

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

ORIGINAL

In re)
)
David L. Titus)
)
)
Amateur Radio Operator and Licensee of)
Amateur Radio Station KB7ILD)

EB Docket No. 07-13
FRN No. 0002074797
File No. EB-06-1H-5048

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OCT 17 2008

To: Chief Administrative Law Judge Richard L. Sippel

Federal Communications Commission
Office of the Secretary

***OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT BUREAU'S
MOTION TO PERMIT TESTIMONY BY REBUTTAL WITNESSES AND
MOTION TO STRIKE BUREAU'S UNAUTHORIZED SUBMISSION OF
REBUTTAL TESTIMONY AND ITS UNAUTHORIZED REPLY TO
OPPOSITION TO REBUTTAL TESTIMONY***

David L. Titus, by his counsel and pursuant to the presiding officer's direction contained in a September 29, 2008 email to the parties, submits its opposition to the Enforcement Bureau's October 8, 2008 Motion for Leave to File Supplement to Enforcement Bureau's Motion to Permit Testimony by Rebuttal Witnesses. Mr. Titus also moves to strike unauthorized submissions of the Bureau. In support, the following is shown:

Introduction.

The Bureau seeks leave to supplement its September 8, 2008 Motion To Permit Testimony by Rebuttal Witnesses to submit a statement from Victoria Halligan. In addition, the Bureau seeks to include the entire transcript of a proceeding held August 8, 2008 wherein Mr. Titus sought to be relieved of the obligation to register as a sex offender. The Bureau's motion should be denied and its Supplement stricken.

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Moreover, the Bureau's submission is violative of the presiding judge's specific direction. Paragraphs 10 through 12 of the Motion represent the Bureau's attempt at an unauthorized reply to Mr. Titus's September 22, 2008 Opposition to Enforcement Bureau's Motion to Permit Rebuttal Testimony. Those paragraphs of the Motion should be stricken as violative of the presiding officers *Order*, FCC 08M-41 (July 23, 2008), which made no provision for a reply by the Bureau. Interlocutory movants in hearing proceedings before the Commission are not entitled to submit replies. FCC Rule Section 1.294(b). The presiding officer's order allowing the Bureau to request rebuttal recognized that fact. The Bureau should not in the guise of a motion to supplement, be allowed to shoehorn a reply into the record.

Likewise, the presiding officer should strike the entirety of the Bureau's Supplement to Motion to Permit Testimony by Rebuttal Witnesses. In his September 29, 2008 email to counsel for the parties, the presiding officer was clear as to the proper procedure. He said:

Do not file Supplement.

You may file Motion for Leave to File Supplement limited to attempted justification for late filing. It is significant that the prescribed time for the round of pleadings has expired so the Bureau now must show cause for filing outside the cycle.

If objecting, Mr. Titus must respond within 4 business days of your e-mailed courtesy copy of motion to counsel and the Presiding Judge. There shall be no reply pleading filed.

The Bureau entirely disregarded the presiding judge's direction and nevertheless submitted the very "Supplement" it was told not to submit. And in doing so, the Bureau apparently could not resist the temptation to submit yet another unauthorized reply to Mr. Titus's Opposition. *See*

Bureau Supplement at 3-4. The Bureau's disregard for established procedures should not be condoned. It violates the Commission's established procedural rules; it violates the presiding officer's rulings; and most importantly it is unfair to Mr. Titus who must respond to these violations to vindicate his rights. The Supplement should therefore be stricken.

Discussion.

The Bureau has not shown justification for the late submission of proposed rebuttal testimony, much less testimony concerning collateral matters. The Bureau seeks to submit a statement from Victoria Halligan some three months after resting its case. Ms. Halligan is supposedly to testify concerning the events following a traffic accident occurring six years and ten months ago. This incident was examined at length at hearing and in deposition. Mr. Titus was examined concerning it. The police report concerning that matter was admitted *not* for the truth of the matters asserted, but only to show it formed part of the basis for Detective Shilling raising Mr. Titus's sex offender status to a level three. The sole basis the Bureau presents for seeking to submit testimony from Ms. Halligan now is that she had been traveling in Europe and was supposedly unavailable. That is weak.

