

Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

David L. Titus, by counsel, and pursuant to FCC Rule Section 1.106, replies to the Enforcement Bureau’s December 15, 2014 opposition (“Opposition”)¹ to his December 5, 2014 petition for reconsideration (“Petition”) of the Commission’s November 6, 2014 Final Decision, FCC 14-177 (“Decision”) in this proceeding, reversing the March 9, 2010 Initial Decision of Chief Administrative Law Judge Richard Sippel, FCC 10D-01, 25 FCC Rcd 2390. (“ID”).

Introduction.

As shown below, the opposition fails to rebut Mr. Titus’s showing that the Decision materially erred in finding him unqualified to hold the amateur license he has held without incident since he was 14 years of age. Specifically, the Decision departs from established policy and precedent, failed to make findings and conclusions on material issues in violation of FCC rules and the Administrative Procedures Act, and ignored the record evidence that David L. Titus is fully fit to remain a Commission amateur radio licensee.

¹ For reasons not at all apparent, page numbering of the Bureau’s Opposition begins at the *second* page of text with the number “1.” For sake of clarity, Mr. Titus will follow the Bureau’s unconventional numbering scheme in referencing its arguments.

Discussion.

In a footnote, the Bureau claims Mr. Titus failed to previously raise before this agency the points discussed in his Petition. Opposition at 1, n.3. This is demonstrably false. The issue of the Decision's failure to make findings and conclusions on material issues could not have been raised earlier in this proceeding, because the Commission did not fail to follow the dictates of Section Rule §1.282(b)(1) and the Administrative Procedures Act, 5 U.S.C. §1007(b), until it actually released its Decision. So on this point the Bureau cannot possibly be right.

In regard to the failure to make necessary findings and conclusions, the Bureau argues the Decision did indeed make findings and conclusions on its exceptions, and that was all it was required to do. In the Bureau's words, the Commission was not required to make a wide ranging review of the record. Opposition at 2. That argument is just too simple. Obviously, the Decision was required to rule on the Bureau's exceptions and it did. But in doing so it was required to make findings and conclusions on the material evidence of record concerning those exceptions. This is what it did not do. The Commission was not within its discretion to ignore evidence of record that showed the Bureau's exceptions to be without merit.² The Commission, in conducting a de novo review, was required to actually look at all the evidence relevant to the Bureau's exceptions and make appropriate findings and conclusions. It plainly did not.

Among the key deficiencies of the Decision was its failure to evaluate the rehabilitation testimony of Mr. Titus, Dr. Allmon and Mr. Titus's ten character witnesses and to consider Mr. Titus's unblemished record of compliance and the long period since his conviction. The Decision, to be sure, acknowledged that these witnesses presented testimony, yet it made no

² The Bureau states at its Opposition, at 8, that "there is no reason to believe the Commission's review of the record was anything but robust." On the contrary there is everything to believe that the Commission's review of the record was lacking given its failure to make key factual findings.

factual finding or conclusions giving reasoning for rejecting any of their rehabilitation testimony. Rather, the Decision simply decided that notwithstanding this evidence it would credit the highly questionable opinion of Mr. Shilling, who based his conclusion on an evaluative tool as to which he testified that he does not even support its use. Tr. 801. This was in spite of the ALJ's negative demeanor findings concerning Mr. Shilling. ID at para. 11. Although the Commission is free to reject testimony it finds unreliable or lacking in credibility, it has to explain in a reasoned decision why it rejected such testimony and especially as to demeanor findings. This it did not do and cannot do in light of the state of the record in this proceeding. It cannot simply ignore testimony and demeanor findings because they conflict with its desired outcome, yet again this is exactly what it appears to have done. This was error and requires vacation of the Decision.

As to the issue of what Mr. Titus previously raised before this agency, Mr. Titus previously raised each of the other matters on which his Petition is based. Mr. Titus raised the point that Mr. Shilling's testimony totally undercut his classification of David Titus as either a Level 2 or Level 3 sex offender. Mr. Titus's February 27, 2009 Proposed Findings of Fact and Conclusions of Law pointed out that Mr. Shilling admitted that the initial Level 2 determination lacked any scientific basis. *See* Titus Conclusions at para. 7. Despite Mr. Shilling's quest for scientific means of evaluating sex offenders, he did not use the WaSOST inventory when he unilaterally raised Mr. Titus's level to a "3" in 2004. *Id.* He only used the WaSOST when preparing to testify at the revocation hearing. *Id.*

