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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) File No. EB-06-IH-5048
Amateur Radio Station KB7ILD)

To: The Commission

ENFORCEMENT BUREAU'S
EXCEPTIONS TO INITIAL DECISION

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SUMMARY

This case presents the fundamental question whether David Lee Titus, who has multiple felony convictions for sex offenses against children, admits to additional unadjudicated sex offenses, and recently has engaged in behavior causing the Seattle Police Department to reclassify him as a “High Risk” sex offender, is qualified to remain an amateur radio licensee. Holding an amateur radio license is a privilege, not a right, and only those with the requisite character should hold one. Titus’s license gives him unsupervised access to the many children who are actively involved in the hobby of amateur radio, and the Commission should not facilitate his exposure to children by allowing him to retain his license. Titus lacks the character qualifications to remain a Commission licensee and his license should be revoked.

In the Initial Decision, the ALJ found that the Bureau failed to demonstrate that Titus is unqualified to hold an amateur radio license. That decision, however, relies on a flawed legal interpretation relating to character determinations in FCC licensing matters. It also ignores or otherwise unjustifiably minimizes critical evidence, case precedent, and expert testimony about the risk that Titus will pose to children if he continues to hold an amateur radio license. Moreover, the ALJ excluded altogether important testimony about Titus’s character.

The current record in this proceeding demands that Titus’s amateur radio license be revoked, and we ask the Commission to do so. In the event that the Commission remains unconvinced by that record, as evaluated under the proper legal standard, the Bureau respectfully requests that the Commission remand the case to the ALJ and order the ALJ to permit the Bureau to present its rebuttal evidence.

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The Chief, Enforcement Bureau, by her attorneys and pursuant to Section 1.276 of the Commission's Rules¹ hereby respectfully submits the Enforcement Bureau's Exceptions to *David Titus*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 10D-01 (rel. Mar. 9, 2010).

I. STATEMENT OF THE CASE

David Lee Titus holds the Commission license for Amateur Radio Station KB7ILD, issued on June 8, 1989, and operates a related radio repeater on frequency 444.375 MHz.² Having been convicted of multiple felony sex offenses against children, Titus is required to register as a sex offender with his local law enforcement agency,³ and has been designated by the Seattle Police Department as a "high risk" sex offender.⁴

On January 30, 2007, the Enforcement Bureau (the "Bureau") issued an *Order to Show Cause*⁵ instituting this proceeding to determine whether the amateur radio license for Station KB7ILD should be revoked, and to determine whether Titus is qualified to be a Commission licensee. The *Order to Show Cause* stated that "felony convictions, especially those involving sexual offenses against children, raise questions regarding an amateur licensee's qualification," and specifically noted "the fact that the amateur radio service is particularly attractive to children."⁶ The *Order to Show Cause* designated the following issues:

(a) to determine the effect of David L. Titus's felony conviction(s) on his qualifications to be and to remain a Commission licensee; and

(b) to determine, in light of the evidence adduced pursuant to the foregoing issue, whether David L. Titus is qualified to be and to remain a Commission licensee; and

¹ 47 C.F.R. § 1.276.

² See EB Ex 1; Tr. 506-07, 661. The repeater is not separately licensed.

³ See EB Ex. 5; EB Ex. 2, pp. 2-5; Tr. 670.

⁴ See EB Ex. 5; EB Ex. 2, pp. 4-5, 7-9.

⁵ EB Dkt. 07-13, 22 FCC Rcd 1638 (Enf. Bur. 2007) ("*Order to Show Cause*")

⁶ *Order to Show Cause* at ¶ 5.

(c) to determine, in light of the evidence adduced pursuant to the foregoing issues, whether the license of David L. Titus for Amateur Radio Station KB7ILD should be revoked.

Chief Administrative Law Judge Richard L. Sippel (the “ALJ”) held a hearing in Washington, D.C. on July 14, 15, and 16, 2008, on all issues. On March 9, 2010, the ALJ issued an Initial Decision finding that the Bureau had failed to meet its burden of proving that Titus lacked the character qualifications to remain a Commission licensee.⁷ Because the ALJ applied the wrong legal standard in the Initial Decision, ignored or discounted much of the record evidence in reaching his conclusion, and incorrectly barred the Bureau from presenting evidence on certain key issues, the Bureau files these Exceptions to correct the record and to put this matter before the Commission.

II. QUESTIONS OF LAW AND EXCEPTIONS TO THE INITIAL DECISION PRESENTED

A. The ALJ Misstated and Misapplied the Law Concerning Character Qualifications

The ALJ erred as a matter of law by misstating the Commission’s standard for making character determinations in FCC licensing matters and, as a result, failed to consider multiple instances of Titus’s misconduct. Under the correct standard, the evidence presented at hearing established by a preponderance of the evidence that Titus committed five sexual offenses against minors and therefore lacks the requisite character to hold a Commission license.

B. The ALJ Did Not Properly Evaluate the Evidence Produced by the Enforcement Bureau at Hearing

The ALJ made findings of fact contrary to the preponderance of the evidence, including (a) failing to consider all of the factors set forth in the Commission’s precedent for character assessment, (b) failing to defer to Seattle authorities’ risk assessment of Titus and disregarding

⁷ See *David Titus*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 10D-01 (rel. March 9, 2010).

Police Detective Robert Shilling’s testimony, (c) overvaluing Dr. Douglas Allmon’s testimony, (d) improperly assessing Titus’s proffered character witnesses and Titus’s credibility, and (e) disregarding evidence of the danger Titus poses to children as an amateur radio operator.

C. The ALJ Excluded Critical Evidence

Titus presented testimony at the hearing intending to demonstrate that he presents a low risk to children. The Bureau properly moved to present rebuttal on both this point and on the general question of Titus’s credibility. The ALJ denied the Bureau’s requests, finding that rebuttal testimony was unnecessary and would be burdensome. In doing so, the ALJ violated the Administrative Procedure Act, which entitles the Bureau to submit rebuttal evidence as required to present an accurate picture of the facts. This violation is particularly troublesome given that the ALJ then found that the Bureau had presented insufficient evidence that Titus might harm children in the future.

III. ARGUMENT

A. Standard of Review

The FCC may alter the conclusions in an initial decision if the record supports a contrary decision by a preponderance of the evidence, and need not find that the ALJ’s initial decision was “clearly erroneous.”⁸ The Commission, when considering exceptions, may conduct a *de novo* review of the entire record.⁹ The Commission may change the result provided it considers the reasons for the initial decision and explains its rationale for reaching a contrary conclusion.¹⁰

⁸ See *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

⁹ See, e.g., *Crystal Comm’ns, Inc.*, Order, 12 FCC Rcd 2149, 2150 (1997) (noting “clearly erroneous” standard not applicable to Commission proceedings as an Initial Decision is subject to a *de novo* review by the Commission).

