

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
DAVID TITUS)
)
Amateur Radio Operator and Licensee of)
Amateur Radio Station KB7ILD)

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

FILED/ACCEPTED

To: The Commission

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Federal Communications Commission
Office of the Secretary

REPLY TO EXCEPTIONS TO INITIAL DECISION

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Summary

The Commission should overrule each of the Enforcement Bureau's ("Bureau") exceptions in this case. Chief Judge Sippel's Initial Decision, FCC 10D-01 (March 9, 2010) is amply supported by the facts and the law. There is no reversible error in the Chief Judge's decision that David Titus's amateur radio license should not be revoked.

The Chief Judge properly weighed the evidence in this case. The Chief Judge found that the evidence showed Mr. Titus's rehabilitation from the sexual misdeeds of his adolescence. He found Mr. Titus to be a credible witness. He found Dr. Douglas Allmon's expert testimony that Mr. Titus was at a low risk to reoffend to be convincing. He properly credited Mr. Titus's now 17 years of offense free behavior as evidence of Mr. Titus's rehabilitation. He properly credited Mr. Titus's record of compliance with the FCC's rules in his more than 20 years of service as an amateur radio licensee. He properly credited the testimony of a cross-section of the community attesting to Mr. Titus's character despite these witnesses' knowledge of Mr. Titus's past misdeeds.

The Chief Judge also properly discounted the "risk assessment" testimony of Seattle Detective Shilling in light of the detective's admission that the risk assessment tool the detective used is seriously flawed and that he actually opposes its use. The Chief Judge properly concluded that a traffic accident occurring in 2002 and a matter where Mr. Titus was using a public restroom in the early morning hours occurring in 2004 were collateral and immaterial. Neither of these matters resulted in an arrest, involved sexual misconduct, involved minors or involved use of amateur radio.

The Chief Judge properly declined to allow further rebuttal testimony concerning these two collateral matters, and he properly declined to allow late tendered, conclusory and flawed rebuttal testimony of an unlicensed psychologist who never examined Mr. Titus. Because there is no reversible error in the Initial Decision in this proceeding, the Chief Judge was correct in holding that Mr. Titus's possession of an amateur radio license would not constitute a risk of his reoffending and thus the Chief Judge correctly determined that no cause exists for revoking Mr. Titus's amateur radio license.

TABLE OF AUTHORITIES

Constitutions

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Cases

Contemporary Media, Inc., 14 FCC Rcd 8790 at n.1 (1999)13

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Other Authorities

Washington Attorney General Opinions 1980, No. 2 (January 11, 1980)..... 2

Kemshall, Risk Assessment and Management of Known Sexual
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<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.121.2355&rep=rep1&type=pdf>)..... 11

Hanson, The Validity of Static-99 with Older Sexual Offenders
2005-01 (available at http://www.static99.org/pdfdocs/hanson_april_2005.pdf)..... 11

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REPLY TO EXCEPTIONS TO INITIAL DECISION

David Titus, by counsel, replies to the Enforcement Bureau's ("Bureau") April 8, 2010 Exceptions to Initial Decision of Chief Administrative Law Judge Richard Sippel, FCC 10D-01 (March 9, 2010) ("ID"). As shown below, the Initial Decision should be affirmed in all respects. The Bureau's Exceptions largely amount to a disagreement over Chief Judge Sippel's factual findings and evaluation of the evidence and his refusal to allow the Bureau to introduce untimely rebuttal on collateral matters. The Chief Judge's factual findings and legal conclusions are supported by the overwhelming weight of the evidence, and his evidentiary rulings were plainly not an abuse of his judicial discretion. For these reasons the Initial Decision should be affirmed.

I. The Chief Judge properly considered the nature of Mr. Titus's past misconduct.

The Bureau complains that the Chief Judge failed to consider the extent and nature of Mr. Titus's sexual misconduct. The Bureau's claim is mistaken. The issues in this case are to determine the effect of [Mr. Titus's] felony conviction(s) on his qualification to be and remain a Commission licensee" and "whether he is qualified to be and remain a Commission licensee." ID para. 2. As the Chief Judge found, Mr. Titus has one felony conviction. Seventeen years ago, having just turned 18, Mr. Titus pled guilty to having an improper communication with a minor

for immoral purposes, having asked the boy to expose himself to Mr. Titus. He was sentenced to 25 months confinement in a correctional center, and assessed \$500 in penalties. ID at para. 5. That was Mr. Titus's sole felony conviction. The Bureau complains, however, that the Chief Judge failed to consider four "other felonies" Mr. Titus is alleged to have committed based on two delinquency adjudications and two *non-adjudications*. These alleged incidents, occurring when Mr. Titus was an even younger child, 10 to 15, however, were not the subject of any issue in this proceeding, which was focused on "felony convictions." ID at para. 3.

