

Before the **FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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

FILED/ACCEPTED

APR 30 2010

Federal Communications Commission
Office of the Secretary

To: The Commission

**ENFORCEMENT BUREAU'S OPPOSITION TO
MOTION TO ACCEPT LATE-FILED REPLY**

1. On April 26, 2010, David L. Titus ("Titus") filed a pleading with the Commission entitled, "Motion to Enlarge the Time to File Reply to Exceptions to Initial Decision" ("Motion"). The Chief, Enforcement Bureau, by her attorneys, hereby opposes Titus's Motion. As shown below, Titus's Motion is not simply a routine plea for additional time to submit a document to the Commission; rather it is a wholly-unsupported and unjustified late-filed request to accept another pleading outside of an established pleading cycle.¹

2. The Presiding Judge issued his Initial Decision in this proceeding on March 9, 2010.² The Bureau timely filed its Exceptions to the Initial Decision on April 8, 2010. Pursuant

¹ Titus filed his Reply to the Enforcement Bureau's Exceptions to Initial Decision ("Reply") on April 26, 2010.

² See *David L. Titus*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 10D-01 (rel. March 9, 2010).

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to Section 1.277(c) of the Commission's rules,³ Titus was required to file a reply to the Bureau's Exceptions, if at all, by April 21, 2010.⁴

3. In support of his Motion, Titus states that his counsel "inadvertently misapprehended" the April 21st due date, "discovering the mistake" two days later "during a conversation with Bureau counsel." Titus maintains that the brief extension of time will result in "no prejudice to any party or the public." Titus claims that good cause exists for an extension of time, citing *Pappas Telecasting Companies*.⁵

4. Section 1.46 of the Commission's Rules unambiguously states that "[i]t is the policy of the Commission that extensions of time shall not be routinely granted."⁶ Moreover, the U.S. Court of Appeals for the District of Columbia Circuit has counseled:

[T]his Court has held often enough that the Commission does not abuse its discretion when it "decline[s] to entertain a late-filed petition in the absence of extenuating circumstances prohibiting a timely filing". . . In fact, we have gone so far as to discourage the Commission from entertaining late-filed pleadings "in the absence of extremely unusual circumstances."⁷

5. The Commission should deny Titus's Motion. Titus has not demonstrated *any* basis whatsoever for affording him additional time to file his Reply. Titus does not maintain that

³ 47 C.F.R. § 1.277(c).

⁴ Section 1.277(c) establishes a deadline of 10 calendar days, or such other time as the Commission may specify, within which to file a reply to exceptions. *See id.* ¶ 1.277(c). Section 1.4(h) provides an additional three business days where, as here, service of the exceptions was by mail. *See id.* ¶ 1.4(h). Titus concedes that his deadline for filing a reply to the Bureau's Exceptions was April 21, 2010. *See* Motion at 1. The Commission has at no time specified any such other deadline in this proceeding than the 10 days articulated in Section 1.277(c) for the filing of a reply to the Bureau's exceptions.

⁵ Motion at 1-2 (citing *In re Pappas Telecasting Companies*, Order, 19 FCC Rcd 22694 (Med. Bur. 2004)).

⁶ 47 C.F.R. § 1.46.

⁷ *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003)).

he or his counsel were unable to meet the April 21st deadline. Indeed, he makes absolutely no claim at all that circumstances prevented him from interposing his Reply in accordance with Section 1.277 of the Commission's Rules. Rather, Titus's counsel simply forgot about the deadline or never knew it in the first place. In fact, Titus's counsel "discovered" that he had missed the deadline only when Bureau counsel contacted him to inquire whether he had filed a reply to the Bureau's Exceptions. The Bureau is aware of no case (and Titus references none) in which the Commission has granted an extension of time to reply to another party's exceptions when the stated basis for such request is, as here, so utterly lacking.

6. Moreover, Titus's claim that neither the Bureau nor the public will be prejudiced by grant of the extension is unsupported, conclusory, and erroneous. Prior to 1976, Section 1.46 of the Commission's Rules provided that extensions of time for filing a pleading would be granted "upon motion for good cause shown." However, in 1976, the Commission revised Section 1.46 to state, as it currently does, that "[i]t is the policy of the Commission that extensions of time shall not be routinely granted." The Commission took such action out of concern "that the practice of requesting and granting requests for extensions of time on a regular, routine basis has grown to the point of abuse and has contributed materially to the delay of proceedings." Accordingly, the Commission admonished parties and Commission staff responsible for acting on requests for extensions to "tighten up the process."⁸

7. Extending the deadline in the instant case, where no cause has been shown other than an oversight by Titus's counsel, would be prejudicial to the public interest because it is inconsistent with the Commission's stated rationale for amending Section 1.46. Moreover, even assuming, *arguendo*, that neither the public nor the Bureau would be prejudiced, a mere claim of

⁸ *Amendment of Parts 0 and 1 of the Commission's Rules with Respect to Adjudicatory Re-Regulation Proposals*, Report and Order in Docket No. 20626, 58 FCC 2d 865, ¶¶ 36-38 (1976).

lack of prejudice is not a substitute for the affirmative showing of good cause that is minimally required for grant of an extension.⁹ Miscalculation of a filing date by experienced communications counsel does not constitute “good cause.”