¹⁰ *Lorain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965). In general, deference is given to the presiding judge’s determinations regarding the relative credibility of witnesses and such determinations are not overturned except on substantial evidence. *Ramon Rodriguez and Assoc., Inc.*, Supplemental Decision, 9 FCC Rcd 3275 (Rev. Bd. 1994), quoting *Lorain Journal*, 351

B. The ALJ Improperly Failed To Consider the Number and Nature of Titus's Sexual Offenses Against Children

1. Sexual Offenses Against Children Are Relevant to a Licensee's Character, Even If Those Offenses Occurred More Than 10 Years Ago

The Commission has long held that a person's character is relevant to his or her qualification to be or remain an FCC licensee, and even conduct that has no direct connection to the agency may be relevant in assessing character. For instance, as the ALJ himself noted, the Commission has long held that all felony convictions are relevant to the issue of character, because they provide an indication of an individual's propensity to obey the law.¹¹

Even unadjudicated allegations of criminal conduct can be relevant to character, in "circumstances in which an applicant has engaged in non-broadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation."¹² "Such misconduct," the Commission has held, "might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body."¹³

The Commission has repeatedly held that sexual misconduct toward children is precisely the sort of offense that "shocks the conscience" and should be grounds for disqualification from holding an FCC license,¹⁴ and the courts have supported this approach. In *Contemporary Media*

F.2d at 828. The Commission has said, however, that it would be derelict in its duty if it accepted findings that are patently in conflict with facts established by the record. *Milton Broad. Co.*, Decision, 34 FCC 2d 1036, 1045 (1972).

¹¹ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 ¶ 4 (1990) ("*1990 Character Policy Statement*") (subsequent history omitted).

¹² See *Policy Regarding Character Qualifications In Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1205 n. 60 (1986) ("*1986 Character Policy Statement*") (subsequent history omitted); see also *1990 Character Policy Statement* at 3254, n. 5.

¹³ *Id.*

¹⁴ See, e.g., *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437, 14442 ¶ 11 (1998), *recon. denied*, 14 FCC Red 8790 (1999), *aff'd Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000); *Lonnie L Keeney*, Order of Revocation, 24 FCC Rcd 2426, 2428 (Enf. Bur. 2009)

v. FCC, the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to the Commission's character policy, stating that "it is hardly irrational to conclude that if an individual is unwilling to obey the law with respect to such patently criminal behavior as sexual assault on children, he will be equally unwilling to obey FCC rules that require openness and honesty with the Commission."¹⁵ The court went on to say that "there is no question but that the crimes at issue here are, as the FCC found, 'characterized by moral turpitude' to such an extent that they fall in the category of those that 'shock the conscience' and summon almost universal disapproval."¹⁶ The court also rejected an argument that the sex offenses at issue were not particularly egregious stating, "we do not understand how the repeated sexual assault of five children could be regarded as anything less than egregious; perhaps wisely, licensees do not suggest what misconduct they would regard as more serious than that described in this record."¹⁷

The Commission has recognized that some misconduct should not be considered in making a character analysis, because of its age. In the *1986 Character Policy Statement*, the Commission found that "as a general matter," conduct that occurred prior to the current license term should not be considered, and that even as to conduct indicating "a flagrant disregard" of FCC rules, a ten year limitation should apply because of the "'inherent inequity and practical difficulty' in requiring applicants to respond to allegations of greater age."¹⁸ The more recent *1990 Character Policy Statement*, however, makes no mention of a ten-year limitation, but simply lists the currentness of the misconduct as one of the mitigating factors that the

(revoking amateur radio license finding felony sex offender not rehabilitated in part due to his continued treatment by law enforcement as a sex offender); *Robert D. Landis*, Order of Revocation, 22 FCC Rcd 19979, 19982 (Enf. Bur. 2007) (revoking the license of an amateur radio operator on the basis of felony convictions for child molestation).

¹⁵ *Contemporary Media*, 214 F.3d at 193.

¹⁶ *Id.*

¹⁷ *See id.* at 195.

¹⁸ *See 1986 Character Policy Statement*, 102 FCC 2d at 1228-29 ¶ 105.

Commission must consider.¹⁹ In this case, given the evidence that Titus's misconduct was ongoing at the time of the hearing, the older offenses remain relevant and should not have been excluded from consideration.

2. The ALJ Misstated and Misapplied the Legal Standard for Character Determinations

The ALJ characterized the Commission's prevailing character policy as follows:

A licensee's character is relevant in determining qualifications for continuing to hold an FCC license. In determining character, prior felony convictions must be considered. Allegations of relevant non-FCC misconduct receive no consideration unless it is determined to be "misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." Non-adjudicated misconduct that is determined to be relevant is considered only if it falls within a ten-year statute of limitations.²⁰

Notwithstanding the ALJ's acknowledgment that Commission precedent required consideration of prior felony convictions, he nonetheless erroneously decided that two of Titus's three convictions were not relevant.²¹ The record developed at hearing unquestionably demonstrates that Titus was convicted three times of sexual-related offenses on minors, but the ALJ considered only one of those convictions. Moreover, the ALJ also wrongly failed to consider several unadjudicated incidents in assessing Titus's character. The ALJ's failure to consider the entire record in his decision constitutes reversible error.

Titus has three felony convictions for sexual offenses against children. The first occurred when Titus, then 11, raped an 8-year-old boy.²² The second occurred when Titus, then 15, fondled a 12-year-old boy and threatened to hurt him if he did not reciprocate.²³ The third involved "Communication with a Minor for Immoral Purposes," in which Titus (then 18)

¹⁹ See *1990 Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5.

²⁰ Initial Decision at 7-8 ¶ 19 (internal footnotes omitted).

²¹ Initial Decision at 10 ¶ 24.

²² EB Ex. 4, p. 14.

²³ *Id.*

“groomed” an eleven-year-old boy at the gymnasium where Titus then worked.²⁴ “Grooming” is a term used to describe the actions taken by sex offenders in order to gain the trust of potential victims.²⁵

Having recognized twice in the Initial Decision that all felony convictions are relevant, the ALJ then inexplicably excluded two of them, considering only the most recent conviction.²⁶ In excluding two felony convictions from consideration, the ALJ erroneously relied on a purported ten-year “statute of limitations” from the *1986 Character Policy Statement*. But the Commission has never established a “statute of limitations” relating to consideration of offenses, whether adjudicated or not. Even the *1986 Character Policy Statement*, which stated that it generally would be unfair to require licensees to respond to allegations of misconduct more than ten years old,²⁷ never imposed an absolute bar to consideration of adjudicated felonies.²⁸ And as noted above, the more recent *1990 Character Policy Statement* has made it clear that the age of any conviction or allegation is simply one of several factors to be considered in evaluating a licensee’s fitness.²⁹

The ALJ also erroneously excluded from consideration relevant non-adjudicated conduct involving two felony sex offenses that Titus admits, but for which he was not convicted.³⁰ In the first case, Titus (then 10 years old) groped and anally raped a six-year-old boy after promising

²⁴ EB Ex. 4, p.12.