Washington State law, R.C.W. §13.04.240 (2006) clearly states that, "An order of court adjudicating a child delinquent or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime." The Washington State Supreme Court made this point crystal clear in *In re Frederick*, 93 Wash. 2d 28 (1980). *Accord* Attorney General Opinion 1980, No. 2 (January 11, 1980). It is true that R.C.W. §13.04.011.1 (2006) indicates that an adjudication has the same meaning as a conviction, but that plainly did not repeal §13.04.240. Moreover, R.C.W. §13.04.011.1 was not enacted until 1997, seven years after the second and last of Mr. Titus's juvenile adjudications. It would plainly violate the federal ex post facto clause, U.S. Constitution, Art. 1, Sec. 10, clause 1, to apply §13.04.011.1 to criminalize Mr. Titus's juvenile adjudications retroactively. And such a result is plainly not supported by the continued existence of §13.04.240. Surely, if Washington State does not consider such adjudications to be felonies, this Commission is in no position to hold otherwise.¹ And certainly the alleged instances of non-adjudicated conduct are wholly outside the issues in this proceeding.

¹ Thus, the Chief Judge's conclusion at ID para. 21 that Mr. Titus had two felony adjudications at ages 11 and 15, while undercutting the Bureau's argument that he did not consider such conduct, was error since juvenile adjudications under Washington State law are not criminal and felonies by definition are criminal.

Yet, belying the Bureau's claim, Chief Judge Sippel did indeed consider Mr. Titus's past record of non-criminal sexual misconduct. Paragraph 5 of the ID, citing Bureau Exhibit 4, sets forth the punishable [in juvenile proceedings of] acts of sexual misconduct occurring when Mr. Titus was a child, incidents that the Bureau complains erroneously that the Chief Judge failed to consider – all of which occurred by the way more than 20 years ago.² Hence, any Bureau suggestion that the Chief Judge failed to consider these long ago maledictions is simply fallacious.

In fact, it appears that the Bureau's real complaint is that Chief Judge Sippel discounted Mr. Titus's childhood sexual misconduct due to the extended time period since those incidents occurred. Chief Judge Sippel was right to do so. His decision fully comports with the Commission's Character Policy Statements³ and applicable precedent, including that which the Bureau cites. As the Bureau admits, the 1986 Character Policy held that misconduct should not be considered if it fell outside a ten-year period. Exceptions at 7. See ID at para. 19, 21, 24. The 1990 Character Policy broadened the range of relevant non-FCC misconduct to include all felonies but did not disturb the 1986 Character Policy in terms of limiting the inquiry to matters occurring within a ten-year time frame. Apparently recognizing this point, the Bureau claims that the passage in the 1990 Character Policy which states that the Commission will consider the "currency of the misconduct" amounted to a retrenchment from the ten-year limitation. Exceptions at 7. That is just not a fair reading of the 1990 Character Policy which nowhere

² The Chief Judge also determined that Mr. Titus has a history of acting out sexually with peers and younger children that did not result in legal punishment. ID at para. 5. Thus, the Bureau's suggestion that the Chief Judge failed to consider all of Mr. Titus's history, is incorrect.

³ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986) ("1986 Character Policy"), modified, *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) ("1990 Character Policy").

questioned the continued validity of the ten year cut-off period.⁴ Indeed in its decision in *Contemporary Media*, 13 FCC Rcd 14437 at n.2 (1998), the Commission specifically discussed the convictions at issue in that case and stated they were within the ten-year limitation period set forth in the 1986 Character Policy. That statement would appear to suggest that the Enforcement Bureau erred in designation this proceeding for hearing in the first place since Mr. Titus's latest adjudication was well more than ten years prior to the issuance of the order to show cause. *See Order to Show Cause*, 22 FCC Rcd 1638 (Enf. Bur. 2007).

Finally, even if the Chief Judge had formally considered the two unadjudicated instances of misconduct, it would not have made any decisionally difference. Not only were these instances more than 20 years ago, they occurred when Mr. Titus was a young child. Chief Judge Sippel acknowledged that Mr. Titus was a troubled child who himself had been molested and which caused him to act out sexually. ID at paras. 3, 5. The Initial Decision appropriately analyzed Mr. Titus's misconduct in light of the passage of time.⁵ Chief Judge Sippel found that Mr. Titus's adjudicated misconduct was extremely serious and his felony conviction of an immoral communication with a minor when he was 18 "shockingly evil." ID at para. 22.

