

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

Appearances

George L. Lyon, Jr., Esq. on behalf of David L. Titus; *P. Michele Ellison, Esq., Judy Lancaster, Esq., and William Knowles-Kellett, Esq.*, on behalf of the Enforcement Bureau

DECISION

Adopted: November 5, 2014

Released: November 6, 2014

By the Commission:

I. INTRODUCTION

1. By this decision, we reverse the initial decision¹ by Chief Administrative Law Judge Richard L. Sippel (ALJ) that declined to revoke the license held by David L. Titus (Titus) to operate amateur radio station KB7ILD. We find that the ALJ erred in holding that the Enforcement Bureau (EB) failed to meet its burden of demonstrating that Titus is currently unqualified to remain a Commission licensee, inasmuch as the ALJ failed to consider relevant convictions for sex offenses, and failed to give appropriate deference to the judgment of local law enforcement authorities that Titus is a convicted sex offender who poses a high risk to the safety of the community. Accordingly, we grant EB's exceptions to the extent indicated, reverse the ALJ's initial decision, and revoke Titus's license.

II. BACKGROUND

2. **Order to Show Cause.** In 2007, EB issued an Order to Show Cause why Titus's license should not be revoked, based on information it received that Titus had previously been convicted in the State of Washington of at least one felony sex offense involving a child. In particular, EB learned that Titus had been convicted of "communicating with a minor for immoral purposes," a Class 3 felony for which he served 25 months in prison, and is registered as a sex offender by the Seattle Police Department.² The Order to Show Cause also adverted to the possibility that Titus had other felony convictions for sex crimes.³ EB designated for hearing whether Titus is qualified to remain a licensee in light of his past criminal misconduct or whether his license should be revoked.⁴ Pursuant to 47 U.S.C.

¹ See *David Titus*, 25 FCC Rcd 2390 (ALJ 2010) (Initial Decision).

² See *David L. Titus*, 22 FCC Rcd 1638, 1638 ¶ 2 (EB 2007) (Order to Show Cause).

³ See *id.* at 1640 ¶ 6. Indeed, the parties agree that Titus had several prior juvenile adjudications for sex crimes. See Initial Decision, 25 FCC Rcd at 2392 ¶ 5 (describing Titus's offenses).

⁴ See Order to Show Cause, 22 FCC Rcd at 1640 ¶ 6.

§ 312(d) and 47 C.F.R. § 1.91(d), the Order to Show Cause placed the burden of proceeding with the introduction of evidence and the burden of proof on EB.⁵

3. **Initial Decision.** In his initial decision, the ALJ concluded that EB had not met its burden of proving that Titus currently lacks the qualifications to be a Commission licensee.⁶ He found that Titus had committed at least four sexual offenses against children,⁷ which resulted in one conviction as an adult for a felony as well as two juvenile adjudications of guilt.⁸ And he held that the sexual offense committed when Titus was an adult, and for which he was found guilty of a felony and served 25 months in prison, was “shockingly evil.”⁹ But, the ALJ found, only the adult conviction should be considered at all for purposes of this proceeding because the juvenile adjudications occurred more than 10 years before this proceeding commenced.¹⁰ The ALJ further held that it was appropriate to consider mitigating factors. In this regard, he found that a substantial period of time had elapsed between the adult offense, which occurred in 1993 when Titus was 18, and the time of the Initial Decision, when Titus was 35.¹¹ The ALJ found that the record contained credible evidence that in the interim Titus had been rehabilitated, as indicated by his lack of new criminal convictions, the evaluation of a consulting psychologist, and the testimony of several character witnesses from the community (including a police officer, a corrections officer, a clergyman, and a school counselor).¹² Further, the ALJ found to be credible Titus’s testimony in this proceeding expressing remorse about his past offenses and asserting that he was now rehabilitated.¹³

4. The ALJ also concluded that EB presented no credible evidence that Titus was a high-risk sex offender. In particular, the ALJ found unpersuasive evidence that in 2004 the Seattle Police Department had modified Titus’s sex-offender classification from “moderate risk” to “high risk” based on two incidents that occurred in 2002 and 2004. In 2002, Titus was involved in an altercation in which, after a minor traffic accident, Titus twisted the other driver’s hand.¹⁴ In 2004, Titus was stopped by the police at 3 a.m. in a public restroom in a closed park.¹⁵ He had in his possession or in his vehicle a miniature police medallion, a sheriff’s cap, and a police-style flashlight.¹⁶ The ALJ found that there had been no showing that the two incidents had any relevance to Titus’s fitness to hold a license because the conduct was not sexual, did not involve children, and did not result in criminal charges.¹⁷ The ALJ also rejected a showing by the Seattle Police that the Washington State Sex Offender Screening Tool (WASOST) confirmed that Titus should be classified as a high risk offender, finding the test “non-

⁵ See *id.* at 1640 ¶ 9.