The Bureau never identified Ms. Halligan as a potential witness in this matter. *See* Enforcement Bureau Response and Objections to David Titus's First Interrogatories to the Enforcement Bureau (July 17, 2008). Mr. Titus never had the opportunity to take her deposition or to conduct any investigation of this person. The Bureau knew well before the hearing in this matter who Ms. Halligan was. It has been in receipt of the police report of that

incident for more than a year. The Bureau plainly could have called Ms. Halligan to testify to support its theory of the case had it so desired.

Moreover, the Bureau cannot possibly claim surprise from Mr. Titus's testimony. The Bureau knew at least as far back as February Mr. Titus's version of the events of that traffic accident since it examined him on it during his deposition. The Bureau choose voluntarily not to call Ms. Halligan at hearing. Now, after resting its case, it wants to prolong this hearing by submitting her testimony at this late stage of the proceedings. Significantly, the Bureau does not even explain why between July 16, 2008 and September 8, 2008 (when it submitted its request for rebuttal) it was unable even to talk to Ms. Halligan. The Bureau says she was traveling. But the Bureau gives no dates of travel and no statement to her to that effect. It is simply not credibly that Ms. Halligan was unavailable during this entire time.

The burden is on the Bureau to show good cause for the late tendering of this witness. It has not and cannot do so since this witness has been known to the Bureau for more than a year.

The Bureau apparently intends to contradict Mr. Titus's testimony that he twisted Ms. Halligan's arm down after she waved it in his face. That is based on the "statement" tendered in its "supplement." Putting aside that this "supplement" was submitted in direct violation of the judge's clear instructions, it is nonetheless problematic. First, it is unsworn. Second, its not even signed by the witness. Third, it is contradicted by the very report of the officers the Bureau also wants to present. For example, Ms. Halligan claims Mr. Titus said he was a police officer. The testimony of both officers who interviewed her, however, said that Mr. Titus

specifically refused to say what his occupation was. Any hearing will thus require that we evaluate this witnesses testimony against her prior inconsistent statement of more than six years ago. In any event, her testimony essentially confirms what Mr. Titus already said, that he merely twisted her hand toward her body to get it out of his face. Significantly, she did not press charges. And Mr. Titus was not charged.

This is a typical example of a collateral matter for which intrinsic impeachment is not allowed.. As McCormick explains,

[C]ourts maintain the safeguarding rule that a witness may not be impeached by producing extrinsic evidence of "collateral" fact to "contradict" the first witnesses assertions about those facts. If, the collateral fact sought to be contradicted is elicited on cross-examination, this safeguarding rule is often expressed by saying that the answer is conclusive or that the cross-examiner must "take the answer."

Cleary, McCormick on Evidence (1972), §47. The traffic accident with Ms. Halligan is plainly a collateral matter. The Commission neither cited this incident in the designation order nor designated an issue concerning it. There was no conviction. There was no arrest. There was no civil proceeding. And most importantly of all, there is not even a hint at a sex offense. Bringing this witness in at this late date will essentially require trying an accident case and an assault case on top of this proceeding. Ms. Halligan's deposition will need to be taken; we will need to identify any witnesses to the alleged occurrence; her medical records must be subpoenaed; the notes from the responding officers will need to be subpoenaed all for what purpose? To ascertain the exact degree of force Mr. Titus used to remove the woman's hand from face. Ms. Halligan's testimony will serve no purpose here other than to drain Mr. Titus's

limited resources so that he will ultimately just have to throw in the towel. The Bureau's punitive attempt to resurrect its failing case at this late date should be rejected.