⁴ Nor does the Bureau's revocation order in *Robert D. Landis*, 22 FCC Rcd 19979 (E.B. 2007) support its contention here. First, the Bureau is in no position to modify or overrule Commission policy statements, and the Bureau's citing of its own unreviewed orders are hardly persuasive authority for overruling long standing policy statements. Second, the Bureau's discussion in that case is fully consistent with Chief Judge Sippel's decision to consider adjudications and not unadjudicated misconduct. *See id.* at para. 7. This is because *Landis* involved a felony conviction for child molestation. Third, a significant distinguishable difference between that case and Mr. Titus's case is that after the *Landis* served an 11 year prison sentence he was civilly committed to a mental hospital as a violent sexual offender, *where he was resident at the time of his license revocation.* *Landis* thus hardly provides support for consideration of unadjudicated misconduct occurring more than 20 years ago when Mr. Titus was child, nor provides any precedential support for revocation of Mr. Titus's amateur radio license.

⁵ The Bureau also asserts Chief Judge Sippel failed to consider certain allegedly aggravating factors such as the willfulness of his misconduct. Exceptions at 8. Mr. Titus never denied that his actions were willful and intentional and the Initial Decision never suggests anything to the contrary. The Chief Judge did not mince words in characterizing Mr. Titus's misconduct, calling it "shockingly evil." Plainly, that subsumes a finding that the misconduct was willful since one could hardly pin that label to unintentional conduct. ID at para. 22.

However heinous one may view Mr. Titus's past actions 17 years and longer ago, the point of this proceeding is not to punish him. He served his punishment and all conditions of his judgment and sentence and must now bear publicly the scarlet letter of a sex offender. Rather the point of this proceeding is whether it remains in the public interest for Mr. Titus to retain the amateur radio license he has held since a teenager (now for some 21 years). To that end, the Chief Judge required the Bureau to meet its burden of proof to show that Mr. Titus now lacks the requisite character qualifications to be a Commission licensee. *Id.* It was simply not enough for the Bureau to rely on distant adjudications occurring in Mr. Titus's youth to suppose he now presents a danger to children. The Bureau was required to show by the preponderance of the evidence that Mr. Titus cannot be trusted to use his amateur radio license appropriately. The Chief Judge found that the Bureau failed to shoulder its burden to prove that Mr. Titus was a continuing danger to reoffend or that his amateur radio license represented a threat to the public. *Id.* Indeed, the Chief Judge found to the contrary that

Mr. Titus presented expert psychological evidence that he now has no attraction to minors and there is no probability of his repeating his past misconduct in the future. This constitutes convincing proof of rehabilitation. The Bureau, however, failed to offer opposing proof of a qualified expert. So while Mr. Titus has satisfactorily proven his rehabilitation, the Bureau has not met its burden to prove non-rehabilitation by a preponderance of the evidence.

Id. In sum, the Chief Judge made no reversible error in applying the 1986 and 1990 Character Policies in evaluating Mr. Titus's adjudicated misconduct. If anything, he should have limited his evaluation to the one adult felony conviction occurring 17 years ago. Having nevertheless also considered two juvenile adjudications as well as Mr. Titus's childhood history of acting out sexually, he still correctly determined that given the evidence of Mr. Titus's rehabilitation, the evidence did not support the conclusion that Mr. Titus presents any danger to children through

his amateur radio hobby, nor that he lacks the character qualifications to hold an FCC amateur license.

II. The Chief Judge correctly found that the Bureau failed to meet its burden of proof.

The Bureau's case both at hearing and in its exceptions comes down to the following argument: Mr. Titus as an adolescent, 18 years old and under, previously committed sex offenses against minors.⁶ The Seattle police classified him as a level 3 sex offender after two non-arrest interactions. Seattle Police detective Robert Shilling using a predictive tool so flawed that he himself disagrees with its use, confirms the level 3 ranking. Mr. Titus may be in a position to interact with children in practicing his chosen hobby of amateur radio. Therefore Mr. Titus should be seen as a threat to reoffend against children through the use of his amateur radio hobby.

Chief Judge Sippel considered all the evidence the Bureau timely proffered, yet determined the Bureau had not proven its case by a preponderance of the evidence. The Chief Judge's evaluation of the evidence was plainly correct because the record lacks any substantial evidence to support the conclusion that Mr. Titus currently constitutes a danger to minors, much less a danger through his amateur radio license.

The following facts are undisputed. Mr. Titus has been an exemplary amateur radio operator for some 21 years who has advanced the hobby and used the hobby to promote public safety. He operates an important repeater in the Seattle area. He founded the "Micro-Hams" amateur club at Microsoft. He has been active in the amateur community and has a good

⁶ The Bureau appears to downplay the highly material fact that all but one of these incidents occurred when Mr. Titus himself was a minor, and the last one came at age 18, some 17 years ago. *See, e.g.*, Exceptions at 8-9, 12. Our justice system is predicated on the belief that young offenders can be rehabilitated and become productive members of society. The record in this proceeding amply supports the conclusion that this is exactly what Mr. Titus has done, and he should be commended for doing so despite the impediment he carries of being labeled a sex offender and felon.

reputation in the amateur community. He participates in the ARES program. There have never been any complaints whatsoever concerning Mr. Titus's amateur radio operation. He has never been cited for any violation of the FCC's rules. There was no evidence that Mr. Titus has ever used amateur radio in an attempt to attract children.

