

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

David L. Titus

EB Docket No. 07-13

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

DAVID L. TITUS

Amateur Radio
Operator and
Licensee of
Amateur Radio
Station
KB7ILD
Seattle, Washington

EB Docket No.
07-13

FRN No.
0002074797

File No.
EB-06-IH-5048

VOLUME II

Pages 48-169

Federal Communications Commission
Hearing Room TW-A363
445 12th Street, S.W.
Washington, D.C.

Wednesday, September 19, 2007
9:30 a.m.

BEFORE:

RICHARD L. SIPPEN
Chief Administrative Law Judge

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:43 a.m.

3 ADMIN. JUDGE SIPPEL: I'm just
4 going to ask counsel to identify themselves
5 again on the record. And you identify
6 yourself, and we'll go forward.

7 Let's start with Mr. Schonman.

8 MR. SCHONMAN: Good morning, Your
9 Honor.

10 Gary Schonman, and William
11 Knowles-Kellett on behalf of the Chief
12 Enforcement Bureau.

13 ADMIN. JUDGE SIPPEL: Thank you.

14 MR. MARSHALL: Your Honor, this is
15 David Marshall on behalf of David Titus.

16 ADMIN. JUDGE SIPPEL: Thank you.

17 Mr. Marshall, can you hear all
18 right?

19 MR. MARSHALL: I can. I can hear
20 you quite well, Your Honor. Mr. Schonman was
21 a little faint. I heard everything he said,
22 but if he's any softer or any further from the

1 mouthpiece, I will miss something I'm sure.

2 ADMIN. JUDGE SIPPEL: Okay. I'll
3 just ask him to speak up a little bit.

4 Okay. I've got a list of things,
5 and you all have filed your status reports,
6 which I've reviewed those. And it looks like
7 we're getting some place. I mean, when I say
8 getting someplace, I mean it looks like things
9 are narrowing down, and I certainly can make
10 some calls, I think, on what is relevant, what
11 needs to be done, and what the parties should
12 do, with the exception of the suggestion of an
13 expert witness.

14 Can you tell us, is there anymore
15 to tell us on that one? I mean -- go ahead.

16 MR. MARSHALL: Well, Your Honor,
17 first of all before I go further, I should say
18 that because I've been traveling since the
19 status reports were due, I have not seen the
20 Enforcement Bureau's status report. I've not
21 been able to connect to the internet to view
22 it by e-mail.

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1 ADMIN. JUDGE SIPPEL: Okay. Well,
2 that's because these were filed yesterday.

3 And as I said, I gave those dates
4 for filing on the supposition that we were
5 going to have this conference tomorrow. We
6 did change it, primarily to accommodate you,
7 which is okay. But one of the Bureau counsel,
8 can you kind of paraphrase your status report
9 so I don't have to read it to them?

10 MR. SCHONMAN: Sure. I can do
11 that.

12 By the way, we did e-mail a copy
13 of it to Mr. Marshall's office yesterday, when
14 we filed it.

15 I prefer to just read it rather
16 than paraphrase, so I get it right.

17 ADMIN. JUDGE SIPPEL: Okay. Well,
18 get it to the point that where we --

19 MR. SCHONMAN: I'll start with
20 paragraph two after the preliminary paragraph.

21 ADMIN. JUDGE SIPPEL: Thank you.

22 MR. SCHONMAN: In the Bureau's

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1 status report filed September 18, the Bureau
2 stated in paragraph 2, "The Bureau is actively
3 engaged in the process of amassing evidence to
4 meet its burdens at hearing. To this end, the
5 Bureau has, among other things, noticed David
6 Titus to be deposed on Thursday, September 27,
7 2007, in the Seattle area, and has made
8 necessary arrangements for that trip."

9 Paragraph 3, "David S. Marshall,
10 Mr. Titus' counsel" -- and there's a footnote.
11 The footnote reads, "The Law Office of David
12 S. Marshall entered an appearance on behalf of
13 Mr. Titus in March 2007, shortly after this
14 case was designated for hearing."

