

SEP 22 2008

Federal Communications Commission
Bureau / Office

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: Chief Administrative Law Judge Richard L. Sippel

***OPPOSITION TO ENFORCEMENT BUREAU'S
MOTION TO PERMIT REBUTTAL TESTIMONY***

David L. Titus, by his counsel and pursuant to the Presiding Judge's *Order*, FCC 08M-41 (July 23, 2008), opposes the Enforcement Bureau's ("Bureau") September 8, 2008 motion to permit rebuttal testimony in this proceeding, and shows the following:

The Bureau rested its case in this proceeding. Tr. 951-52. Apparently, however, the Bureau, after reflection, is now unhappy with the state of the case it has already rested. Perhaps for good reason, because the Bureau has utterly failed to show that an amateur radio license in the hands of Mr. Titus is a threat to the public interest. Mr. Titus, after all, has held an amateur radio license for some 20 years without any evidence that he has ever used it for an improper purpose.

Nevertheless, the Bureau essentially seeks to re-present its case by calling witnesses: (1) it surely knew or should have known were available when it first tendered its witness list, and (2) which otherwise would offer testimony which is inadmissible, irrelevant or immaterial to the question whether Mr. Titus's holding of an amateur radio license would somehow enable him to commit a sex offense.

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Because the Presiding Judge has previously ruled that the Bureau cannot use rebuttal simply to reargue or bolster its case and because such rebuttal testimony would unfairly prejudice Mr. Titus by subjecting him the expense of several more days of hearing and attendant discovery, the Bureau's request should be denied.

I. Dr. Hover – who is unqualified in any event -- does not offer rebuttal to Dr. Allmon's testimony; his testimony should therefore not be allowed.

Proposed witness Gerald R. Hover. The presiding judge required advance expert witness identification. Mr. Titus followed that procedure and identified Dr. Doug Allmon as his expert. The Bureau identified no expert. The Bureau took Dr. Allmon's deposition. After taking Dr. Allmon's deposition, the Bureau did not request the opportunity to designate an expert late, much less make a good cause showing justifying a late expert designation. The Bureau did offer testimony in the nature of expert testimony from Detective Shilling with the reluctant concurrence of Mr. Titus. Among the testimony Detective Shilling offered was that the tool he used to designate Mr. Titus as a level 3 sex offender is seriously flawed, substantially eviscerating the Bureau's trial strategy that the Commission should just accept the determination of the State of Washington that Mr. Titus as a level 3 sex offender run a high risk to reoffend. Now, the Bureau wants a second bite at the apple to try to salvage the damage its own witness wrecked on its case. The supposed basis for this second bite at the apple is a supposed conflict between Dr. Allmon's deposition testimony and his hearing testimony concerning the likelihood of reoffense for Mr. Titus, who just by the way has not reoffended in more than 16 years following release from confinement.

Preliminarily, there is a serious question as to Dr. Hover's qualifications to testify as an expert on this subject. Unlike Dr. Allmon, Dr. Hover is not a licensed psychologist. *See* Exhibit 1. And unlike either Dr. Allmon or Dr. Natalie Novick-Brown (a potential Titus rebuttal witness), *see* Exhibit 2, Dr. Hover is not a certified sex offender treatment provider. *See* Exhibit 1. Indeed, the only credential Dr. Hover appears ever to have held is a registration as a counselor; and he has let that expire. Information that has come to Mr. Titus is that Dr. Hover has taken and failed the exam to become a licensed psychologist many, many times.

Putting aside Dr. Hover's questionable credentials, the Bureau asserts Dr. Hover's testimony is necessary because Dr. Allmon testified at Tr. 959, 1019-20 that Mr. Titus presented a low risk to re-offend.¹ The Bureau labels this "new evidence." The Bureau asserts this is inconsistent with Dr. Allmon's deposition testimony at Allmon Dep. Tr. 22-24.

Any such alleged inconsistency -- and there is none -- is no basis for rebuttal testimony. Bureau counsel was free to impeach Dr. Allmon to the extent there was any inconsistency. The Bureau extensively -- if not tediously (*see* Tr. 1017) -- cross examined Dr. Allmon. *See* Tr. 983-1036, 1044-1046. Indeed, Bureau Counsel on cross examination, elicited the following testimony:

Bureau Counsel: Question: "Okay. Now the report that you did, the purpose was to assess Mr. Titus's need for treatment and not to predict the risk of re-offense?"