Since his release from custody some 15 years ago, Mr. Titus has never been arrested or charged with a crime. His sexual interest is in age appropriate mates. He has maintained stable employment and residence. His amateur radio activities have given him an appropriate support group including doctors, police officers, and emergency services personnel. His choice of character witnesses aptly illustrates this last fact. He has done all the things one would expect and want a former sex offender to do to facilitate his rehabilitation.

The Bureau nevertheless has obsessed throughout this proceeding on two isolated occurrences, which Chief Judge Sippel correctly found totally immaterial to this proceeding.

First, Mr. Titus had an automobile collision with a woman, Victoria Halligan. Apparently, the two parties argued, with Ms. Halligan pointing her finger in Mr. Titus's face, prompting him to make contact with her hand and twist it down and away from him. During the confrontation, she asked him if he was a police officer and he refused to answer the question. Police did not witness the accident or the confrontation. Ms. Halligan apparently did contact the police after Mr. Titus left and police did interview Mr. Titus. Neither party was charged or arrested in connection with the accident or the confrontation, however. There is no evidence that Ms. Halligan was hurt or required medical attention. ID at para. 8.

The Bureau tendered the police report of the incident as an exhibit in its case in chief. However, Chief Judge Sippel correctly limited admissibility of the report given its hearsay nature. *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930). The Bureau never identified Ms.

Halligan as a witness or even a potential witness, nor did the Bureau ever identify the police officers who responded to her complaint, Mark Wong and Susan Wong.⁷ Mr. Titus, however, was examined at length concerning the incident at hearing by Bureau counsel.

Second, Mr. Titus met a friend at Mercer Island, Washington late one night. He then went for a walk and felling the call of nature, used a public restroom in Mercer Island Park. He was there confronted by a police officer who accused him of shooting paintballs at the outside of the restroom. Mr. Titus had no paintball equipment in his possession. He was wearing a small necklace with a badge medallion, which he wears to honor friends and family in law enforcement. After Mr. Titus identified himself, and the ID check came back identifying Mr. Titus as a registered sex offender, Mr. Titus was detained further and further questioned. Eventually he became irritated at the officers' incessant accusations and subsequently refused to respond to further questions. Nevertheless, Mr. Titus freely consented to a search of his vehicle where no paint ball paraphernalia or other contraband was found. What was found was a sheriff's ball cap that he testified was given to him by one of his friends in law enforcement, and a Streamlight brand flashlight. Mr. Titus was not arrested. Indeed, nothing he did during that incident was a crime. ID at para. 9.

Nevertheless, the Mercer Island matter was reported to Detective Shilling of the Seattle police force who labeled Mr. Titus as a "clown" and immediately raised his sex offender level to a Level 3 without affording him any right or ability to contest the action. ID at para. 10-11.

⁷ See Enforcement Bureau's Response and Objections to David Titus' First Interrogatories to the Enforcement Bureau (July 17, 2007); Enforcement Bureau's Supplemental Response to David Titus' First Interrogatories to the Enforcement Bureau (October 15, 2007); Enforcement Bureau's Response to David Titus' Motion to Compel Answers to Interrogatories (August 1, 2007). Enforcement Bureau's Comments on Statement in Response to October 16, 2007 Order, Motion for Reciprocal Disclosure and Motion for Extension of Time to Provide an Expert Statement (November 5, 2007) (Bureau states it will limit its direct case witnesses to persons previously identified in its Interrogatory Answers); Enforcement Bureau's Statement of Readiness for Hearing (June 2, 2008).

Again, the Bureau never sought to call as part of its case in chief any of the officers present at Mercer Island Park and the Bureau never even identified any such persons as potential witnesses in response to Mr. Titus's discovery requests.⁸

It is nevertheless the Bureau's supposition that the necklace Mr. Titus was wearing, the hat located on the floor in his truck along with a flashlight prove by the preponderance of the evidence that Mr. Titus was impersonating a police officer. Likewise, the Bureau argues that Mr. Titus refusing to answer the question whether he was police officer, allegedly asked by Ms. Halligan, also somehow proves by the preponderance of the evidence that he was impersonating a police officer, all of which the Bureau asserts therefore makes him likely to reoffend as a sex offender. Exceptions at 12-13. Supposition, however, is not evidence. It is merely supposition.

Chief Judge Sippel correctly concluded that neither the traffic accident, occurring eight years ago, nor the Mercer Island incident, six years ago, have any decisional significance. ID at paras. 26-27. Neither incident involved criminal charges, sexual misconduct, conduct with children or amateur radio. In neither circumstance did Mr. Titus represent himself as a police officer. A deputy friend gave him the hat and medallion, and it is hardly nefarious to possess a high quality flashlight in one's vehicle; in fact it makes good common sense.⁹ The weakness of the Bureau's case is aptly illustrated by its reliance on these two immaterial matters.