15 And the text continues that,
16 "David Marshall, Mr. Titus' counsel informed
17 the Bureau on Friday, September 14, 2007, less
18 than two weeks before Mr. Titus' deposition in
19 Seattle, that Mr. Titus is considering calling
20 an as-yet unidentified expert witness from the
21 Seattle area to testify at the hearing on Mr.
22 Titus' behalf. Clearly the Bureau would

1 expect to have the opportunity to depose such
2 witness (and all other witnesses who Mr. Titus
3 intends to call to provide direct testimony)
4 prior to hearing. The Bureau believes it
5 would be an inefficient use of scarce
6 Commission resources not to arrange for all
7 such depositions in the Seattle area during a
8 single trip. Thus, the Bureau very
9 reluctantly may be compelled to delay Mr.
10 Titus' deposition, currently scheduled for
11 next week, until such time as it is also able
12 to depose Mr. Titus' expert and other
13 witnesses, upon whom Mr. Titus intends to
14 rely."

15 Footnote 2, "Because the
16 government's fiscal year begins on October 1,
17 2007, rescheduling the Bureau's trip to
18 Seattle may be impacted by the availability of
19 funding under a new budget."

20 Continuing in the text, "The
21 Bureau notes that such delay in discovery
22 could necessarily delay the commencement of

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1 the hearing in this proceeding."

2 Paragraph 3, "The Bureau and Mr.
3 Marshall are engaged in discussions to craft
4 an appropriate protective order so that the
5 Bureau may question Mr. Titus about certain
6 documents of a sensitive nature at his
7 deposition."

8 Footnote 3, "While Mr. Titus would
9 ordinarily be restricted to using the Freedom
10 of Information Act to request copies of
11 Commission records, in this case, due to the
12 sensitivity of some of the documents, the
13 Bureau would prefer to produce the documents
14 pursuant to an appropriate protective order."

15 And that's the end of the
16 document.

17 ADMIN. JUDGE SIPPEL: All right.

18 MR. SCHONMAN: Thank you.

19 ADMIN. JUDGE SIPPEL: Now, that
20 brings you up to speed, Mr. Marshall.

21 I've got some thoughts about these
22 depositions and all. But my general approach

1 to this is that I don't want a witness being
2 put on the stand who hasn't been deposed or
3 for whom the opportunity to depose has not
4 been given. And that means adequate notice.

5 Even with the expert, a brief
6 summary of what the witnesses are going to
7 testify to would be served, and this is by
8 all parties, would be served in advance so
9 that you can make a decision, then, as to
10 whether or not you want to take a deposition.

11 In other words, who the witness
12 is, what the witness' identity, background, et
13 cetera, and then what the witness is going to
14 testify to. In other words, a proffer.

15 It seems to me it's a much more
16 useful way to, first of all, to make a
17 decision as to whether or not you want to
18 depose, and then secondly make the deposition.

19 Having said all of that, let me
20 back up again to my first question about the
21 expert. Is that still extant? Is that still
22 under consideration?

1 MR. MARSHALL: It is, Your Honor.
2 And I'm looking -- the big factor -- the
3 biggest question in deciding whether to call
4 an expert witness is simply whether David
5 Titus can afford it.

6 This litigation is tremendously
7 expensive for him because of the -- well,
8 legal work is always expensive. But because
9 of the geographic challenges here, it's a very
10 difficult litigation for him to carry on.

11 And I'm looking forward this
12 morning to getting some guidance from the
13 Court on how an expert witness might testify
14 at the hearing. I understand that the way the
15 hearing would proceed is that direct testimony
16 is submitted in writing, and then the party
17 against that testimony as provided has the
18 opportunity to require the witness to appear
19 for cross examination.