²⁵ Tr. 913-14, 1029.

²⁶ Initial Decision at 7, 8, 10 ¶¶ 19, 21, 24 (stating that the “prescribed statute of limitations” neutralizes two of the felony convictions).

²⁷ See *1986 Character Policy Statement*, 102 FCC 2d at 1228-29 ¶ 105.

²⁸ The *1986 Character Policy Statement* stated that it was unfair to require a defense to old allegations because evidence would be stale. *Id.* In *Robert D. Landis*, Order of Revocation, 22 FCC Rcd 19979, 19982 (Enf. Bur. 2007), however, the Enforcement Bureau held that there was no unfairness associated with considering a 16-year-old conviction as the allegations were fully litigated at the time of adjudication and there was no concern related to the licensee defending against stale allegations. Similarly, in this case, all five offenses are a matter of record and there is no concern relating to staleness.

²⁹ See *1990 Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5.

him candy. This charge was dropped after Titus agreed to enter counseling. In the second case, at age 16, Titus physically assaulted and fondled a 12-year-old boy at the fast food restaurant where Titus then worked.³¹ The charges were dropped because the victim was unable to testify.³² In each case, Titus admits that he did in fact commit the underlying acts, which constitute felony offenses.³³

The ALJ's failure to consider these unadjudicated felonies constitutes reversible error. Titus's admitted repeated and violent actions towards minors are highly relevant to whether he should remain a Commission licensee, particularly in the amateur radio service. As discussed above, Commission precedent does not bar consideration of these facts, but merely states that the Commission should consider the age of these actions as one factor among several.

C. The ALJ Improperly Assessed the Evidence Presented at Hearing

1. The ALJ Failed to Consider the Range of Aggravating Factors Enunciated in the 1990 Character Policy Statement

The Commission has noted that a proper analysis of an applicant's or licensee's character necessarily involves consideration of "the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any of managers or owners), efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation."³⁴ The ALJ failed to consider a number of these criteria.

First, the ALJ failed to consider the willfulness of Titus's actions, both by Communications Act standards and criminal standards. Titus's sexual offenses were intentional,

³⁰ Initial Decision at 8 ¶ 21.

³¹ EB Ex. 4, p. 14; Tr. 537-38.

³² EB Ex. 4, pp. 14, 17.

³³ Tr. 518-20, 536-38.

³⁴ *1990 Character Policy Statement*, 5 FCC Rcd at 3252, ¶¶ 2-5.

knowing acts under either standard. As described below, Titus has had at least two more recent incidents that should give cause for concern. Yet the ALJ labeled both of those incidents as nonsexual in nature, thereby overlooking the currentness and the relevance of the misconduct and ignoring the risk that Titus may be a danger to minors. By failing to acknowledge that Titus repeatedly and violently raped young boys, and demonstrated physical aggression and verbal assaultiveness,³⁵ the ALJ glossed over the heinous character of these offenses and did not properly consider the seriousness or the violent nature of Titus's acts. By failing to recognize Titus's poor performance in therapy and his refusal to continue Depo-Provera shots that according to his sexual offender treatment records curbed his sexual inclinations,³⁶ the ALJ not only refused to acknowledge the recidivist nature of Titus's misconduct, but failed to conduct the type of thorough analysis required by the *Character Policy Statement* to ensure that Titus actually merits the continued privilege of operating as an FCC licensee.

2. The ALJ Failed to Give Proper Weight to the Risk Assessment Performed by the Seattle Police Department

Recently, Titus was involved in two incidents that caused the Seattle Police Department to reevaluate its risk assessment and classify Titus as a "High Risk" to reoffend. Specifically, in 2002, Titus was involved in an assault on Victoria Halligan, a woman with whom he had a minor traffic accident.³⁷ Titus admitted to the police officer that he "grabbed Ms. Halligan's hand and twisted it."³⁸ The police reports indicate that he used a police hold to restrain her, and that she was very frightened and intimidated by his actions.³⁹ The police report also indicates that Ms. Halligan "was concerned that he was a police officer and acting in an inappropriate way or he

³⁵ EB Ex. 4, pp. 14, 27.

³⁶ EB Ex. 4, p. 28.

³⁷ EB Ex. 4, pp. 35-37.

³⁸ EB Ex. 4, p. 37.

³⁹ EB Ex. 4, p. 35. As discussed in detail below, the ALJ denied the Bureau's request to present

was trying to impersonate a police officer.”⁴⁰ The second incident occurred in 2004, when Titus was observed at 3 a.m. in a closed park on Mercer Island, a suburb of Seattle.⁴¹ According to the police report, Titus was meeting an “asian guy” whose name he said he did not remember; he first claimed that he had met this person through amateur radio, then changed his story to say they met through the Internet.⁴² At the time of this incident, Titus had with him a number of items that made it appear that he was a police officer – he was wearing a police badge necklace, and also had a sheriff’s cap and a flashlight of the type often carried by police officers.⁴³ As a result, the Seattle Police Department, which monitors the activities of registered sex offenders, pulled Titus’s file and checked his risk assessment.⁴⁴

Acting pursuant to applicable state and local laws, and after reviewing Titus’s criminal records, treatment records, and the police reports relating to the recent incidents, the Seattle Police Department elevated Titus from a Level 2 sex offender, a “Moderate Risk” to reoffend, to a Level 3 sex offender, a “High Risk” to reoffend.⁴⁵ A Level 3 assessment is the highest, most serious risk assessment that a convicted sex offender can receive in the State of Washington. The individual responsible for raising Titus to a “High Risk” category on behalf of the Seattle Police Department was Seattle Police Detective Robert Shilling.⁴⁶

Detective Shilling, the lead detective in the Seattle Police Department’s Sexual Assault

Ms. Halligan as a rebuttal witness after Titus disputed the accuracy of the police report.

⁴⁰ EB Ex. 4, p. 37.

⁴¹ EB Ex. 4, p. 39.

⁴² *Id.* Titus testified that the other man lived with his parents and claimed to be 19 years-old. Tr. 605-06.

⁴³ EB Ex. 2, pp. 4, 7. Titus’s vehicle was also equipped with a ham radio and a whip antenna often used by law enforcement. EB Ex. 4, pp. 30, 40; Tr. 607-10 Titus testified that he is often asked whether he is a police officer and that “everybody” in his neighborhood thinks he’s a “cop.” Tr. 612-13 This conduct caused Detective Shilling concern because Titus’s attraction to symbols of power and control raised the question whether he was in his offense cycle. Tr. 874

⁴⁴ EB Ex. 2, p. 7.