III. The Chief Judge properly weighed Detective Shilling's risk assessment of Mr. Titus.

The Bureau faults Chief Judge Sippel for not blindly following the "risk assessment" performed by Seattle Police Detective Shilling following Mr. Titus's 2004 contact with the

⁸ See Note 7, *supra*.

⁹ The Bureau distorts the record when it states (at Exceptions 10) that Mr. Titus had with him at the time of the Mercer Island incident the hat and flashlight. The record shows without dispute that these two items were in his pickup truck several blocks away and not on his person. ID at para. 27. The Bureau also tries to make something of the fact that Mr. Titus stated that some people have told him they think he is a police officer because his truck has an amateur radio antenna attached to it. Exceptions at 12, n.53. It defies logic to fault Mr. Titus for how other persons misperceive his amateur radio antenna.

Mercer Island police and Detective Shilling's risk assessment of Mr. Titus prior to the hearing employing the WASOST screening tool. Exceptions 9-12. The ID clearly indicates that the Chief Judge gave appropriate credence to Detective Shilling's "risk assessments." For reasons discussed in the previous sections, he did not find either the traffic accident or the Mercer Island matter a basis to find Mr. Titus to be a danger to use his amateur radio license to reoffend against minors. Particularly, the Chief Judge rightfully found Detective Shilling's email labeling Mr. Titus a "clown" to be unprofessional and evidence of bias undercutting his contemporaneous raising of Mr. Titus's sex offender classification level. ID at paras. 11, 27.

Equally unpersuasive to the Chief Judge was Detective Shilling's attempt immediately before the hearing to buttress his 2004 decision to raise Mr. Titus's sex offender level to a Level 3 using the WASOST risk assessment tool. The failings of that "tool" were explored in depth at hearing, prompting Detective Shilling to admit that he disagrees with its use and uses it only because it is the only such tool Washington State allows him to use.¹⁰ The Chief Judge correctly found that the WASOST test was inappropriate to evaluate Mr. Titus because it is designed to measure risk at the time of release from incarceration, does not account for an offender's long time in the community being free of subsequent offenses, and has been found to have little effectiveness in predicting recidivism. ID at para. 12.

Notwithstanding all these problems with Detective Shilling's risk assessment, the Bureau suggests the Commission should be bound by his risk assessment. That suggestion defies logic and would amount to a violation of Mr. Titus's due process. Why hold a hearing at all if the Commission feels itself bound by local police agency's discretionary decision no matter what the infirmities of that decision? The answer is plain: because Mr. Titus is entitled to a full and fair

¹⁰ Tr. 801, 814, 816-17, 843-44. In addition, the Chief Judge noted that the Washington State Institute for Public Policy found the WASOST to have little effectiveness in predicting recidivism. ID at para. 12; Titus Exhibit 17.

hearing whether his holding of an amateur license is in the public interest. The evidence before Chief Judge Sippel was that Detective Shilling, in a fit of self-described irritation, accepted at face value a hearsay report from Mercer Island officers to raise Mr. Titus's sex offender level, despite that the report failed to indicate Mr. Titus had committed any crime. Beyond the basic unfairness of that action, he failed even to ask Mr. Titus his side of the story. He then submitted written testimony to this Commission in which he said he based his risk assessment on a tool he not only knew was not designed to measure the risk of re-offense of someone who had been released from custody long ago, but of which he himself personally disagreed with the use.¹¹ These facts were more than ample to discredit Detective Shilling's testimony. It was thus not error for Chief Judge Sippel in these circumstances to decline to blindly accept Detective Shilling's view that Mr. Titus might reoffend. ID at para. 27.

IV. The Chief Judge properly evaluated Dr. Allmon's testimony.

The Bureau makes a one paragraph pass at faulting Chief Judge Sippel's reliance on Dr. Douglas Allmon's testimony that Mr. Titus presented a low risk to reoffend. The Bureau asserts that Dr. Allmon's statement that Mr. Titus should avoid situations where he is exposed to children somehow undercut's his diagnosis. Exceptions at 13. The logic of that claim is lacking. Although Mr. Titus is at a low risk to reoffend, it stands to reason he would not want to be in a

¹¹ Virtually all such actuarial tools such as the WASOST and one of its components, the RRASOR, rely on static factors which are not capable of modification even with a long history of being offense free. Thus, they are designed to gauge the risk of reoffense at the time of release from custody and are not designed to account for integration in society. *See generally*, Kemshall, Risk Assessment and Management of Known Sexual and Violent Offenders: A review of current issues (available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.121.2355&rep=rep1&type=pdf>); Hanson, The Validity of Static-99 with Older Sexual Offenders 2005-01 (available at http://www.static99.org/pdfdocs/hanson_april_2005.pdf.) Thus, the Bureau suggestion that Shilling's use of the WASOST was salvaged by one of its component parts (Exceptions at 12 n.56), is unavailing.

position where contact with children could result in him being falsely accused. Dr. Allmon made this clear in his testimony. Tr. 996.