Moreover, Mr. Titus previously explained in detail why the WaSOST was not a reliable indicator of the likelihood of re-offense years after an offender is released from confinement, a fact confirmed by Mr. Shilling himself. Tr. 801, 814, 843-44. As set forth in his proposed findings and conclusions, Mr. Titus explained that the WaSOST evaluation Mr. Shilling prepared

could not be credited for any one of several reasons. First, it was clear, as the judge noted, from the context that Mr. Shilling prepared the WaSOST on Mr. Titus merely to support his previous seat of the pants conclusion that Mr. Titus was at a high risk of reoffense. ID at para. 12; Tr. 885-86. Given that, it could hardly be considered that Mr. Shilling was an objective scorer. Second, the WaSOST was *specifically formulated to assess the risk of re-offense when a sex offender is released from confinement*, not 16 (now some 20) years after the individual has lived an offense free life. Tr. 816-17. Third, Mr. Shilling specifically testified that evaluations of sex offenders should be made by professionals such as psychologists, psychiatrists or sex offender researchers. Despite his experience with respect to community notification programs, he had none of these credentials. Fourth, Mr. Shilling candidly admitted there are serious problems with the WaSOST. These include that it is predominately based on the MnSOST and that Dr. Epperson who created the MnSOST: (1) does not support its continued use; (2) does not support the tool any longer; and (3) has not cross validated the tool. Indeed Mr. Shilling testified he does not support the use of the WaSOST. Tr. 801 (stating he very “very vocal” in opposing its use). Fifth, the Washington State Institute for Public Policy (“WSIPP”), an arm of the State of Washington, studied the WaSOST and found it wanting in several ways, including that the notification and assessment scores had little or no accuracy in predicting recidivism and the notification levels did not classify offenders into groups that accurately reflect their risk for reoffending. Titus Exhibit 17. Sixth, and most distressing, was Mr. Shilling's and the Bureau's failure to acknowledge these documented shortcomings of the WaSOST in the Bureau’s direct case. At the very least this was an omission of a material fact bearing on the credibility of Mr. Shilling’s conclusions which candor required he and the Bureau to disclose. This omission further, however, suggested a distinct bias against Mr. Titus, and thus raised serious questions

concerning Mr. Shilling's credibility, matters appropriately considered by the ALJ. *See* Titus Proposed Findings and Conclusions, paras. 29-38; Conclusions at para. 8; ID at paras. 11-12. Yet, the Decision makes no findings or conclusions on the matter.

The need to make findings and conclusions was critical since they go directly to Mr. Titus's claim of rehabilitation. They include the issue of Mr. Titus's credibility. They include the credibility of Dr. Douglas Allmon, an expert psychologist who specializes in sex offender treatment and evaluation, who testified that Mr. Titus has no pedophilic tendencies. They include the credibility of the widespread group of character witnesses who testified as to Mr. Titus's reputation in the community and his sizable contributions to amateur radio. Even more fundamentally, and as will be discussed in more detail below, the Decision makes no findings as to how Mr. Titus's nearly 22 year-old felony conviction renders him unqualified to be a Commission licensee. Because the Decision fails to make statutorily required findings with respect to these and other matters, the Decision must be vacated.³

The Bureau nevertheless blithely contends there are no material errors in the Decision. Opposition at un-numbered first page. Yet, the Bureau ignores the error Mr. Titus pointed out concerning the Decision's conclusion that the Chief ALJ failed to consider the two juvenile adjudications of sexual misconduct of Mr. Titus. Decision at paras. 10-12. Petition at 3-6.

The Bureau does however dispute the Petition's showing that those adjudications should not have been considered under the Commission's Character Policy Statements⁴ because they were more than 10 years prior to release of the show cause order. Opposition at 4-5. (Indeed, as

³ *See, e.g., Puerto Rico v. Federal Maritime Bd.*, 288 F.2d 419 (D.C. Cir. 1961); *Greensboro-High Point Airport Authority v. CAB*, 213 F.2d 517, 521-22 (D.C. Cir. 1956).