Dr. Allmon: Answer: "Well, I think that is misleading as well. It would be quite

¹ Copies of these transcript pages are attached as Exhibit 3.

intuitive and obvious, I would think, that if a person had a high probability of re-offense, as the best data showed and other data showed, then I would say he needs more treatment. If he appears there's no need for further treatment and he retains treatment concepts that were originally provided for him and he's not re-offending, then the probability as implied is not likely to reoffend."

Upon eliciting the response which the Bureau now complains about, it drew the witness's attention to his deposition and inquired as to whether the two answers were inconsistent. Dr. Allmon stated (at Tr. 1021-22) that:

"My understanding of probability in actuarial terms or otherwise has said Mr. Titus has a high or low or medium probability of re-offense. I said he doesn't need more treatment right now, which implies that the probability of re-offense would appear presently low based on the data considered." To which Bureau counsel replied, "Okay. Thanks for the explanation." (Tr. 1022).

In response to a prompt from the Presiding Judge, Bureau Counsel asked the witness if he still stood by his deposition testimony, to which Dr. Allmon replied, "Yes." (Tr. 1022). The Bureau is, of course, free to argue any inconsistency and seek to discredit Dr. Allmon's testimony thereby. But it is plain that there is no inconsistency. This is shown clearly by reference to Dr. Allmon's full deposition testimony where he explains that he was giving a narrative, not a numerical assessment of risk of reoffending. Dr. Allmon makes this clear when he says at Deposition Tr. 22 that he did not seek to assign a numerical value as to risk to reoffend. "It is to identify predisposition to

reoffend. There is no numerical assessment put forth here.” He goes on to explain his narrative report as follows:

It states in the report various sources of information, such as polygraph and such as the lie scales that are built into the testing and summarizes it at the end the need for treatment based on that information collectively. But there is no number assigned to each incremental part that says: Therefore we think he has X percent probability of reoffending in five years or ten years or 15 years. It says: Does he appear to have pedophilic tendencies now and the finding was quite resoundingly no.

TR. 23-24. It takes no one with Holmesian logical capabilities to derive that if Mr. Titus does not have pedophilic tendencies, he is not at a risk to reoffend. Thus, contrary to the Bureau’s assertion, Dr. Allmon’s testimony is neither inconsistent with his deposition testimony, nor does it constitute “new” testimony.

Moreover, review of Dr. Hover’s proffered testimony shows it to be a mere summary rehash of the Bureau’s claims and is otherwise lacking. Most notably, Dr. Hover does not rebut Dr. Allmon’s testimony to any degree. For example, Dr. Hover has not independently examined Mr. Titus and come to a different conclusion than Dr. Allmon. He offers no critique of either Dr. Allmon’s methodology or his conclusions. He does not point to any failure of Dr. Allmon’s methodology and simply offers a different, summary, conclusory opinion pointing to no scientific evidence, learned treatises or other authority to support his conclusions. Most notably, he labels Mr. Titus as a pedophile without discussing how the criteria for pedophilia set forth in DSM IV apply to Mr. Titus, much less how they affect his 15 year record of not reoffending, his undisputed preference for age appropriate sexual relationships, and the findings of Dr. Allmon that Mr. Titus does not now have pedophilic tendencies.

Finally, nowhere in Dr. Hover's testimony does he even state that Mr. Titus is at a high, medium or low risk of reoffending, the purported reason the Bureau seeks to have his testimony. It would be laughable were he to do so since in some 16 years, Mr. Titus has not reoffended.² Plainly, that is telling evidence that the Bureau merely seeks to bolster its case through Dr. Hover's conclusory and flawed testimony.

Simply stated, putting aside Dr. Hover's questionable qualifications, he is offered merely to bolster the Bureau's sagging case. His testimony is conclusory. And it does not rebut Dr. Allmon's testimony. There is no need for this testimony. The Bureau's motion should be denied.