Nor does the record support the conclusion that amateur radio presents a special risk to children. See Exceptions at 13. Children can be on a Metro bus, in a grocery store, a barbershop, or virtually any other public place except perhaps a public bar. And yes, minors are engaged in amateur radio, as Mr. Titus himself obtained his amateur radio license when he was under 18 years of age, but this does not mean that amateur radio is a magnet for children as the Bureau would suggest. In any event, if Mr. Titus is at a low risk to reoffend as Dr. Allmon concluded and has been rehabilitated as Chief Judge Sippel found, it is immaterial how attractive amateur radio is to minors since Mr. Titus does not constitute a threat to them.

Chief Judge Sippel found Dr. Allmon, a licensed psychologist, to be a qualified expert in treating and evaluating sex offenders. Dr. Allmon administered a battery of psychological tests to Mr. Titus. He rendered his expert opinion that Mr. Titus now has no predisposition to pedophilia. He concluded that Mr. Titus's past pedophilia is "unambiguously in remission." Chief Judge Sippel further found there was no contrary opinion of a licensed professional or other qualified expert to prove the contrary. ID at para. 28. Thus, there is no error in Chief Judge Sippel's conclusion, based partly on Dr. Allmon's testimony, that the preponderance of the evidence shows that Mr. Titus "presents absolutely no proven risk to commit or attempt sexual misconduct involving a minor." ID at para. 28.

V. The Chief Judge properly weighed the testimony of Mr. Titus's character witnesses.

The Bureau suggests that Chief Judge Sippel should have discounted the testimony of character witnesses for Mr. Titus where they evidence little knowledge of his past misconduct. Exceptions at 13, citing *Contemporary Media v. FCC*, 214 F.3d 187, 195 (D.C. Cir. 2000). The

Bureau tries to shoehorn this case into the *Contemporary Media* mold by saying that Mr. Titus's character witnesses *only recently* learned of his past sexual misconduct. But it is not important when they learned of the misconduct as long as they knew about it when they gave their testimony – and each of the character witnesses did. This case is thus to be contrasted with *Contemporary Media, Inc.*, 14 FCC Rcd 8790 at n.1 (1999), where the Commission held that the four tendered character witness statements did not discuss the licensee's character in light of his criminal activities, but only his business record. In this case, all the witnesses were aware of and discussed Mr. Titus's character in relation with his past misconduct. *See* Titus Exhibits 3-13.

Here, Chief Judge Sippel found that

[e]ach of these witnesses testified that they have known Mr. Titus for at least five years. Each attested to his good character despite his criminal past. Several of these witnesses are active in Amateur Radio and approved of Mr. Titus' conduct in operating Amateur Radio. There was no rebuttal. Nor was any negative character testimony or other evidence bearing on character offered.

Chief Judge Sippel held that the character evidence substantiated the evidence of Mr. Titus's rehabilitation. He held that a "cross-section of character witnesses were produced, including a clergyman, a police officer, a corrections officer, a school counselor, a government contractor, a Red Cross worker, and a lab engineer, each of whom attested to Mr. Titus' successful integration into the community as a law-abiding citizen." That conclusion is entirely appropriate and supported by the evidence. It was not erroneous.

VI. *The Chief Judge properly found Mr. Titus's testimony to be credible.*

The Commission made it clear in its *Contemporary Media* decision that an ALJ's credibility determinations are entitled to credit, stating

An ALJ's credibility findings are "entitled to great weight," *Broadcast Assoc. of Colorado*, 104 F.C.C. 2d 16, 19 (1986), and his credibility determinations will be upheld unless the findings patently conflict with other record evidence. *Milton Broadcasting Co.*, 34 F.C.C. 2d 1036, 1045 (1972); *KOED, Inc.*, 3 FCC Rcd

2821, 2823 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 1784 (1990), *recon. denied*, 6 FCC Rcd 625 (1991), *aff'd mem. sub nom. California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir. 1991); *see also WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (ALJ's credibility findings may not be upset unless reversal is supported by substantial evidence)... [T]he law accords deference to the ALJ's witness observations. *See Maria M. Ochoa*, 8 FCC Rcd 3135 (1993), *recon. denied*, 9 FCC Rcd 56, *recon. dismissed*, 10 FCC Rcd 142 (1995), *aff'd by judgment*, 98 F.3d 646 (D.C. Cir. 1996) (Table) (affirming ALJ credibility conclusion that witnesses were not biased or seeking to "get back" at applicant).