⁴ *See Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986), *recon. dismissed/denied*, 1 FCC Rcd 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992).

the Petition pointed out, Mr. Titus's sole felony conviction was well beyond the Commission's 10 year limitation period, a matter the Bureau also failed to address. Petition at 9-10. *See* Opposition at 1, n. 3, noting the Petition explained that due to his sole felony conviction occurring more than 10 years prior to designation, that the proceeding should not have been designated for hearing at all, but not addressing the point.) In doing so the Bureau misstates the Commission's Character Policy Statements and the Decision saying "evidence of any conviction constituting a felony – *regardless of when the adjudication occurred* – is relevant in evaluating a licensee's character." Opposition at 4 (emphasis supplied). Neither the Character Policy Statements, nor even the Decision, say this however. *See Id.*; Decision at para. 12.

In the 1986 Character Policy Statement, the Commission specifically noted that the passage of substantial time since the relevant misconduct was itself indicative of rehabilitation (although additional evidence of rehabilitation would still be relevant) and immediately thereafter set forth the 10 year limitation period on consideration of convictions. 1986 Character Policy Statement, at 102 F.C.C.2d at para. 105. Yet, the Bureau totally overlooks this point. The Bureau points to nothing in the subsequent modifications to the Character Policy where this statement of policy is questioned or modified, much less overruled.⁵

Even more astonishing is the Bureau's failure to address the Commission's 1998 decision in *Contemporary Media, Inc.*, 13 FCC Rcd 14437, which came eight years after the 1990 Policy Statement upon which the Bureau and the Decision rely. As the Petition pointed out, that case made crystal clear that the 10 year limitation period was not abrogated by the 1990 Policy Statement or any decision or order thereafter. At footnote two in that decision, the Commission

⁵ Indeed, the Bureau previously conceded that the 1986 Character Policy held that misconduct should not be considered if it fell outside a ten-year period. Exceptions at 7. *See also* ID, at paras. 19, 21, 24. The Bureau's defense of the Decision in this regard is thus plainly disingenuous.

explained, “The crimes [in issue in that proceeding] were well within the ten year limitation applied by the Commission... Also Rice’s convictions were one year prior to designation.” 13 FCC Rcd at 14445 n.2.⁶ The Commission’s reiteration of the efficacy of the 10 year limitation period completely eviscerates both the Bureau’s contention that all felonies should be considered, no matter how remote in time, and the Decision’s determination to rely on juvenile adjudications occurring 24 plus years ago, and well more than 10 years prior to designation of this proceeding for hearing. It further shows again that the Bureau’s designation of this proceeding for hearing violated established Commission policy.

As the Petition pointed out, the Decision’s ad hoc departure from precedent is unexplained and irrational.⁷ It reinforces the plain conclusion that the Decision is a result-oriented determination based on an emotional revulsion to Mr. Titus’s long past conduct (now some 22 years distant), and not an objective determination of the record, the evidence contained therein, established Commission policies or the ultimate question of whether given Mr. Titus’s unblemished record of compliance with the Commission’s rules and policies, he can be expected to continue to comply with those rules and policies. Failure to vacate the Decision would undoubtedly result in reversal by the Court of Appeals for unexplained departure from precedent. The Bureau’s response to this argument in the Petition, however, amounts to crickets chirping.

⁶ It is also noteworthy that the Court of Appeals affirmed the Commission’s decision to revoke the license at issue in *Contemporary Media* by relying on the concurrent finding that the licensee had engaged in misrepresentation. *Contemporary Media, Inc. v. FCC*, 214 F.2d 187, 193-94 (D.C. Cir. 2000). The court contrasted that case with *Wilkett v. ICC*, 710 F.2d 861 (D.C. Cir. 1983), where it reversed a license revocation based on the sole proprietor’s second degree murder conviction and conviction for conspiracy to distribute a controlled substance.

⁷ As now Chief Justice Roberts pointed out in *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003), “the core concern underlying the prohibition of arbitrary and capricious agency action is that agency ‘ad hocery’ is impermissible.” He went on to note that “where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.” *Id.* at 1130.

Likewise, the Bureau is silent on Mr. Titus's point that while the Decision purports to place great reliance on Washington State's alleged determination of Mr. Titus's sex offender status, now a level 2, and not a level 3, the Decision ignored Washington State law, R.C.W. §13.04.240 (2006) which clearly provides that, "An order of court adjudicating a child delinquent or dependent under the provisions of this chapter *shall in no case be deemed a conviction of crime.*" (Emphasis supplied.) See Petition at 3-4. Here again, the Decision makes no findings or conclusions concerning this critical element of Washington State law. The Bureau has pointed to no Commission decision holding that juvenile proceedings are considered under the Character Policy Statement, and Mr. Titus has been unable to find any.⁸

Nor does the Bureau address Mr. Titus's argument that by foreclosing the Chief ALJ from questioning the risk assessment Mr. Shilling made as to Mr. Titus, the Decision enacts an irrebuttable presumption⁹ of the validity of that assessment, and thus denies Mr. Titus his due process right to a full and fair hearing on the subject of whether the Commission can have confidence that in using his amateur license he will follow the Commission's rules and policies, something he has done without question since he first obtained his amateur license at 14 years of age. Again the Bureau's response is chirping crickets.