8. Finally, the case on which Titus relies, *Pappas Telecasting Companies*, is inapposite. *Pappas* involved the grant of a *timely* request for an extension of time; that is, a request for additional time filed prior to the applicable deadline. Here, by contrast, Titus requested more time from the Commission *after* his deadline had already lapsed. In analogous situations, the Commission’s Rules require motions for extensions of time to be filed a minimum number of days *before* the applicable deadline. *See* Section 1.46(b). Thus, not only did Titus file his Reply beyond the April 21st deadline without legitimate reason, he filed his instant Motion for an extension of time after the deadline, also without any justification.

9. Based on the foregoing, the Bureau respectfully requests that the Commission deny Titus’s Motion. The Motion seeks extraordinary relief, and Titus has failed to present any facts or circumstances justifying the remedy he proposes. Titus has, throughout this proceeding,

⁹ The Commission has granted extensions of time when good cause was found to exist. *See, e.g., Fanch Cablevision of Colorado, L.P. v. Pub. Serv. Co. of Colorado*, Order, 12 FCC Rcd 6034, 6035 (Cable Servs. Bur. 1997) (a death in counsel’s family provided “good cause” for an extension of time to file a response); *see also Advanced Television Systems & Their Impact Upon the Existing Television Broadcast Serv.*, Order Granting Extension of Time for Filing Reply Comments, 11 FCC Rcd 1779, 1179 (Mass Med. Bur. 1996) (a blizzard which stalled mail deliveries, disrupted transit, and forced many workplaces to close constituted extremely unusual event justifying extension of time to file reply comments). The Commission has declined, however, to grant requested extensions of time when insufficient justification is presented. *See e.g., Satellite Signals of New England, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 515, 517 ¶ 6 (2010) (“losing sight of” the deadline does not justify an extension of time); *Cavalier Telephone, LLC v. Va. Elec. & Power Co.*, Order, 15 FCC Rcd 40 (Cable Servs. Bur. 1999) (request for 30 day extension of time not granted because the circumstance was “foreseeable and should have been anticipated . . . in [the] normal course of business”); *Competition, Rate Deregulation & the Comm’n’s Policies Relating to the Provision of Cable Television Serv.*, Order Denying Motions For Extension of Time To File Reply Comments, 5 FCC Rcd 2095 (Mass Med. Bur. 1990) (case complexity and volume of comments, standing alone, do not justify extension of time).

been represented by experienced telecommunications counsel who is charged with the obligation to comply strictly with the Commission's procedural rules. In the absence of any cause – much less the good cause required to support his Motion -- the Commission should reject Titus's late-filed request to accept his untimely Reply, and, as a consequence, strike his Reply as procedurally defective.¹⁰

Respectfully submitted,
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¹⁰ Titus's untimely Reply also is defective because it interjects into this proceeding for the first time new legal arguments and factual characterizations to which the Bureau has not previously had the occasion to consider and to which the Bureau will not have an opportunity to refute. See Reply at 2. Such untimely arguments are highly prejudicial to the Bureau and, in other similarly situated proceedings, have been properly barred from consideration. See *BDPCS*, 351 F.3d at 1181-82 (concluding that legal arguments first raised in supplements to an application for review were "procedurally deficient and warranted dismissal on their face" because they were "untimely and had not been first presented to WTB, as required by Commission rules."); see also *Pro-Football, Inc. v. Harjo*, 567 F.Supp.2d 46, 62 (D.D.C. 2008) (concluding that prejudice to the party asserting laches may arise from either trial prejudice or economic prejudice), *aff'd* 565 F.3d 880, 883 (D.C. Cir. 2009); *Mount Vernon Sav. Bank v. Wardman*, 173 F.2d 648, 649 (D.C. Cir. 1949) ("Laches is not only an equitable doctrine, but controlled by equitable considerations. The fundamental requisite necessary for its application is an undue and unexplained delay working an injustice to the other party.") (citations omitted).

CERTIFICATE OF SERVICE

Judy Lancaster, counsel for the Enforcement Bureau, certifies that she has, on this 30th day of April 2010, served the foregoing “Enforcement Bureau’s Opposition to Motion to Accept Late Filed Reply” by delivery of a copy as follows.

Via First Class United States Mail to:

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