⁶ See Initial Decision, 25 FCC Rcd at 2402 ¶ 11.

⁷ See *id.* at 2392 ¶ 5.

⁸ See *id.*

⁹ See *id.* at 2397-98 ¶ 22. The ALJ also acknowledged that the two adjudicated felony child molestations Titus committed as a juvenile “involved egregious misconduct.” *Id.* at 2397 ¶ 21.

¹⁰ See *id.* at 2397 ¶ 21.

¹¹ See *id.* at 2398-99 ¶¶ 23-25.

¹² See *id.* at 2395-96 ¶¶ 13-15, 2399-2400 ¶¶ 25, 28.

¹³ See *id.* at 2401-02 ¶ 33.

¹⁴ The other driver in the 2002 traffic accident stated that she asked Titus whether he was a police officer and that he refused to answer her. See *id.* at 2393 ¶ 8.

¹⁵ A police witness testified that Titus indicated he was in the area to meet someone either involved in amateur radio or that he had met over the Internet. EB Exh. 4 at 39.

¹⁶ See Initial Decision, 25 FCC Rcd at 2393 ¶¶ 8-9.

¹⁷ See *id.* at 2399-2400 ¶¶ 26-27.

probative” and “defective.”¹⁸ In light of this evidence, the ALJ found that EB had not met its burden to prove “non-rehabilitation” by a preponderance of the evidence.¹⁹

5. By a separate order, the ALJ denied EB’s motions to introduce testimony by an expert on sex offenders to rebut the testimony of Titus’s consulting psychologist and further evidence about the two incidents to show that Titus had lacked candor in his testimony about these events. The ALJ found that EB’s rebuttal showing was untimely and lacking in probative value.²⁰

6. **Exceptions.** Now before the Commission are EB’s exceptions to the initial decision.²¹ EB contends that the ALJ’s analysis does not comport with Commission precedent regarding character and does not accurately appraise the evidence. First, EB argues that the ALJ failed to consider the number and nature of Titus’s egregious sexual offenses, which should be considered disqualifying despite the passage of time. In particular, EB argues that the ALJ should have considered Titus’s juvenile adjudications although they occurred more than 10 years before the Order to Show Cause issued.²² Second, EB asserts that the ALJ improperly assessed the evidence at the hearing. EB maintains that the ALJ should have given more weight to the incidents in 2002 and 2004 that prompted the Seattle Police Department to raise Titus’s assessed risk level from moderate to high, and should have credited the State’s use of the WASOST inventory.²³ In EB’s view, the ALJ should have deferred to the Seattle Police Department’s judgment in this regard. Further, EB asserts that the ALJ gave unwarranted weight to the testimony of Titus’s consulting psychologist and character witnesses and had no basis for evaluating Titus’s credibility favorably.²⁴ EB maintains that the ALJ ignored the danger to children posed when a sex offender has access to amateur radio.²⁵ Finally, EB argues that the ALJ improperly excluded EB’s rebuttal evidence. EB represents that this evidence would have contradicted the testimony of Titus’s consulting psychologist and showed that Titus did not testify candidly about certain aspects of the 2002 and 2004 incidents.²⁶

7. Also before the Commission is Titus’s reply to EB’s exceptions.²⁷ Titus filed his reply on April 26, 2010, five days after the deadline established by the Commission’s rules.²⁸ Titus acknowledges his error, which he attributes to the fact that his “counsel inadvertently misapprehended the due date,” but asks the Commission to waive the filing deadline and accept his late-filed reply.²⁹ Titus contends that “[f]oreclosing his response to the Exceptions would be inequitable and unduly prejudicial to

¹⁸ See *id.* at 2395-95 ¶ 12, 2400-01 ¶ 29.

¹⁹ See *id.* at 2398 ¶ 22.

²⁰ See *David Titus*, FCC 08M-51 (Dec. 5, 2008).

²¹ See Enforcement Bureau’s Exceptions to Initial Decision, EB Docket No. 07-13, File No. EB-06-IH-5048 (filed April 8, 2010) (Exceptions).