⁴⁵ EB Ex. 2, pp. 4-5, 7.

and Child Abuse Unit/Sex and Kidnapping Offender Detail, testified at the hearing in this case.⁴⁷ He was accepted by the ALJ as an expert in the field of community notification, community education, sex offender registration, the management of sex offenders in the community, and in using the Washington Sex Offender Risk Level Classification tool.⁴⁸

The ALJ, however, failed to acknowledge in the Initial Decision that Detective Shilling had testified as an expert witness, and even went so far as to explicitly state that no qualified expert testified regarding the basis for assessing Titus as a risk to his community.⁴⁹ Moreover, rather than taking official notice of the fact that the Seattle Police Department had engaged in a lawful administrative action when it raised Titus from a Level 2 “Moderate” to his current “High Risk” Level 3 “High Risk” sex offender status, the ALJ apparently performed his own evaluation of Titus’s risk to the residents of Seattle and determined that Detective Shilling had acted arbitrarily.⁵⁰

The ALJ should not have second-guessed the discretion and lawful authority of the Seattle Police Department in an area in which they have expertise.⁵¹ Whether the Seattle Police Department acted within the laws of the State of Washington in raising Titus from a Level 2 to a Level 3 sex offender status is a matter for the local courts.⁵² The ALJ should have focused on

⁴⁶ *Id.* at 2, 5.

⁴⁷ *Id.* at 1.

⁴⁸ Tr. 911-12.

⁴⁹ Initial Decision at 4 ¶ 7.

⁵⁰ Initial Decision at 4-5 ¶ 10. Indeed, the ALJ describes the Mercer Island incident as “not remotely relevant” and Titus’s behavior as not “even suspicious.” Initial Decision at 11 ¶ 27.

⁵¹ *See Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9959 ¶¶ 21-22 (1995) (deferring to local authorities to apply “clear and present danger” test to speech alleged to incite violence).

⁵² Because the evidence is clear that Titus is classified as a Level 3 “High Risk” sex offender in Seattle, Washington, the Commission need not decide whether a Level 2 “Moderate Risk” sex offender would be qualified to hold an amateur radio license under the other facts of this case. In any event, *Contemporary Media v. FCC* suggests that Titus might be found unqualified even if he were classified as a “moderate risk” by the Seattle authorities as that case suggests that the conviction is decisionally significant in itself rather than focusing on a post-conviction risk

the scale and scope of Titus's misconduct and Level 3 "High Risk" sex offender status as they relate to his qualifications to hold an amateur radio license.

Even if the propriety of the Seattle Police Department's action was an appropriate area of inquiry at hearing, the ALJ did not properly evaluate all of the record evidence. Detective Shilling testified that he raised the risk assessment on the basis of "Titus's record -- particularly Titus's multiple sex offenses involving children, the nature of Titus's offenses, and Titus's limited participation in sex offender treatment," and noted that Titus's "recent behavior in the park and the circumstances relating to the incident on Mercer Island indicated that he might be in his offense cycle."⁵³ The record is unambiguous that Titus is a recidivist who committed five felony sex offenses, a number of which involved violence; Titus performed poorly in sex offender treatment; and he failed to cooperate with the police, refusing to answer questions when they asked him why he was in a closed park at 3 a.m.⁵⁴ Detective Shilling also testified that had the initial assessment of Titus used the criteria applied in 2004, Titus likely would have been classified at Level 3 upon his release from prison.⁵⁵ Detective Shilling found that based on the "totality of the circumstances," his years of experience managing sex offenders and evaluating their potential risk to the community, Titus presented a high risk.⁵⁶

assessment.

⁵³ EB Ex. 2, p. 4, 7. Detective Shilling testified that different sex offenders have different offense cycles, which he described as the way they operate; managing sex offenders in the community involves watching for clues in the behavior of registered offenders. Tr. 919. Titus testified that he is often asked whether he is a police officer and that "everybody" in his neighborhood think he's a "cop." Tr. 612-13. This conduct caused Detective Shilling concern because Titus's attraction to symbols of power and control raised the question whether he was in his offense cycle. Tr. 874.

⁵⁴ EB Ex. 4, pp. 12, 14, 32-34, 38-40.

⁵⁵ Tr. 709.

⁵⁶ Tr. 941-44. His assessment did not, as the Initial Decision suggests, rely solely on the WASOST actuarial test (Initial Decision pp. 5-6 ¶12) that he is frequently required to use as a part of his analysis, although research has found a portion of that test, the RRASOR, to be accurate in predicting felony sex recidivism. Tr. 843-44.

3. The ALJ Did Not Properly Weigh Dr. Douglas Allmon's Full Testimony

Titus presented evidence on his behalf from a psychologist, Dr. Douglas Allmon, whom Titus hired for the purpose of the hearing.⁵⁷ Dr. Allmon characterized Titus as being at low risk to reoffend,⁵⁸ although at his deposition, he had refused to make any such risk assessment.⁵⁹ Contrary to the ALJ's conclusion, the weight of Dr. Allmon's testimony does not demonstrate that Titus is, in fact, a low risk to children if he retains his amateur license. The ALJ relied heavily on Dr. Allmon's diagnosis that Titus is in remission,⁶⁰ but failed to acknowledge Dr. Allmon's admonishment that Titus should refrain from engaging in activities in which he is exposed to children.⁶¹ Moreover, Dr. Allmon admitted that he knows almost nothing about amateur radio or the extent to which children are involved in the hobby.⁶² Accordingly, Dr. Allmon could not opine about the special risks that the hobby might present to young amateur radio enthusiasts being exposed to a convicted sex offender. Thus, the ALJ relied too heavily on Dr. Allmon's testimony as support for the Initial Decision's conclusion.⁶³

4. The ALJ Improperly Assessed the Weight to be Afforded to Titus's Character Witnesses and Inaccurately Assessed Titus's Credibility

In *Contemporary Media v. FCC*, the court agreed with the Commission that self-serving statements may reasonably be entitled to no weight where the statements "vouch[] for [the licensee's] character while evidencing little if any knowledge of his egregious acts...."⁶⁴ Similar

⁵⁷ Dr. Allmon interviewed Titus for two hours and gave him several tests that took approximately five hours to complete. Tr. 1007-10.

⁵⁸ Tr. 959, 1021-22.

⁵⁹ Depo. 22-24; Tr. 1020-21.

⁶⁰ Initial Decision at 6 ¶ 13; Tr. 989.

⁶¹ Tr. 995-96, 1000.

⁶² Tr. 974-79.

⁶³ Explaining that pedophiles should avoid situations involving children, where the risk may be unnecessarily heightened, Dr. Allmon compares sex offenders with access to children to an alcoholic drinking 7-Up in a tavern. Tr. 996.