13 FCC Rcd 14437 at para. 38.

Chief Judge Sippel had the opportunity to observe Mr. Titus's demeanor and assess his credibility. He rightfully rejected the Bureau's assertion that Mr. Titus's failure to remember some of the details of his sexual misconduct and treatment, events occurring as long as 20 or more years ago. ID at para. 33. The Bureau's apparent strategy was to ask Mr. Titus to confirm his memory of various alleged facts set forth in Bureau Exhibit 4, a compendium of Mr. Titus's sex offender file the Bureau obtained from Detective Shilling. Commission licensees are not expected to have perfect memories. It is entirely understandable that Mr. Titus's consciousness would suppress the details of such unpleasant matters. Significantly, the Bureau was unable to point to any motive Mr. Titus would have to deceive concerning these matters, and even more significantly Mr. Titus openly conceded that while he did not remember many of the details the Bureau asked him to confirm, he acknowledged he was not disputing them. In light of these facts, Chief Judge Sippel committed no error in finding that there was no basis for a finding of lack of candor in Mr. Titus's testimony. ID at para. 33.

The Bureau's similar effort to tar Mr. Titus with the brush of misrepresentation because he disputed statements in hearsay police reports is unavailing. The reports were not sworn, are hearsay and were not admitted for the truth of the matters asserted. Anything said in those reports cannot be credited against Mr. Titus's sworn testimony. In any event, the details on

which the Bureau focuses are immaterial, e.g., whether he met his friend over the Internet or amateur radio or what he told the police or refused to tell them about the last name of his friend.¹² There was no misrepresentation issue in this proceeding. The Bureau never sought to enlarge the issues pursuant to FCC Rule Section 1.229 to specify a misrepresentation/lack of candor issue. And certainly the police report upon which the Bureau tries to relay now, as unsworn hearsay, would not have supported a petition to enlarge issues under the express requirements of Section 1.229.

VII. The Chief Judge correctly denied the Bureau rebuttal on collateral matters.

After the Bureau rested its case, Tr. 951-52, it sought to present the following witnesses: Dr. Gerry Hover, Jennifer Franklin, Victoria Halligan, Mark Wong and Susan Wong. The Chief Judge correctly denied the request.

Chief Judge Sippel's decision denying rebuttal testimony from Dr. Hover was plainly correct. Chief Judge Sippel required advance expert identification. Mr. Titus followed that procedure and identified Dr. Allmon as his expert witness. The Bureau designated no expert. The Bureau took Dr. Allmon's deposition, and subsequently did not seek to make a late expert witness designation, much less make a good cause showing for such late designation. The Bureau did offer testimony in the nature of expert testimony from Detective Shilling, after having represented that he would be a fact witness, and Mr. Titus reluctantly acceded to that testimony. Among Detective Shilling's testimony was that the predictive tool he relied upon to label Mr. Titus a level 3 sex offender is seriously flawed. That admission substantially eviscerated the Bureau's hearing strategy, that the Chief Judge should essentially accept Detective Shilling's determination at face value.

¹² The Bureau asserts the Mercer Island police would have had no basis to know if Mr. Titus's involvement in amateur radio, but that ignores the big whip antenna the Bureau notes was on Mr. Titus's truck which the Mercer Island police inquired about to Mr. Titus. Bureau Exhibit 4,

So the Bureau sought a second bite at the apple to salvage the damage its own witness wrecked on its case. The hook the Bureau urged before Chief Judge Sippel and which it urges now before this Commission was that there was a supposed conflict between Dr. Allmon's testimony at hearing, that Mr. Titus is at a low probability to reoffend, and his deposition testimony.

There was no such conflict, as the Bureau's own examination of Dr. Allmon plainly shows. Dr. Allmon was extensively cross-examined. Tr. 983-1036, 1044-46. On cross, the following exchange occurred:

Bureau counsel: 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: Well, I think that is misleading as well. It would be quite intuitive, 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 reoffending, then the probability as implied is not likely to reoffend.

(Tr. 1019-20). Upon eliciting this response, of which the Bureau now complains, it drew the witness's attention to his deposition and asked the witness if the two answers were inconsistent.

Dr. Allmon replied (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.

The Bureau appeared perfectly satisfied with that answer, responding, "Okay, thanks for the explanation. (Tr. 1022). Just to be sure, however, Chief Judge Sippel prompted Bureau Counsel to ask if the witness still stood by his deposition testimony, to which Dr. Allmon replied, "Yes." (Tr. 1022). Plainly there was no inconsistency. And in fact, reference to Dr. Allmon's deposition testimony makes this crystal clear as he explains that he was giving a

narrative, not a numerical value, as to risk to reoffend. “It is to identify predisposition to reoffend. There is no numerical assessment put forth here.” Dr. Allmon’s deposition testimony went 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 does not require superior logic skills to conclude that if Mr. Titus does not have pedophilic tendencies, he is not at risk to reoffend. Thus, contrary to the Bureau’s claim, Dr. Allmon’s hearing testimony was not materially at odds with his deposition testimony.