Likewise the Bureau's request to admit into this proceeding testimony from the August 8, 2008 hearing on whether Mr. Titus should be required to continue to register as a sex offender should be denied. First, the Bureau has not explained at all why it was not possible to propose this material previously since the hearing was one month prior to the deadline the presiding officer gave the Bureau to request rebuttal. That is fatal to the Bureau's request since the material is coming well after the deadline set by the presiding officer. Second, the material submitted is inappropriate impeachment material. The material is hearsay and as such is inadmissible on its own. *See* Fed. R. Evid. 804 (former testimony admissible only if declarant is unavailable and other conditions are met). Thus, for example, there is no basis for admitting the testimony of Officer Franklin, which is included in the transcript, and the Bureau's two submissions offer no justification at all to support admitting her testimony in this other proceeding. It is entirely inappropriate to admit into evidence any testimony from this unrelated proceeding for the purpose of impeachment. Furthermore, the matters the Bureau seeks to impeach Mr. Titus on, such as whether he told an officers he met his friend Charles over the Internet is again a totally collateral and irrelevant matter that was nevertheless explored at length in the hearing and in deposition.

The Bureau tries to make much of a statement Mr. Titus is *alleged* to have made that meeting Charles over the Internet "was a lie to the police." However, the transcript is clearly in error. This is shown because immediately after the alleged statement, Mr. Titus says "I told

the police we had talked on the internet. We did not meet on the internet.” As Mr. Titus explains in the attached declaration (Exhibit 1), his actual statement in court, and the only one that makes sense in context is “that was a lie of the police. I told the police we had talked on the internet. We did not meet on the internet.” Mr. Titus’s Declaration is confirmed by the Declaration of his counsel Edward Alden. (Exhibit 2).¹ It is telling that the Bureau’s discussion of the matter omits to quote even the erroneous transcript, and instead presents counsel’s distorted gloss on the testimony, rather than even attempting to discuss Mr. Titus’s statement that “I told the police we had talked on the internet. We did not meet on the internet.”

Finally, Mr. Titus contacted the certified court reporter who prepared the transcript tendered by the Bureau, John R. McLaughlin, Jr. and requested that he review his notes. Following his review, the court reporter acknowledged that the word “to” was a mistake and should have been the word “of.” As a result, the reporter forwarded to undersigned counsel via facsimile a corrected version of the page of the transcript in question. That corrected page is attached as Exhibit 3, along with the reporter’s certification attesting to the correction. It is thus completely clear therefore that there is no inconsistency between Mr. Titus’s testimony in the Benton County proceeding and in this proceeding concerning this matter. The Bureau’s entire argument is premised upon a typographical error the court reporter has readily

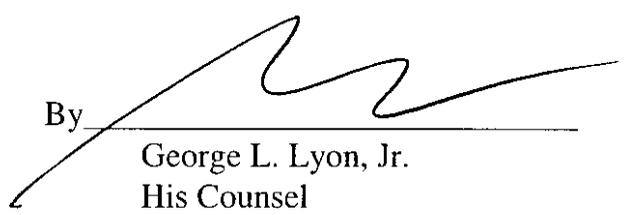
¹Mr. Alden advised undersigned counsel that his recollection was that Mr. Titus’s testimony was not to the effect that he had lied to the police, an admission that would have caused him substantial concern, but that the police had reported his words inaccurately. (As of the deadline for submission of this opposition, undersigned counsel had not received Mr. Alden’s declaration back from him. It will be submitted upon receipt).

acknowledged. In light of this fact, none of the various cases the Bureau cites -- based on alleged misrepresentations of material fact² -- support admitting late rebuttal testimony, much less having any rebuttal at all.

Therefore, the Bureau's request for now yet a third bite at the apple to explore collateral issues must be denied.³

Respectfully submitted,

DAVID L. TITUS

By 

George L. Lyon, Jr.
His Counsel

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October 15, 2008

²In any event, the alleged misrepresentation concerning whether or not Mr. Titus met Charles over the Internet or in some other way has no material bearing on this case which seeks to determine whether Mr. Titus's HAM radio license somehow makes him a danger to minors. In any proceeding, there is likely to be minor inconsistencies in testimony, especially as to matters happening many years ago. The fact that the Bureau had to reach to this length in an attempt to tar Mr. Titus with the brush of deceit is truly indicative of the paucity of its case.