²² See Exceptions at 4-9.

²³ See *id.* at 9-12.

²⁴ See *id.* at 13-15.

²⁵ See *id.* at 15-18.

²⁶ See *id.* at 18-24.

²⁷ Reply to Exceptions to Initial Decision, EB Docket No. 07-13, File No. EB-06-IH-5048 (filed Apr. 26, 2010) (Reply).

²⁸ The ALJ issued his Initial Decision on March 9, 2010. The Bureau timely filed its Exceptions on April 8, 2010. Pursuant to section 1.277(c) of the Commission’s rules, Titus was required to file a reply to EB’s exceptions, if at all, by April 21, 2010. See 47 C.F.R. § 1.277(c).

²⁹ Motion to Enlarge the Time to File Reply to Exceptions to Initial Decision, EB Docket No. 07-13, File No. EB-06-IH-5048 (filed April 26, 2010).

him,” and that “[t]he short enlargement of time will result in no prejudice to any party or the public.”³⁰ EB opposes Titus’s request, arguing that he failed to demonstrate good cause for waiver of the applicable filing deadline.³¹

III. DISCUSSION

8. **Late filing of Titus’s reply.** Before turning to EB’s exceptions to the ALJ’s initial decision, we first address Titus’s motion to have us accept his late-filed reply. Section 1.46 of the Commission’s rules provides that “[i]t is the policy of the Commission that extensions of time shall not be routinely granted.”³² We further note that the U.S. Court of Appeals for the D.C. Circuit has repeatedly “discourage[d] the Commission from entertaining late-filed pleadings ‘in the absence of extremely unusual circumstances.’”³³ We find that Titus has failed to provide a sufficiently unique and compelling reason for the pleading’s late filing.³⁴ Both the Commission and the courts have consistently held that error by counsel is not an extenuating circumstance that justifies waiving a filing deadline.³⁵ As such, Titus’s professed reasons why considering a late-filed reply is in the public interest cannot alone provide an adequate basis for granting a waiver. Indeed, as the D.C. Circuit has observed, “[w]hen an agency imposes a strict deadline for filings, as the FCC has done, many meritorious claims are not considered; that is the nature of a strict deadline.”³⁶ Accordingly, we deny Titus’s request to accept his late-filed reply to EB’s exceptions.³⁷

³⁰ *Id.*

³¹ Enforcement Bureau’s Opposition to Motion to Accept Late-Filed Reply, EB Docket No. 07-13, File No. EB-06-IH-5048 (filed April 30, 2010).

³² 47 C.F.R. § 1.46.

³³ See *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)).

³⁴ Titus’s reliance on our decision in *Pappas Telecasting Companies*, 19 FCC Rcd 22813 (Med. Bur. 2004), is unavailing. That decision involved the grant of a *timely* request for additional time—that is, a request for additional time filed prior to the applicable deadline. *Id.*; see also 47 C.F.R. § 1.46(b) (requiring motions for extension of time to be filed a minimum number of days before the applicable deadline). Here, by contrast, Titus requested a waiver of the filing deadline *after* it had already passed.

³⁵ See *Independent Communications, Inc.*, 15 FCC Rcd 7080, 7081 ¶ 6 (1999) (counsel’s illness does not justify waiver of filing deadline); *Northwest Broadcasting, Inc.*, 6 Comm. Reg. (P&F) 685 ¶ 9 (1997) (declining to consider petitioners’ untimely objection to a license assignment, which petitioners attributed to inexperienced counsel); *Crystal Broadcast Partners*, 11 FCC Rcd 4680, 4681 ¶ 8 (1996) (declining to waive deadline after counsel filed application for review four days late); *RDH Communication, Limited Partnership*, 6 FCC Rcd 4764, 4765 ¶ 5 (1991) (“[r]egardless of ... whether the omission occurred in the office of applicant’s counsel, or in transit, the applicant bears the full burden of its (or its agents’) failure to file a complete application.”).

³⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 126 (D.C. Cir. 2008) (waiver of filing deadline after counsel failed to timely remit the correct filing fee was arbitrary and capricious); see also, e.g., *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (tardiness caused by miscommunication among petitioner’s counsel was not an “unusual circumstance” that excused its late-filed petition for reconsideration); *Reuters LTD. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) (FCC “acted beyond its lawful authority when it entertained” a petition for reconsideration filed two days late).