⁶⁴ *Contemporary Media*, 214 F.3d at 195.

facts are present here. Titus presented written statements from ten “character witnesses” who, not surprisingly, offered glowing remarks about him. Of those ten witnesses, however, only two – Titus’s mother and an older man with whom Titus had a sexual relationship as a teenager knew about Titus’s criminal past prior to this proceeding.⁶⁵ Most indicated that they had only recently learned of his convictions for molesting children.⁶⁶ Nevertheless, the ALJ afforded significant weight to these statements.⁶⁷

The ALJ accepted at face value Titus’s testimony, which was, at times, highly questionable. For example, Titus testified that the police fabricated the idea that he told them that he was meeting with someone that he had met through amateur radio.⁶⁸ It is simply not plausible, however, that the police – who had no knowledge of Titus’s interest in amateur radio – could have spontaneously made up the statements in the police report about how he met the young man he was meeting on Mercer Island.

The ALJ also ignored Titus’s selective memory about his misconduct.⁶⁹ For example, while it may be plausible for Titus not to recall insignificant facts about events that transpired years ago, the ALJ drew no conclusions from Titus’s professed inability to remember many of the most egregious elements of his admitted crimes. When questioned about the details of his criminal acts, Titus often claimed he was unable to remember the most incriminating facts.⁷⁰ Thus Titus claimed that he did not recall that he threatened and continued to rape an eight-year-

⁶⁵ Titus Exs. 3-13; EB Ex. 4, p. 32, Tr. 541-42, 546.

⁶⁶ Titus Exs. 3-13.

⁶⁷ Initial Decision at 6-7 ¶15, 10 ¶ 25.

⁶⁸ The Mercer Island incident police report states that Titus first told them “Charles” was a friend through ham radio and then he said they had met on the internet. EB Ex. 4, p. 39. At hearing, Titus stated that these statements were not true and the police made them both up. Tr. 644-45. According to the police report, Titus told the police that he did not know the last name of the person he was meeting, but at hearing Titus testified that this statement was not true — he did in fact know the name and told the police that it was none of their business. Tr. 605.

⁶⁹ Tr. 519-20, 526-27, 536-39.

⁷⁰ Tr. 536, 538-39.

old boy even though the boy told him to stop,⁷¹ or that he threatened to hurt a twelve-year-old boy whom he fondled in a junior high bathroom if the boy refused to touch his penis,⁷² or that he asked an eleven-year-old boy to measure his own erect penis.⁷³ Similarly, while often acknowledging the accuracy of the sex offender treatment records, police reports, and other documents discussed at hearing,⁷⁴ Titus denied or did not recall the most negative findings in them, like the statements in his sex offender Treatment Summary that he was fantasizing about raping young boys and refused to continue helpful treatments,⁷⁵ or that a man with whom he had been caught having sex while incarcerated was mentally disabled.⁷⁶

5. The ALJ Failed to Address the Special Risk Posed By Allowing Titus to Interact With Children Through Amateur Radio

The ALJ almost wholly failed to address the concerns raised by Titus's status as a "High Risk," convicted child molester as they relate to his activities as an amateur radio operator. This case raises not only the serious problem presented by Titus's propensity to violate the law, it presents the potential that Titus may use amateur radio to access children and "groom" them for sex.

The ALJ improperly concluded, contrary to the weight of the evidence, that Titus will not use his amateur radio license to endanger children, and that if he does, Titus is "registered as a

⁷¹ Tr. 526, 527; EB Ex. 4, pp. 2, 14, 24.

⁷² Tr. 536-39; EB Ex. 4, pp. 1-2, 14, 24.

⁷³ Tr. 550-51; EB Ex. 4, pp. 2-13, 23.

⁷⁴ Tr. 560-62, 565, 528; EB Ex. 4. The EB Ex. 4 documents are relevant, credible, reliable records kept in the course of business by disinterested third parties and, as such, they have the requisite indicia of relevance, truthfulness, and trustworthiness to be considered substantial evidence in this case. *See Richardson v. Perales*, 402 U.S. 389, 403-406 (1971); *EchoStar Commun'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002); *Willingham v. Gonzales*, 391 F.Supp.2d 52 (D. D.C. 2005).

⁷⁵ Tr. 563-65; EB Ex. 4, p. 28.

⁷⁶ Tr. 590-91; EB Ex. 4, pp. 2, 25.

sex offender and can be readily identified and apprehended if necessary.”⁷⁷ The ALJ based his finding on (1) the absence of specific evidence that Titus has already used his amateur license to victimize a specific child,⁷⁸ (2) Dr. Allmon’s testimony at trial, addressed above, that Titus is at low risk to commit additional sexual offenses against children,⁷⁹ and (3) the ALJ’s personal opinion that the “Internet [rather than amateur radio] is the chosen tool for pedophiles for readily reaching minors and children.”⁸⁰

Although the record lacks specific evidence that Titus has already used his amateur license in a way that harms children, the preponderance of the evidence indicates both that he continues to be a danger to children, and that his amateur license gives him the opportunity to engage children in a way that puts them at risk. We note that the ALJ failed to acknowledge or address the concerns raised in *George E. Rodgers*,⁸¹ a case cited in the *Order to Show Cause* in this proceeding.⁸² That case involved a child molester who used amateur radio to engage unsuspecting youngsters in sexual talk and activities. Rodgers “attracted his victims through a common interest in amateur radio and ... each victim was assaulted while spending a night at Rodger’s home to use his amateur radio apparatus.”⁸³ The Rodgers hearing designation order states that “[c]ertainly, [Rodgers’s] conviction for corrupting and indecently assaulting minors attracted through amateur radio is relevant” to his qualifications to be a Commission licensee.⁸⁴ This case demonstrates undoubtedly that Titus has the means to attract minors through their interest in amateur radio and thereby “groom” them for assault.

⁷⁷ Initial Decision at 12 ¶ 32.

⁷⁸ Initial Decision at 12 ¶ 32.

⁷⁹ Initial Decision at 12 ¶ 31, Tr. 959, 1021-22.

⁸⁰ Initial Decision at 12 ¶ 32.

⁸¹ See *George E. Rodgers*, Hearing Designation Order, 10 FCC Rcd 3978 (WTB 1995).

⁸² See *Order to Show Cause*, 22 FCC Rcd at 1639.

⁸³ See *George E. Rodgers*, 10 FCC Rcd at 3978.

⁸⁴ *Id.* Rodgers’s renewal application was dismissed after he failed to enter an appearance in the hearing proceeding. *George E. Rodgers*, Order, FCC 94M-121 (ALJ Gonzales 1995).