II. Rebuttal is not appropriate to try collateral issues.

The Bureau has repeatedly sought to try in this proceeding two collateral matters for which Mr. Titus was neither arrested nor tried: One occurring when he was questioned for using the bathroom *alone* in a park at night and one following a traffic incident. Neither of those instances involved a juvenile. Neither involved any suggestion of engaging in a sex offense. In neither instance was Mr. Titus arrested. The Bureau examined Mr. Titus at length concerning these instances in his deposition. See Deposition Tr. 80-88, 92-94, 117. And the Bureau again tediously examined Mr. Titus concerning these two incidents at hearing. Tr. 592-614. There is no need to rehash these irrelevant incidents.

² It is interesting that at no point has the Bureau put forth statistics to show the likelihood of re-offense following 16 years of living in the community offense free. To the extent the presiding judge were to allow Dr. Hover to testify, Mr. Titus would be compelled to request that Drs. Epperson, Allmon and Novick-Brown be allowed to offer previously exchanged rebuttal testimony.

There is no basis to allow rebuttal testimony on these two incidents for several reasons. First, Mr. Titus was not charged or convicted of any offense in connection with these two incidents. Apparently then, there was not probable cause to believe he committed any offense.

Second, it appears the intent of the testimony of Officer Franklin is to indicate that she was suspicious of Mr. Titus and that he was uncooperative at Mercer Island. As to exactly what that is rebutting, the Bureau is strangely silent. The fact is Mr. Titus voluntarily allowed a search of his vehicle. He was under no obligation to do so. He did refuse to allow his photograph to be taken, which was his perfect right. He was not obligated to cooperate with the officer at all. U.S. Const. Amend. V. There is no inference that can legitimately be drawn from Officer Franklin's testimony that has a bearing on this proceeding. And it should not be a surprise that someone questioned by the police would be nervous when they are accused of being "up to something" whether they were up to something or not.

The actual stated purpose for rebuttal on the Mercer Island incident according to the Bureau (Motion at 6) is that Mr. Titus allegedly told the officer he had met his friend Charles through amateur radio. Again, that is not new or changed testimony. His denial should have come to no surprise to the Bureau because Mr. Titus was asked this same question (at Tr. 93) of his deposition:

Question: "Okay. Did you tell the police he was an acquaintance through ham radio?"

Answer: "Absolutely not."

As to the testimony of the two Officers Wong concerning the traffic accident, their discussion is entirely hearsay and thus inadmissible. The Bureau has not offered the testimony of the person who was involved in the traffic accident with Mr. Titus. She is the only person that is competent to testify concerning the incident. She was available to the Bureau prior to the hearing. The Bureau saw fit not to designate her as a witness. Mr. Titus has had no chance to take her deposition or otherwise investigate her truth and veracity. The Officers Wong have no personal knowledge of the facts. Their testimony would therefore be incompetent.

It is thus beyond question that all of this "rebuttal" information was available to the Bureau prior to the hearing. Nothing in Mr. Titus's testimony at hearing is inconsistent with his testimony in his deposition. Rather, the Bureau is simply now having second thoughts concerning its trial strategy and its presentation. It could easily have called these officers to testify at hearing, but it did not. And for good reason because these two incidents are collateral and irrelevant to whether Mr. Titus presents some danger to minors in connection with holding an amateur radio license, a license he has held for more than 20 years without adverse incident. The Bureau made the reasonable decision that this case did not justify bringing in three officers to give hearsay or speculative testimony as to collateral matters. It appears now with a change of Bureau counsel that new counsel now thinks this hearsay and speculative testimony is somehow justified. That, perhaps is counsel's prerogative. What is not the Bureau's prerogative is to have a second bite at the apple just because it now wishes it would have done things differently. That is the nature of any trial. Hindsight is always 20-20. The Bureau rested

its case. Tr. 951-52. It now has to live with that decision. And in any event, it was the right decision.

At hearing, the Bureau's strategy was directed to reliance upon an assessment tool which even its sponsoring witness, Detective Shilling, acknowledges has serious shortcomings; which its creator, Dr. Epperson, does not recommend using; and which the State of Washington itself has found lacks predictive reliability. So now the Bureau is left to try to bolster its case with these two collateral matters by having officers offer hearsay testimony and speculation concerning matters that neither led to an arrest nor conviction.