20 I'm wondering whether that
21 appearance can be in the form of a video
22 deposition or telephone testimony. I'm

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1 wondering whether it might be in any form
2 other than personal appearance before Your
3 Honor. And if it does need to be through
4 personal appearance before Your Honor, then
5 I'm wondering -- I say this with some
6 hesitation because I suspect it's not your
7 normal course -- but I'm wondering whether the
8 entire hearing might be held at the FCC office
9 in Kirkland, Washington. Because I think
10 that's where virtually all, if not every
11 single one of the witnesses, will be -- that
12 is to say in the Seattle area.

13 ADMIN. JUDGE SIPPEL: Well, I
14 don't see this, what you've outlined, as being
15 a basis for the Commission undertaking that
16 burden.

17 What may be of equal importance is
18 the fact that the budget is extremely tight,
19 and we might have a problem justifying doing
20 that to the people who have the purse strings,
21 not to reviewing authorities. But in any
22 event, I think there's got to be a way that we

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1 can handle this.

2 Let me ask you this. If we agree
3 on some kind of a procedure, are you then
4 prepared to say this morning that you're going
5 to get the expert?

6 MR. MARSHALL: I'm not prepared,
7 Your Honor, because I still have to sit down
8 with Mr. Titus. I mean, we have to talk to
9 experts. We have to add up the nickels and
10 dimes and see whether it's doable. So I'm
11 sorry, but I cannot tell you this morning in
12 any event.

13 ADMIN. JUDGE SIPPEL: You don't
14 have an expert in mind then?

15 MR. MARSHALL: I have one in mind.
16 Yes. I have more than one in mind. I guess
17 that's the best answer to the question. I
18 have not settled on one whom I would
19 necessarily use if the costs could be covered.

20 ADMIN. JUDGE SIPPEL: Yes. Well,
21 okay. Well, that's an issue off the record.
22 That's between you, the doctor, and Mr. Titus

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1 -- or the expert rather and Mr. Titus.

2 All right. Well, let me ask the
3 Bureau counsel then if they have any objection
4 to the procedure proposed by Mr. Marshall.
5 That would be a videotaped conference, but we
6 would also have a written record. Is that
7 correct? It would be a transcript as well as
8 a video?

9 MR. MARSHALL: Yes, Your Honor.

10 ADMIN. JUDGE SIPPEL: Any
11 objection to that?

12 MR. SCHONMAN: Well, yes, Your
13 Honor. The Bureau would very strongly oppose
14 the use of a videoconference to cross examine
15 any of the witnesses, especially an expert
16 witness.

17 But I have some questions that I'd
18 like to ask the Court to ask Mr. Marshall.
19 What is the nature of the expert witness that
20 he's considering bringing in? I'm assuming
21 that it's an expert in the area of
22 rehabilitation. But that's just an assumption

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1 on my part.

2 ADMIN. JUDGE SIPPEL: Well, those
3 questions are irrelevant even for this
4 morning. I was waiting for that. I was
5 trying to first get to the point of whether or
6 not we have a door for the witness to come in.
7 I mean, if we can't agree on how we're going
8 to do it, and he can't afford him, then that
9 creates a little wrinkle.

10 MR. SCHONMAN: Well -- and let me
11 share with you.

12 If we're not going to address now
13 the nature of the expert witness, then I'm
14 going to go with my assumption that this is
15 probably a witness who would testify about Mr.
16 Titus' rehabilitation.

17 That being the case, that witness
18 would be a critical witness on behalf of Mr.
19 Titus. And under those circumstances, that
20 individual's testimony would be critical. It
21 could be determinative in this case. It could
22 be dispositive.

1 Under those circumstances, I would
2 insist that we have the opportunity to cross
3 examine the individual in person in this
4 courtroom, and also that Your Honor have the
5 opportunity to observe the witness and his or
6 her demeanor.

7 ADMIN. JUDGE SIPPEL: If the
8 witness were being deposed in a videotape,
9 wouldn't I have a chance to observe demeanor
10 that way?