Finally, the Bureau makes no response to Mr. Titus's point that there has never been any complaint whatsoever concerning his amateur radio operation. Petition at 19. Nor does the

⁸ Finally, the Bureau notes, but fails to discuss Mr. Titus's point that the designation of this proceeding for hearing in the first place (by the Bureau and not the Commission) was plainly contrary to the Character Policy Statement's 10 year limitation period inasmuch as Mr. Titus's sole felony conviction occurred 14 years prior to the issuance of the show cause order.

⁹ Such irrebuttable presumptions have been found to violate due process in a variety of circumstances. See, e.g., *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926); *Heiner v. Donnan*, 285 U.S. 312 (1932); *Wieman v Updegraff*, 344 U.S. 183 (1952); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973); *U.S. Dept. of Agr. v. Murry*, 413 U.S. 508 (1973); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974).

Bureau address the deficiency in the Decision where it omits to make any findings or conclusions concerning Mr. Titus's exemplary record of complying with the Commission's rules. *See Id.* at 24 n. 18. He has never been cited for any violation of the FCC's rules. There was no evidence that Mr. Titus has ever used amateur radio in an attempt to attract children or commit any crime. *Id.* at 19. The point of this proceeding is not to punish Mr. Titus for acts committed more than 20 years ago. It is to determine whether he can be trusted to be candid and obey the Commission's rules, regulations and policies concerning his amateur radio license. Petition at 19, citing *1990 Character Policy Statement*, 5 FCC Rcd at 3252 (para. 3). At no point in this proceeding has the Bureau shown – nor does the Decision show – a nexus between Mr. Titus's past misconduct and the question whether he can be expected to operate his amateur radio station in the public interest. That is a fatal deficiency of the Decision.

The only thing even remotely relevant to this issue is the Bureau's claim – that no one disputes – amateur radio is popular among minors. That is not surprising since minors engage in most conduct in which adults also engage. They ride the bus, go to the library, go to parks, travel on airplanes, go to movies, and use the Internet. Amateur radio is not a secretive hobby. Amateurs broadcast without encryption. Anyone on the frequency can hear them. Amateur radio is self-policing. If someone were attempting to contact children for immoral purposes, amateur radio is the last medium they would want to use because they could not do so in private. Contrasted that with the Internet, which Mr. Shilling testified is a substantial source of contact between sex offenders and their victims, unlike amateur radio. Tr. 755, 758-63. The Decision failed to show a nexus between Mr. Titus's previous misconduct and his amateur radio license. Merely asserting the uncontested fact that amateur radio is popular with minors is insufficient to show a nexus. Decision at para. 11. The Decision must therefore be vacated and reversed.

Conclusion.

Review of the Bureau's opposition demonstrates it has not rebutted Mr. Titus's showing of critical legal and factual errors in the Decision. For this reason, the Decision should be vacated and reversed. One final note is appropriate, however. Throughout this proceeding the Bureau has sought to meet its heavy burden of proof principally by relying on prejudice, the natural revulsion one would have to any sex offense committed against a minor, and the offender. That is the very type of prejudice which Mr. Shilling himself has repeatedly warned against. Tr. 736-38, 750-52. Putting prejudice and unsupported fear aside, the record does not show that Mr. Titus holding an amateur license is a threat to children or anyone else; and it certainly does not show that Mr. Titus cannot be trusted to deal openly and honestly with the Commission, which is the core finding the Commission must affirmatively make to support revocation of Mr. Titus's license. Accordingly, the Decision must be reversed and vacated and the show cause order seeking to revoke Mr. Titus's amateur operator's license, must be dismissed.

For all of these reasons, the Decision should be reconsidered and either vacated or reversed and the Initial Decision, FCC 10D-01 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply to Exceptions to Initial Decision was served by first class mail (or email as may be shown below), postage prepaid, on or before the 24th day of December, 2014, to the following:

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