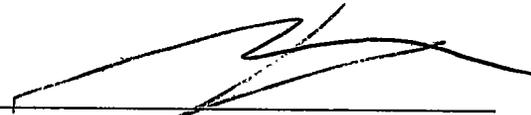
Mr. Titus is a person of limited means. Departing from established practice, the Bureau yielded to Congressional pressure to designate Mr. Titus's license for hearing despite his only felony conviction being some 16 years ago shortly after just turning 18. The Bureau has not shown good cause to reopen this hearing for several days of additional testimony and put Mr. Titus through several more thousands of dollars of expense.

For the reasons stated above, the Bureau's motion should be denied.

Respectfully submitted,

DAVID L. TITUS

By

A handwritten signature in black ink, appearing to read "George L. Lyon, Jr.", written over a horizontal line.

George L. Lyon, Jr.
His Counsel

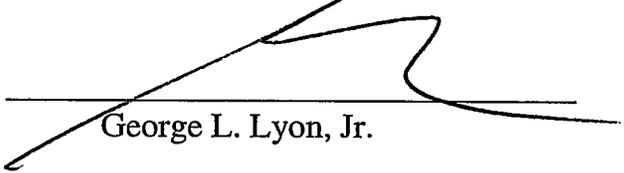
Lukas, Nace Gutierrez & Sachs, Chartered
1650 Tysons Blvd., Suite 1500
McLean, Virginia 22102
202-828-8472
September 22, 2008

CERTIFICATE OF SERVICE

George L. Lyon, Jr. certifies that he has on this 22nd day of September served by First Class Mail and email copies of the foregoing document on:

William Knowles Kellett, Esquire
Judy Lancaster, Esquire
Federal Communications Commission
455 12th Street SW, Room 4-C330
Washington, DC 20554

Chief Administrative Law Judge Richard L. Sippel
Federal Communications Commission
445 12th Street SW, Suite 1-C768
Washington, DC 20554



George L. Lyon, Jr.

Exhibit 1



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RC00058208	HOVER	GERALD	R	Counselor Registration	EXPIRED IN RENEWAL	1947	WA		No
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RC00058208	Counselor Registration	05/24/2007	05/24/2007	06/14/2008	EXPIRED IN RENEWAL	No

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<u>PY00001133</u>	ALLMON	DOUGLAS	J	Psychologist License	ACTIVE	1937	WA	01/27/2008	No
<u>RC00001079</u>	ALLMON	DOUGLAS	J	Counselor Registration	EXPIRED	1937	WA		No
<u>NA00090385</u>	ALLMON	DIANE	LYNN	Nursing Assistant Registration	EXPIRED	1954	ID		No
<u>NC10094143</u>	ALLMON	DEBRA	L	Nursing Assistant Certification	ACTIVE	1980	AZ		No
<u>FC00000097</u>	ALLMON	DOUGLAS	J	Sex Offender Treatment Provider Certification	ACTIVE	1937	WA	01/27/2008	No

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ALLMON, DOUGLAS J

Credential	Credential Type	First Issue Date	Last Issue Date	Expiration Date	Status	Action Taken
PY00001133	Psychologist License	01/22/1987	03/05/2008	01/27/2009	ACTIVE	No

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ALLMON, DOUGLAS J

Credential	Credential Type	First Issue Date	Last Issue Date	Expiration Date	Status	Action Taken
FC00000097	Sex Offender Treatment Provider Certification	08/14/1991	02/27/2008	01/27/2009	ACTIVE	No

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<u>PY00001965</u>	NOVICK BROWN	NATALIE	J	Psychologist License	ACTIVE	1946	WA	09/05/2011	No
<u>RC00025134</u>	NOVICK BROWN	NATALIE	J	Counselor Registration	EXPIRED	1946	WA		No
<u>FC00000112</u>	NOVICK BROWN	NATALIE	J	Sex Offender Treatment Provider Certification	ACTIVE	1946	WA	09/05/2009	No
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NOVICK BROWN, NATALIE J

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FC00000112	Sex Offender Treatment Provider Certification	10/28/1996	08/08/2008	09/05/2009	ACTIVE	No

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Exhibit 3

1 Q Based on your psychosexual
2 evaluation, have you formed an opinion on
3 whether Mr. Titus is likely to re-offend
4 sexually?

