Commission’s consideration of Mr. Titus’s juvenile offenses plainly did not constitute a basis for reversible error.

C. The Commission Appropriately Found Mr. Titus Unqualified

The Petition differs with the Commission in its evaluation of the record in this proceeding.¹⁹ For example, the Petition questions the credibility of Police Detective Robert Shilling and the deference that the Commission afforded Detective Shilling’s testimony.

The Petition fails to demonstrate that the Commission abused its discretion. Mr. Titus stipulated that Detective Shilling was an expert in the management of sex offenders generally, and the individual in charge of the police committee that supervises registered sex offenders living in Seattle, in particular.²⁰ The Presiding Judge in this proceeding accepted Detective Shilling as an expert in this critical area.²¹

The Petition further claims that the Decision should be vacated because it “ignor[ed] the multitude of record evidence that Mr. Titus has been rehabilitated and that he has no pedophilic tendencies.”²² The Petition specifically suggests that the Commission disregarded the testimony of key witnesses, such as Dr. Douglas Allmon, Mr. Titus, and various character witnesses.²³

¹⁷ *Id.*

¹⁸ Decision, at p. 5 (“Indeed, even without considering Titus’s two juvenile convictions, we believe Titus’s adult conviction, tied to the State of Washington’s 2004 re-classification of Titus as a high-risk sex offender, would be sufficient to justify revocation of his license.”).

¹⁹ Petition, at pp. 10-18.

²⁰ Tr. 911-12.

²¹ *Id.*

²² Petition, at p. 2.

²³ *Id.* at pp. 21-23

This argument lacks merit. The Commission stated very clearly in its Decision that it conducted “a review of the record.”²⁴ There is no reason to believe the Commission’s review of the record was anything but robust. Moreover, the Commission specifically acknowledged having considered the testimony of Dr. Allmon, Mr. Titus, and several character witnesses – the very individuals whose testimony Mr. Titus claims the Decision ignored.²⁵

Petitioner may disagree with the Commission about the weight that it afforded the testimony of these witnesses and the significance that it placed on the testimony of Detective Robert Shilling about Mr. Titus’s risk to the community, but that is not sufficient for reversal. The Commission did not abuse its discretion or otherwise commit reversible error when it determined, based on the totality of the record, that Mr. Titus was not rehabilitated.

The Petition also suggests that the Commission improperly restricted the authority of the Presiding Judge.²⁶ Although a Presiding Judge retains broad discretion to adjudicate licensing and basic qualifying issues, the Decision properly held that the Presiding Judge in this instance erred by substituting his own limited expertise or experience for that of local law enforcement authorities in determining the risks that a registered sex offender may pose to the community.²⁷ The Commission acknowledged that many factors are considered when determining whether a convicted sex offender has been rehabilitated, including medical evaluations, character testimonials, and an individual’s expression of contrition.²⁸ However, the Commission made

²⁴ Decision, at para. 10.

²⁵ *Id.* at para. 18.

²⁶ Petition, at p. 11 (“Indeed, the Decision enacts an irrebuttable presumption hold that the ALJ had no authority to evaluate the reliability of the WASOFT.”).

²⁷ Detective Shilling testified that in his opinion, based on the “totality of the circumstances,” his years of experience managing sex offenders and evaluating their potential risk to the community, Mr. Titus presented a high risk. Tr. 941-44. The Commission not only was entitled to give great weight to Detective Shilling’s expert opinion, it was entirely appropriate to do so.

²⁸ *See* Decision, at para. 18.

clear that the determination by state authorities on the risks that a convicted sex offender may pose to the community is perhaps the most reliable barometer of whether the individual has been rehabilitated.²⁹ Thus, the Commission was well within its authority to conclude that the Presiding Judge should not contravene the judgment of those authorities or “undermine their primary authority to evaluate [a felon’s] risk to the community.”³⁰

Finally, the Decision confirmed that there exists a very high bar for a licensee or applicant who is an adjudicated sex offender to demonstrate that he has been rehabilitated and is qualified to be or remain a Commission licensee. This is particularly so if the felony for which he or she was convicted is “shockingly evil” as it was in this case.³¹ Relying on its Character Policy Statements, the Commission emphasized that a particularly egregious crime committed by a convicted sex offender not only *may* be disqualifying, but “is *prima facie* disqualifying.”³²

²⁹ The Petition characterizes Mr. Titus’s evidence of rehabilitation as un rebutted. However, there is extensive evidence undermining his claimed rehabilitation, including: (a) the Seattle Police Department’s risk assessment; (b) Mr. Titus’s admissions that he had not engaged in treatment as recommended by his doctors; and (c) recent incidents by Mr. Titus documented in official police reports (one violent altercation after a traffic accident and one incident in which he dissembled to police about what he was doing in a closed park bathroom in the middle of the night and refusing to identify the youth he intended to meet).

³⁰ Decision, at para. 18.

³¹ *Id.* at para. 11.

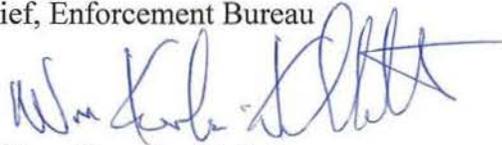
³² *Id.* The Commission noted that misconduct of the kind committed by Mr. Titus was disqualifying “[e]specially in light of the known risks of amateur radios in the hands of sex offenders” *Id.*

IV. CONCLUSION

The Petition fails to present any basis for vacating the Commission's decision in this proceeding. The Commission complied with its rules and the APA with respect to reviewing the Bureau's Exceptions; the Commission made pertinent findings on all decisionally significant matters raised in the Exceptions; it considered all of Mr. Titus's misconduct consistent with its Character Policy Statements; and it afforded appropriate weight to the record evidence.

Accordingly, the Bureau requests that the Commission deny Mr. Titus's Petition and affirm its Decision.

Respectfully submitted,
Travis LeBlanc
Chief, Enforcement Bureau



William Knowles-Kellett
Attorney, Investigations and Hearings Division



Judy Lancaster
Attorney, Investigations and Hearings Division

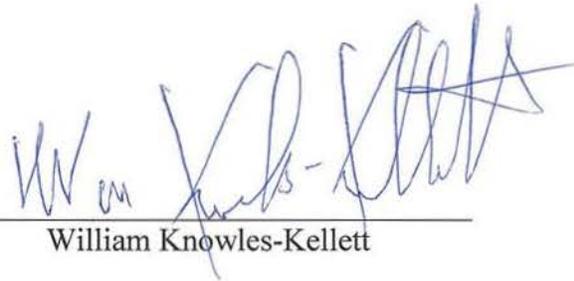
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554
(202) 418-1420

December 15, 2014

CERTIFICATE OF SERVICE

William Knowles-Kellett, counsel for the Enforcement Bureau, certifies that he has, on this 15th day of December, 2014, sent by first class United States mail a copy of the foregoing “Enforcement Bureau’s Opposition to Petition for Reconsideration” to:

George L. Lyon, Jr. Esq.
1929 Biltmore Street N.W.
Washington, DC 20009
Email glyon@fcclaw.com
Counsel to David L. Titus



William Knowles-Kellett