The evidence at hearing demonstrated that Titus's hobby puts him in proximity to children in a manner that endangers them. As noted above, "grooming" is a term used to describe the actions taken by sex offenders in order to gain the trust of potential victims.⁸⁵ The danger of grooming in this case is more than theoretical. As noted above,⁸⁶ Titus groomed an 11-year-old boy at a gym for sex, resulting in his third felony sex offense conviction.⁸⁷ More recently, as discussed above, when police discovered Titus in the restroom of a closed public park at 3 a.m., he admitted that he was in the area to rendezvous with a young man whom he had met through amateur radio.⁸⁸

John Schurman, the President of a Seattle-area amateur radio club whose members are mostly children, testified that amateur radio's activities, including a tradition of experienced amateurs mentoring younger amateurs, give ham radio operators easy access to minors and, in Titus's case, facilitate grooming scenarios.⁸⁹ Titus admits that he "has mentored new-comers to the ranks of amateur radio."⁹⁰ Because Titus operates and almost constantly monitors a repeater with wide coverage in the Seattle area,⁹¹ he has easy access to the conversations of minor ham operators who use his repeater.⁹²

As noted above, the ALJ heavily credited Dr. Allmon's testimony, but the Bureau believes that testimony does not support the ALJ's conclusions. At the same time, the ALJ failed to give proper weight to Detective Shilling's testimony on these matters. The parties stipulated, and the ALJ accepted, Detective Shilling as an expert on managing sex offenders in the

⁸⁵ Tr. 913-13, 1029.

⁸⁶ *See supra*, at 7 (note 22 and accompanying text).

⁸⁷ EB Ex. 4, pp. 5-10, 11-13; Tr. 547-51, 554-55.

⁸⁸ EB Ex.4, p. 39. Titus later claimed that he had met the young man through the Internet and denied telling the police of any connection to amateur radio. Tr. 644-45; EB Ex. 4, pp. 39-40.

⁸⁹ Tr. 410-11, 483-84, 486, 508.

⁹⁰ Titus Ex. 1, p. 10.

⁹¹ Tr. 475, 664.

⁹² Tr. 418-21, 442-43.

community.⁹³ Detective Shilling believes that the community should provide the tools necessary for sex offenders to be successfully re-introduced back into the community,⁹⁴ while minimizing the risk they pose to the community.⁹⁵ To accomplish this, sex offenders should not engage in activities involving the supervision of, or close contact with, children in order to avoid possible grooming scenarios.⁹⁶ For example, Detective Shilling explained that a sex offender who offended against minors should not be a teacher, drive a school bus, run a church youth group or baby sit.⁹⁷ Based on the totality of circumstances considered by Detective Shilling in making his risk assessment, he is “absolutely” concerned about Titus’s access to children.⁹⁸

Finally, the ALJ’s belief that pedophiles pose a greater danger on the Internet than by using amateur radio simply does not support the conclusion that Titus should keep his license.⁹⁹ The Enforcement Bureau need not demonstrate that the access Titus has to children by means of his amateur license creates a greater risk of harm to children than Titus’s access to children via the Internet. Rather, the Bureau must demonstrate by a preponderance of the evidence that Titus lacks the basic character to be a Commission licensee. The ALJ’s holding cannot be reconciled with Titus’s record of five felony sex crimes, his more recent activities and elevation to a High Risk Offender, and the special opportunities amateur radio affords its operators to engage in unsupervised contact with children. The risk is unacceptable.

D. The ALJ Erred in Denying the Enforcement Bureau’s Requests for Rebuttal

Under the Administrative Procedure Act, “[a] party is entitled ... to submit rebuttal

⁹³ Tr. 910-12.

⁹⁴ Tr. 748.

⁹⁵ Tr. 769-70.

⁹⁶ Tr. 768-69, 913-14.

⁹⁷ Tr. 750, 767, 769.

⁹⁸ Tr. 943-44.

⁹⁹ Initial Decision at 12 ¶ 31.

evidence ... as may be required for a full and true disclosure of the facts.”¹⁰⁰ This provision has been interpreted to encourage admission of all relevant evidence.¹⁰¹

As noted above, the ALJ permitted Titus to introduce evidence in support of his claim that he posed no threat to children, and the Initial Decision is based primarily on that premise. When the Bureau sought at the hearing to rebut Titus’s evidence, however, the ALJ prohibited the Bureau from doing so.¹⁰² Similarly, although Titus’s credibility was central to the case, the ALJ denied the Bureau an opportunity to address that issue on rebuttal as well. The ALJ’s denial of the Bureau’s motion to present rebuttal evidence was erroneous and should be reversed.

1. The Bureau’s Proffered Expert Rebuttal Testimony Would Contest Dr. Allmon’s Surprise Predictions Concerning Titus’s Recidivism

The ALJ refused to hear the testimony of Dr. Gerry Hover, a psychologist proffered by the Bureau as an expert witness. Dr. Hover would have testified that Titus presents an unacceptable risk to children and should not be allowed to be an amateur licensee.¹⁰³ Dr. Hover holds a doctorate in counseling psychology, and has been employed by the State of Washington in the Sex Offender Treatment Program at Twin Rivers Corrections Center in Monroe, Washington for approximately 19 years. Since 2006, he has been the Community Sex Offender Treatment Supervisor for the State of Washington. In this position, Dr. Hover supervises sex offender community treatment services in 17 cities.¹⁰⁴

¹⁰⁰ 5 U.S.C. § 556(d).

¹⁰¹ See *Elm Grove Coal Company v. Director, Office of Workers’ Compensation Programs*, 480 F.3d 278, 298-99 (4th Cir. 2007) (mine operator was entitled to submit two interpretations of X-ray in rebuttal after miner submitted two interpretations of X-ray in support of his affirmative case); *United States Steel Mining Company, Inc. v. Director, Off. of Workers’ Compensation Program*, 187 F.3d 384, 388 (4th Cir. 1999) (holding that the exclusionary rule applicable to an agency proceeding is essentially limited to relevance).

¹⁰² *David Titus*, Memorandum Opinion and Order, FCC 08M-51 (Dec. 5, 2008) (“MO&O”).

¹⁰³ See Enforcement Bureau’s Motion to Permit Testimony By Rebuttal Witnesses, filed September 8, 2008 (“Rebuttal Motion”).

¹⁰⁴ See Rebuttal Motion at Hover Resume. As a supervisor at state offender treatment facilities,

The ALJ dismissed the utility of Dr. Hover's testimony on the grounds that he is "not a licensed psychologist."¹⁰⁵ But the ALJ clearly misunderstood the situation in that regard. As an employee of the State, Dr. Hover is not subject to the same licensing requirements that apply to non-governmental psychologists like Dr. Allmon. That does not mean, as the ALJ incorrectly concluded, that Dr. Hover is unqualified, or less qualified than Dr. Allmon. To the contrary, Dr. Hover's background and training show that he is eminently qualified to testify generally, and with regard to Titus, as an expert regarding the characteristics and conduct of sex offenders, the diagnosis and treatment of sex offenders, and the characteristics and usefulness of the various tests used to diagnose and treat sex offenders.¹⁰⁶ Dr. Hover is a disinterested, independent witness, not paid by the Bureau for his expert opinion.¹⁰⁷ In order to have a complete, fair, and impartial record, the ALJ should have permitted Dr. Hover to testify.