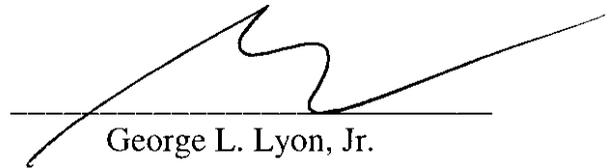
³Should the Bureau succeed in its quest to re-litigate its case in chief, Mr. Titus would, in turn, have to insist on his own right to present additional testimony in rebuttal.

CERTIFICATE OF SERVICE

I, George L. Lyon, Jr., certify that copies of the foregoing document was sent via email and first class postage prepaid to the following this 15th day of October, 2008:

Judy Lancaster, Esq.
William Knowles-Kellet
Federal Communications Commission
Enforcement Bureau
445 12th Street SW
Washington, DC 20554

Hon. Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
Office of Administrative Law Judges
445 12th Street SW
Washington, DC 20554



George L. Lyon, Jr.

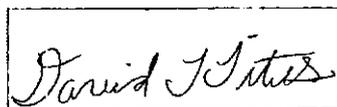
Exhibit 1

DECLARATION OF DAVID TITUS

David Titus, under penalty of perjury, deposes and states as follows:

1. My name is David Titus. I am submitting this declaration to the Federal Communications Commission to support my counsel's opposition to the Enforcement Bureau's motion to submit late filed rebuttal testimony.
2. I have been shown a transcript from the hearing conducted on August 8, 2008 during which I testified concerning the events at Mercer Island. There is an error in the transcript.
3. During that hearing, I was asked the question: Is there as reason you would have told the police that you met "Charles" over an internet chat room?
4. My answer was "That was a lie of the police. I told the police we had talked on the internet. We did not meet on the internet."
5. Counsel responded, "That was a lie of the police?"
6. I responded, "That's correct."
7. The transcript reports I said, "That was a lie to the police. I told the police we had talked on the internet. We did not meet on the internet."
8. The transcript, as written, plainly makes no sense. I specifically recounted what I had told the police, that "we had talked on the internet" not that we met on the internet. I was saying that if the police said otherwise, that they were lying, which as I think about it now is probably too harsh; they likely misunderstood what I had told them. In any event I never said I had met Charles on the internet. I did not meet Charles on the internet. And I never said I met Charles through HAM radio and I did not meet Charles through HAM radio.

The above statement, given under penalty of perjury this 14th day of October, 2008, is true and correct to the best of my knowledge, information and belief



David Titus

Exhibit 2

Exhibit 3

1 my vehicle which is a couple houses down from his
2 residence.

3 Q But you know where he lived then, right?

4 A Yes.

5 Q And you knew his last name I'm assuming?

6 A Yes.

7 Q Is there a reason you told the police that your
8 friend's name was Charles but you did not know his last
9 name or address?

10 A I don't specifically telling them I didn't know
11 his last name. I knew his last name. I told them I would
12 not give them his last name and address.

13 Q You didn't know his name and you were just
14 supposed to meet at the corner of 78 and 85?

15 A That was four years ago. I don't recall what I
16 said but I may have said something like that.

17 Q How do you know this person?

18 A We were introduced by a mutual friend.

19 Q Is there a reason you would have told the police
20 that you met "Charles" over an internet chat room?

21 A That was a lie of the police. I told the police
22 we had talked on the internet. We did not meet on the
23 internet.

24 Q That was a lie of the police?

25 A That's correct.

1 STATE OF WASHINGTON)
2 COUNTY OF BENTON) ss.
3
4

5 I, John R. McLaughlin, Jr. an official court
6 reporter for Benton County, Washington, hereby certify
7 that at said time and place I reported in stenotype all
8 testimony adduced and other oral proceedings had in the
9 foregoing matter; that thereafter my notes were reduced to
10 typewriting under my direction; and that the foregoing
11 transcript, page 2 to 54 both inclusive, correcting page
12 39 line 21 and 24 and replacing the word "to" with the
13 word "of" in both instances, contains a full, true, and
14 correct record of all such testimony adduced and oral
15 proceedings had and of the whole thereof. Witness my hand
16 at Kennewick, Washington, this ^{14th} ~~26th~~ day of ~~September~~ ^{October} of
17 2008.

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25 _____
John R. McLaughlin, Jr., CSR