11 MR. SCHONMAN: If the witness is
12 deposed, the Bureau would notice that
13 individual for deposition, and we would travel
14 out to the Seattle area, assuming he or she is
15 there. We would travel out to the Seattle
16 area and depose that individual at
17 approximately the same time that we're
18 deposing Mr. Titus.

19 As we said in our --

20 ADMIN. JUDGE SIPPEL: Right. No.
21 I understand that. I can arbitrate the timing
22 and all that kind of business. But I'm trying

1 just to establish the principle.

2 If you did go out and you took all
3 your depositions at one time, one of those
4 depositions was going to be the deposition of
5 an expert. And at the expense of Mr. Titus,
6 it was videotaped, a videoconference. I don't
7 want to say conference.

8 Am I correct in what I'm assuming
9 here it's going to just be videotaped
10 deposition?

11 MR. MARSHALL: Exactly, Your
12 Honor.

13 ADMIN. JUDGE SIPPEL: Okay. Now,
14 if he does that and you're there at the
15 deposition, you're cross examining and it's on
16 a tape so that I can have the opportunity to
17 observe the demeanor. The only thing that's
18 missing is that I don't get to ask questions.

19 Perhaps what we could do is hook
20 me into the deposition by phone, and I could
21 ask questions at appropriate times if I feel
22 I have them.

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1 MR. SCHONMAN: Your Honor, what
2 we're doing then is turning his deposition
3 into his testimony at hearing. And that's --

4 ADMIN. JUDGE SIPPEL: That's
5 correct.

6 MR. SCHONMAN: That's not what the
7 deposition is intended for.

8 ADMIN. JUDGE SIPPEL: Well, if you
9 have notice ahead of time as to what it is
10 he's going to testify to, the Rule 26(b),
11 Federal Rules type of statement, it seems to
12 me you would be in pretty good shape going out
13 there, knowing what you're getting into.

14 Go ahead. You may consult with
15 co-counsel.

16 MR. SCHONMAN: I'm sorry, Your
17 Honor.

18 ADMIN. JUDGE SIPPEL: Go ahead.

19 MR. SCHONMAN: Thank you. I don't
20 know where we were.

21 ADMIN. JUDGE SIPPEL: All right.
22 Let me come at this again.

1 You have notification that Mr.
2 Titus' counselor put together a statement as
3 provided for in the Rule 26(b). You would
4 have that. You would be fully advised in
5 terms of the nature of the testimony and what
6 the witness is going to testify to, and what
7 conclusions he was going to reach.

8 So it seems to me that you would
9 be in good shape knowing what you're going out
10 there to do. In other words, there'd be no
11 surprise. This would not be where something
12 went askew in a deposition.

13 Also, if I'm monitoring the
14 deposition in the sense of via telephone, if
15 there's objections, I can rule on the
16 objections. And if something isn't working
17 right about it, then you can always object and
18 ask for a protective order to shut it down and
19 do something different. I mean, you're not
20 going to lose your right to object to its use
21 at the hearing if you can make a good case
22 that there's been some irregularity.

1 MR. SCHONMAN: And so under this
2 proposal then, we would just use his taped
3 deposition at the trial?

4 ADMIN. JUDGE SIPPEL: That's
5 correct.

6 MR. SCHONMAN: And not have him
7 come and testify at the trial?

8 ADMIN. JUDGE SIPPEL: Not have him
9 come here and testify.

10 But with the scheme that I'm
11 outlining here, it seems to me that you do
12 have the opportunity to cross examine him very
13 fully. And if he comes here and he testifies
14 outside the scope of that Rule 26(b)
15 statement, that testimony is going to be
16 allowed.

17 MR. SCHONMAN: Your Honor, my
18 concern is that this sounds extraordinarily
19 unorthodox.

20 We have a procedure here where,
21 first, the discovery schedule, where we can go
22 out and depose this individual like any other

1 witness. And then, in advance of the trial,
2 Mr. Marshall would provide an exchange of
3 documents. Among those documents would be the
4 direct written testimony of this witness.