Dr. Hover's rebuttal testimony was critical because Dr. Allmon's hearing testimony concluding that Titus posed a low risk to re-offend came as a surprise, and could not reasonably have been anticipated by the Bureau when it presented its direct case.¹⁰⁸ As noted above, Dr. Allmon made clear at his deposition that he would not assess Titus's risk to re-offend.¹⁰⁹ At hearing he presented for the first time his conclusion that "the probability as implied is not likely

Dr. Hover is well-aware of the records kept by such facilities and also is qualified to testify generally regarding the record keeping procedures and the accuracy of the medical and treatment records maintained by the State in such institutions.

¹⁰⁵ See MO&O at 2.

¹⁰⁶ See Rebuttal testimony of Gerald R. Hover, Ed.D at 2. Dr. Hover has "studied the psychology of pedophilia, [has] counseled and supervised many pedophiles and [is] familiar with the psychological and legal criteria used to diagnose pedophilia." See Tr. 1041.

¹⁰⁷ Dr. Hover may, however, receive the same travel and per diem funds paid to other types of witnesses.

¹⁰⁸ See *Weis v. Chrysler Motors Corp.*, 515 F.2d 449, 459-60 (2d Cir. 1975) (new trial required for failure of court to allow rebuttal testimony of expert witness); *U.S. v. Tajada*, 956 F.2d 1256, 1267 (2d Cir. 1992); *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981).

¹⁰⁹ Allmon Depo. 22-24.

to re-offend.”¹¹⁰ The ALJ characterized this as only “somewhat of [a] slight discrepancy”¹¹¹ from his deposition testimony, but in fact, it goes to the very heart of this case.¹¹²

2. The Bureau’s Proffered Factual Rebuttal Testimony Would Challenge Titus’s Credibility

The ALJ also refused to hear rebuttal testimony that would have challenged Titus’s credibility. He rejected the testimony of Police Officer Jennifer Franklin, who would have testified as to the accuracy of the facts described in the Mercer Island police report that Titus disputed at hearing.¹¹³ The ALJ also refused to hear testimony of Victoria Halligan and Officers Mark Wong and Susan Wong, who would have testified about Titus’s threatening behavior at a traffic accident.¹¹⁴ During his testimony on these subjects, Titus disagreed with statements in police reports about the incidents.¹¹⁵ These fact witnesses were offered on rebuttal to demonstrate Titus’s lack of candor on the stand concerning the episodes. The ALJ failed to recognize the relevance of the incidents and the significance of Titus’s lack of candor about them.¹¹⁶ The contradictory testimony of these other witnesses was relevant and probative and justified the Bureau’s request for rebuttal.

The Bureau also asked to submit as rebuttal a transcript of a Benton County, Washington hearing regarding Titus’s status as a felony sex offender,¹¹⁷ in which Titus contradicted

¹¹⁰ Tr. 1019.

¹¹¹ MO&O at 2.

¹¹² MO&O at 2.

¹¹³ *See supra*, 15.

¹¹⁴ *See* Rebuttal Motion, and Enforcement Bureau’s Motion For Leave To File Supplement To Enforcement Bureau’s Motion To Permit Testimony By Rebuttal Witnesses (“Supplemental Motion”), and Enforcement Bureau’s Supplement To Motion To Permit Testimony By Rebuttal Witnesses (“Supplement”), both filed October 8, 2008..

¹¹⁵ *See e.g.*, Tr. 593, 644-45.

¹¹⁶ *See* MO&O at 3-5.

¹¹⁷ *See* Supplemental Motion at 2-3.

testimony that he gave in this proceeding.¹¹⁸ In denying the Bureau's request the ALJ stated that "[i]t would be irresponsible to burden the record by litigating [the] truthfulness of a county court transcript not involving pedophilia."¹¹⁹ The point, however, was not the truthfulness of Titus's statements in the county court proceeding, but the fact that his testimony there was inconsistent with his testimony here – one or the other must have been incorrect, thus demonstrating Titus's lack of credibility. The truthfulness and candor of a licensee goes to the core of any character qualification assessment and is cause to revoke a license.¹²⁰

3. The ALJ Should Have Allowed Rebuttal Because It Was Necessary For A Thorough Understanding Of Crucial Issues

In his decision on the Bureau's motion to present rebuttal evidence, the ALJ held that the

¹¹⁸ Titus petitioned the Court to lift the requirement that he register with the state as a sex offender and to reinstate his civil rights. Titus Ex. 1 at 11 The petition was denied. *Washington v. David Lee Titus*, Benton No. 93-1-0035-2, Order (September 8, 2008). In the hearing on Titus's petition, the Benton County court heard testimony from Dr. Allmon, Titus, and Officer Franklin regarding the same psychological examination and incidents at issue in this proceeding. *Washington v. David Lee Titus*, Benton No. 93-1-00035-2, Hearing Transcript (August 8, 2008) ("Benton Tr."). Titus's hearing testimony before the FCC that he has been a "model citizen" who has not broken the law for more than 15 years (Titus Ex. 1 at 9, 11; Tr. 1103-1105) is contradicted by his admission in Benton County that, during that time, he has had sex in public parks and public restrooms, acts that violate the law. Benton Tr. 40-41 Titus's FCC hearing testimony that the Mercer Island police report is inaccurate is directly refuted by Officer Franklin's sworn testimony in the Benton County proceeding; Titus's FCC hearing testimony that he has been truthful and candid concerning the events about which he has testified, including his honesty with Dr. Allmon, (Titus Ex. 1 at 11; Tr. 1105, 1027, 1094) is contradicted by Dr. Allmon's testimony in Benton County that Titus did not tell him that he had gone to Mercer Island to meet someone. Benton Tr. 26. That testimony undermines the validity of Dr. Allmon's report, which relied on Titus's truthfulness and candor. Tr. 1026. Each of these examples demonstrates Titus's lack of candor with the Commission.

¹¹⁹ MO&O at 5.