5 A I found no evidence that he is
6 predisposed currently to behave in any
7 anomalous way, including sexually. So there
8 seems to be nothing remarkable about his
9 sexual predispositions at the present.

10 Q Okay. Let me see if I can
11 rephrase that in normal language. Would that
12 mean that you did not find him to be a
13 pedophile?

14 A I found no evidence of pedophilia
15 in Mr. Titus' data as it was arrayed during
16 this evaluation.

17 Q And is it correct that pedophilia
18 is the sexual desire for minors?

19 A There are precise diagnostic
20 requirements for that definition. But, in
21 general, your Honor, yes. It requires a
22 primary focus on children and spanning more

1 mother, which is whom he authorized.

2 I heard the laughter there. I
3 might just add that is not particularly funny,
4 given that a lot of times when I talk to the
5 mother the mother is the least supportive. So
6 it may sound as though I was going to the
7 grandstand and receiving applause, but in this
8 case I had no idea what she would say. And in
9 many cases the collateral interviewee has been
10 quite adverse, including moms.

11 Q Okay. Now, the report that you
12 did, the purpose was to assess Mr. Titus' need
13 for treatment and not to predict the risk of
14 re-offense?

15 A Well, I think that is misleading,
16 as well. It would be quite intuitive and
17 obvious, I would think, that if a person had
18 a high probability of re-offense, as the best
19 data showed and other data showed, then I
20 would say he needs more treatment. If he
21 appears there's no need for further treatment
22 and he retains treatment concepts that were

1 originally provided for him and he's not re-
2 offending, then the probability as implied is
3 not likely to re-offend.

4 Q Okay. I'd like you to turn to
5 your deposition, page 23.

6 JUDGE SIPPEL: For what purpose.

7 MR. KNOWLES-KELLETT: Prior
8 inconsistent statement, your Honor.

9 JUDGE SIPPEL: Read him the
10 statement and let him see it and then ask the
11 question.

12 BY MR. KNOWLES-KELLETT:

13 Q My question to you was, "But one
14 of the purposes of your report is really to
15 get you to do a narrative statement as to his
16 risk of re-offense --

17 JUDGE SIPPEL: What page? What
18 page are you reading from?

19 MR. KNOWLES-KELLETT: Page 23.

20 JUDGE SIPPEL: Do you have that in
21 front of you, Doctor?

22 THE WITNESS: I have page 23, but

1 I'm not quite sure what line.

2 MR. KNOWLES-KELLETT: Line nine,
3 I'm starting on line nine.

4 THE WITNESS: Line nine, okay.

5 BY MR. KNOWLES-KELLETT:

6 Q It starts actually after your
7 previous answer, and then I ask, "But one of
8 the purposes of your report is really to get
9 you to do a narrative statement as to his risk
10 of re-offense," and your answer is, "No
11 prediction is intended in the findings here."
12 Do you recall that to be your testimony?

13 A Yes.

14 Q Okay. Is that inconsistent with
15 the statement you just made?

16 A No.

17 Q Okay. I thought you just said --

18 A My understanding of probability in
19 actuarial terms or otherwise has said Mr.
20 Titus has a high or low or medium probability
21 of re-offense. I said he doesn't need more
22 treatment right now, which implies that the

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1 probability of re-offense would appear
2 presently low based on the data considered.

3 Q Okay. Thanks for the explanation.

4 JUDGE SIPPEL: If you want to ask
5 him, you're going to do this -- you want to
6 ask him does he still stand by the testimony
7 that he gave in his deposition?

8 BY MR. KNOWLES-KELLETT:

9 Q Okay.. Do you still stand by the
10 testimony that you gave in the deposition?

11 A In this part of the deposition,
12 yes.

13 Q All right.

14 MR. LYON: Your Honor, I don't
15 have that deposition with me. If, in the
16 future, if counsel is going to refer to it,
17 I'd request the opportunity to look at the
18 statement.

19 JUDGE SIPPEL: Well, it's your
20 obligation to bring your depositions with you.

21 MR. LYON: All right. That's
22 fine.