5 We would have an admission
6 session. And then if at that time, if we
7 decide to cross examine the individual, we
8 would call him for cross examination, and he
9 would appear here in Washington.

10 ADMIN. JUDGE SIPPEL: But you
11 would depose him anyway. Right? I mean,
12 you're going to go out and depose him anyway.

13 MR. SCHONMAN: Yes. We're going
14 to do that for Mr. Titus. We're going to
15 depose Mr. Titus at some point.

16 And then at the trial, we would
17 anticipate that he's going to appear here in
18 Washington. That's how every hearing is
19 conducted. And I don't see any basis for
20 deviating from that typical, ordinary process
21 in this hearing.

22 I mean, the concern here is that

1 it's one of cost. Well, when your order first
2 came out in which you appointed yourself to be
3 the presiding judge, I think you indicated
4 that all the hearings would take place here in
5 Washington.

6 This doesn't come as any surprise
7 to Mr. Marshall or his law firm or his client
8 that he would be responsible for, if he so
9 chooses, to prosecute the case on his behalf
10 and to travel here and present his case if he
11 so decides.

12 The burdens are on the Bureau. He
13 has no burdens to present any case of his own.
14 And I'd like to also add that, in our
15 interrogatories that we filed at the very
16 commencement of this hearing proceeding, we
17 inquired of all the individuals upon whom he
18 intends to rely at the hearing. That was back
19 in March.

20 The response that we got from the
21 Law Offices of David Marshall is that it's too
22 early, that he hasn't formulated his case and

1 doesn't know who he's going to present. That
2 was back in March.

3 Here we are in September already,
4 and we still don't know who his witnesses are
5 going to be.

6 ADMIN. JUDGE SIPPEL: Well, okay.
7 You've got several issues there to deal with.

8 Now first of all, this procedure
9 that I'm outlining, I have not set upon it
10 yet. I have not established it yet. And you
11 may convince me that I shouldn't. But Mr.
12 Titus is going to be here. That was
13 established from day one. There's no
14 question. If Mr. Titus wants a hearing in
15 this case, he's going to have to be here and
16 testify in front of me, because obviously
17 everything that you say about demeanor is
18 extremely important in light of the issues in
19 this case.

20 But an expert is a little bit
21 different.

22 MR. SCHONMAN: You know, Your

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1 Honor, in past cases we've had instances where
2 licensees desired to bring in testimonial
3 witnesses about their character. And in those
4 instances, where they wanted to bring in half
5 a dozen or a dozen, arrangements were made
6 where they could pick their best six and bring
7 in letters or statements by those individuals.
8 And in most cases, Bureau counsel did not ask
9 to cross examine those. So their written
10 statements -- their testimonials came in.

11 I think in the case of an expert
12 witness whose testimony could be dispositive
13 in this case is an individual that should be
14 present here in Washington for you to see and
15 for the Bureau to cross examine. And I think
16 in this particular case, under those
17 circumstances, deviating from that procedure
18 could be detrimental to this case.

19 ADMIN. JUDGE SIPPEL: Let me ask
20 you this. And then I'm going to get your
21 input, Mr. Marshall.

22 Suppose you were to go out and

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1 take his deposition under the conditions that
2 we're talking about here. There would be a
3 videotape of it, and I would be supervising
4 the depositions through telephone from
5 Washington, in case there were objections, to
6 rule on objections. That was all completed.
7 Okay, Mr. Marshall?

8 You all then make your final
9 decision as to whether or not you're going to
10 waive the appearance of the witness. If
11 you're still going to insist on the witness
12 coming in, well then we can either do it by
13 motion -- I'm trying to cut down on the
14 paperwork as much as I can. But somehow or
15 other, I could make an ultimate -- a final
16 ruling at that point as to how I wanted to
17 proceed with it.

18 So you would not be going out
19 there with the understanding that this is
20 going to be the final -- this is it. This is
21 the testimony for the hearing that you're
22 taking out there. But it may become that.