Moreover, Chief Judge Sippel was well within his discretion to deny any rebuttal testimony from Dr. Hover. The Bureau failed to show Dr. Hover possessed the requisite qualifications to testify as an expert. He is not a licensed psychologist. Unlike Dr. Allmon, he is not a certified sex offender treatment provider. The only credential he possessed was as a counselor, and he let that expire.¹³ He apparently also has failed repeatedly to pass the state exam to become a licensed psychologist. He did not examine Mr. Titus. His proposed testimony was nothing more than a summary rehash of the Bureau’s theory of the case. He offered no critique of Dr. Allmon’s methodology or his conclusions. He labeled Mr. Titus as a pedophile without any discussion of the criteria for pedophilia as set forth in the DSM IV, the recognized basic psychological diagnostic tool, as applied to Mr. Titus, much less the affect of Mr. Titus’s then 15 year (now 17 year) record of no reoffense, his undisputed preference for age appropriate

¹³ The Bureau claims without citation to any authority that as a state employee, Dr. Hover is not required to be a licensed psychologist. Whether or not true, his failure to be licensed certainly is a factor Chief Judge Sippel could reasonably have considered in exercising his discretion whether to allow him to present expert rebuttal testimony. In this case, the Chief Judge plainly did not abuse his discretion.

sexual relationships, and the findings of Dr. Allmon that Mr. Titus does not now show pedophilic tendencies. *See* Opposition to Enforcement Bureau's Motion to Permit Rebuttal Testimony at 2-6 (September 22, 2008).

Finally, despite the Bureau's claim of why it wanted to present Dr. Hover as a witness, nowhere in his testimony did he ever even mention his conclusion of whether Mr. Titus is at a high, medium or low risk for reoffense. This was purported reason why the Bureau wanted to present his rebuttal testimony. Yet, it was nowhere to be found in the proffered rebuttal testimony.

Chief Judge Sippel was plainly correct to reject Dr. Hover's proffered rebuttal. He correctly saw it as the Bureau's attempt to bolster its case in chief after the Bureau had rested. *David Titus*, FCC 08M-51 (2008) at para. 10. Furthermore, the Chief Judge correctly found that Dr. Hover's proffered testimony did not rebut any testimony of Dr. Allmon. *Id.* at para. 11. He thus, correctly rejected that testimony for that reason as well. Additionally, Chief Judge Sippel's rejection of that proffered testimony was well within his discretion in light of its conclusory nature, its lack of supporting authority and Dr. Hover's lack of expertise. *Id.* at para. 6, 11. For these reasons, the refusal to allow Dr. Hover to testify in rebuttal was not error.

Chief Judge Sippel was correct in rejecting the proffered rebuttal testimony of Officer Franklin, Ms. Halligan, and the two officers Wong as well. *Id.* at para. 14. The stated purpose of calling each of these witnesses was to testify as to the alleged truth of matters set forth in two police reports that the Bureau tendered as part of Bureau Exhibit 4 and as to which in certain respects Mr. Titus disputed. Chief Judge Sippel correctly found these matters to be collateral and an inappropriate subject for rebuttal testimony. *Id.* at para. 12-14.

The time to present these witnesses was in the Bureau's case in chief. The Bureau declined to do so, having never timely designated any of these persons as potential witnesses and thus having never afforded Mr. Titus the ability to conduct discovery of these individuals. Rebuttal is not designed to provide a party the opportunity to repair its flawed trial strategy. Here, the avowed purpose of the Bureau's proposed rebuttal was to demonstrate a supposed lack of candor on the part of Mr. Titus in connection with the traffic accident and the Mercer Island Park matter. Chief Judge Sippel correctly noted trying these collateral matters was not an appropriate use of rebuttal, given that the Bureau had not sought to petition to enlarge the issues on misrepresentation/lack of candor. *Id.* at para. 12.

The Bureau's stated purpose for bringing Officer Franklin to Washington to testify is that Mr. Titus supposedly told her he had met his friend Charles through amateur radio, but denied it at hearing. Bureau Motion to Permit Rebuttal Testimony (September 8, 2008) at 6. That was not new or changed testimony, however. In his deposition Mr. Titus was asked (Tr. 93):

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

Answer: Absolutely not.

Hence, there was no basis for the Bureau to claim it needed rebuttal in connection with the Mercer Island matter. It knew all along that Mr. Titus claimed he did not tell the police that he had met Charles through ham radio, a matter of no relevance anyway. It choose not to present a live witness on the matter presumably because it recognized it was a collateral and immaterial matter. After Detective Shilling eviscerated its case, however, the Bureau had nothing left but collateral and immaterial matters to support its claim that Mr. Titus's amateur radio license should be revoked. Hence its request for rebuttal.