¹²⁰ See MO&O at 3-5; Initial Decision at 12-13 ¶ 33. *But see FCC v. WOKO*, 329 U.S. 223, 226-28 (1946) ("We are solely concerned with the applicant's willingness to deceive the Commission, notwithstanding the significance or materiality of the deceptions."); *Ochoa v. FCC*, 98 F.3d 646, 650-51 (D.C. Cir. 1996) ("lack of candor need not be specially designated as a hearing issue because 'truth and candor are always in issue' in FCC hearings ... it is well-established 'that false statements in the course of the hearing process are, in and of themselves, of substantial significance, ... and that such false testimony may lead to disqualification.'"(internal citations omitted)).

proposed rebuttal testimony was “useless” and too “burdensome” to allow.¹²¹ The ALJ cited Sections 1.353 and 1.244 of the Commission’s rules, but neither of those provisions applies here.¹²² Section 1.353 states only that the presiding judge in a hearing may require the submission of evidence if necessary; it says nothing about what evidence may be presented on a party’s own initiative.¹²³ Section 1.244 is similarly inapplicable, dealing only with the designation of a settlement judge in comparative hearings involving applicants for new facilities — in other words, it does not address the admissibility of evidence, and does not apply to license revocation or non-renewal proceedings.

The ALJ, relying heavily on Black’s Law Dictionary, incorrectly surmised that rebuttal evidence may not be “substantive,” “directly probative of a designated issue,” or “time consuming,” and that opinion evidence is not admissible as rebuttal evidence.¹²⁴ To the contrary,

¹²¹ See MO&O at 4-5. The Initial Decision states that the Bureau’s request for rebuttal was denied because it was “tardy.” Initial Decision at 11, n. 32. This is incorrect, as evidenced by the order denying the Bureau’s rebuttal requests, which never alleges that the Bureau’s requests were untimely. See *David L. Titus*, Order, FCC 08M-41 (Dec. 5, 2008). Indeed, the Bureau moved orally for rebuttal prior to the close of evidence, as instructed by the ALJ earlier in the hearing. See Tr. 1125, 1128. Nonetheless, the ALJ directed motions to be filed. See Tr. 1125-33. Thereafter the Bureau filed written motions on time and in accordance with the schedule set forth by the ALJ. See Enforcement Bureau’s Motion to Permit Testimony By Rebuttal Witnesses, filed September 8, 2008; Enforcement Bureau’s Motion For Leave To File Supplement To Enforcement Bureau’s Motion To Permit Testimony By Rebuttal Witnesses (“Supplemental Motion”), and Enforcement Bureau’s Supplement To Motion To Permit Testimony By Rebuttal Witnesses (“Supplement”), both filed October 8, 2008.

¹²² 47 C.F.R. §§ 1.244, 1.353.

¹²³ See, e.g., *New Life Evangelistic Center, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 2659 (1989) *Van Buren Comm. Serv. Broad., Inc.*, Decision, 87 FCC 2d 1018 (1981); *Kittyhawk Broad. Corp.*, Memorandum Opinion and Order, 15 FCC 2d 322 (1968).

¹²⁴ See MO&O at 4 n.5 (citing *Black’s Law Dictionary* (5th Ed.) at 1139). The citation to Black’s Law Dictionary states that the definition of rebuttal is “rebuttal evidence allowed to explain, repel, counteract or disapprove *facts given in evidence* by the adverse party.” *Id.* (emphasis added by the ALJ). *But see, e.g., Tajada*, 956 F.2d at 1267 (referencing *Weis*, the court notes that “the exclusion of crucial [rebuttal] evidence constituted an abuse of discretion . . . [Any other rule would require attorneys] to present evidence in advance to rebut every possible scenario that defendants might paint.”); *Rodriguez v. Olin Corp.*, 780 F.2d 491 (5th Cir. 1986) (“This rule proceeds from the view that a plaintiff has the right to adduce whatever evidence is necessary to establish its prima facie case and is under no obligation to anticipate and negate in

any evidence may be submitted as rebuttal evidence if it is relevant and explains, repels, counteracts, or disproves the evidence submitted by an adverse party.¹²⁵

The ALJ also cited Federal Rule of Evidence 403, which permits a presiding officer to exclude relevant evidence that is burdensome or a waste of time. But the relevant evidence offered by the Bureau, responding to Dr. Allmon's surprise testimony and Titus's false statements regarding the Mercer Island and traffic accident incidents, was neither too burdensome nor a waste of time. Rather, the evidence excluded here goes to the heart of the case – whether Titus is unqualified to be an amateur radio licensee because of the unacceptable risk he would pose to children in that capacity. Because the proffered rebuttal evidence was vital to a thorough understanding of crucial issues, the ALJ's refusal to allow it constituted an abuse of discretion that should be reversed by the Commission.¹²⁶

IV. CONCLUSION

For the reasons stated above, the Bureau submits that David Lee Titus is not qualified to be an amateur radio licensee. In light of all of the evidence, as well as for the reasons set forth in the Enforcement Bureau's Proposed Findings of Fact and Conclusions of Law and the Enforcement Bureau's Reply to David L. Titus's Proposed Findings of Fact and Conclusions of Law, the Enforcement Bureau respectfully requests that the Commission reverse the Initial Decision, determine that Titus is unqualified to be and to remain a Commission licensee, and revoke Titus's license for Amateur Radio Station KB7ILD. In the event that the Commission

its own case in chief any facts or theories that may be raised on defense"); *Weis*, 515 F.2d at 459-60 (new trial required for court's failure to allow expert witness rebuttal testimony.). *See also Martin*, 666 F.2d at 1020 ("[w]here . . . [the] evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal. . . . Furthermore, with respect to 'real rebuttal evidence,' the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief.")

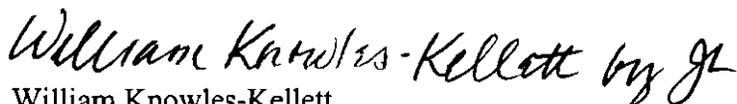
¹²⁵ *See e.g., Elm Grove Coal*, 480 F.3d at 298-99 (medical interpretations of X-ray); *Tajada*, 956 F.2d at 1266 (law enforcement agent's testimony); *Martin*, 666 F.2d at 1020 (eye-witness testimony); *Weis*, 515 F.2d 449 (non-medical expert opinion testimony).

remains unconvinced by the record, as evaluated under the proper legal standard, the Bureau respectfully requests that the Commission remand the case to the ALJ and order the ALJ to permit the Bureau to present its rebuttal evidence.

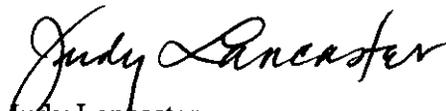
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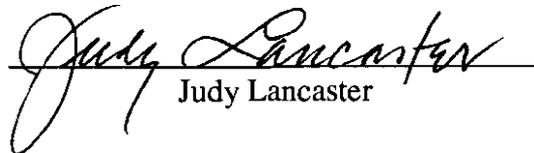
April 8, 2010

¹²⁶ See *Tajada*, 956 F.2d at 1267.

CERTIFICATE OF SERVICE

Judy Lancaster, counsel for the Enforcement Bureau, certifies that she has, on this 8th day of April 2010, sent by first class United States mail copies of the foregoing “Enforcement Bureau’s Exceptions to Initial Decision of Chief Administrative Law Judge Richard L. Sippel” to:

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