³⁷ Titus also filed a motion asking the Commission to accept a reply to EB’s opposition. See Motion to Accept Reply to Opposition to Motion to Enlarge the Time to File Reply to Exceptions to Initial Decision, EB Docket No. 07-13, File No. EB-06-IH-5048 (filed May 11, 2010). Section 1.294(c) of our rules provides that replies to oppositions in hearing cases “will not be entertained” except in certain circumstances, none of which are applicable here. See 47 C.F.R. § 1.294(c). Accordingly, we deny Titus’s motion.

9. **Merits of EB's exceptions.** We now turn to EB's exceptions. As a general matter, we review the ALJ's decision *de novo*.³⁸ We do, however, give deference to the ALJ's assessment of the credibility of the witnesses under appropriate circumstances.³⁹ In determining the impact of misconduct on a licensee's character qualifications, we consider the factors set forth in our character policy statements.⁴⁰ These include the willfulness, frequency, currentness, and seriousness of the misconduct, efforts made to remedy the wrong, overall compliance with Commission rules and policies, and rehabilitation.⁴¹

10. After a review of the record and the relevant case law, we find that the ALJ committed several errors in reaching his ultimate finding that EB did not meet its burden of proving that Titus lacks the requisite character qualifications to be a Commission licensee. In particular, we hold that the ALJ erred in failing to consider Titus's two juvenile convictions, and failed to give adequate weight to the State of Washington's determination that Titus is a high-risk sex offender. We therefore reverse his Initial Decision and revoke Titus's license.

11. *Consideration of past convictions.* There can be no serious question that Titus's misconduct was willful, repeated, and serious. It rises to the level of misconduct that is "so egregious as to shock the conscience and evoke almost universal disapprobation."⁴² Indeed, the ALJ himself characterized Titus's behavior that led to his adult felony conviction as "shockingly evil."⁴³ Especially in light of the known risks of amateur radios in the hands of sex offenders,⁴⁴ such misconduct is *prima facie* disqualifying,⁴⁵ and has resulted in the loss of licenses in past cases.⁴⁶ Indeed, even without considering Titus's two juvenile convictions, we believe Titus's adult conviction, tied to the State of Washington's 2004 re-classification of Titus as a high-risk sex offender, would be sufficient to justify revocation of his license.

³⁸ See 5 U.S.C. § 557(a) ("[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .").

³⁹ See *Moore v. Ross*, 687 F.2d 604, 609 (2d Cir. 1982).

⁴⁰ See *Character Qualifications*, 102 FCC 2d 1179 (1986) (*1986 Policy Statement*), *recon. dismissed/denied*, 1 FCC Rcd 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (*1990 Policy Statement*), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992).

⁴¹ See *1986 Policy Statement*, 102 FCC 2d at 1227-28 ¶ 102; *1990 Policy Statement*, 5 FCC Rcd at 3252 ¶ 5. Factors relevant to rehabilitation include: (1) whether the applicant has not been involved in any significant wrongdoing since the alleged misconduct occurred; (2) how much time has elapsed since the misconduct; (3) the applicant's reputation for good character in the community; and (4) meaningful measures taken by the applicant to prevent the future occurrence of misconduct. See *1990 Policy Statement*, 5 FCC Rcd at 3252 n.4.

⁴² See *1986 Policy Statement*, 102 FCC 2d at 1205 n.60.

⁴³ See Initial Decision, 25 FCC Rcd at 2397-98 ¶ 22.

⁴⁴ See, e.g. *George E. Rogers*, 10 FCC Rcd 3978 (WTB 1995) (sex offender used amateur radio to engage children in sexual talk and activities).

⁴⁵ See *supra* note 42.

⁴⁶ See *Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998), *aff'd*, 214 F.3d 187 (D.C. Cir. 2000) (revoking the license of a broadcaster based on its principal's conviction for child molestation); *Lonnie L. Keeney*, 24 FCC Rcd 2426 (EB 2009) (revoking the amateur radio license of a child molester); *Robert D. Landis*, 22 FCC Rcd 19979 (EB 2007) (revoking the amateur radio license of a child molester).

12. We also find that the ALJ erred in ruling that Titus's juvenile adjudications should not be considered in this proceeding.⁴⁷ According to the ALJ, these adjudications could not be considered because they occurred more than ten years before the Order Show Cause.⁴⁸ But under the Commission's *1990 Policy Statement*, "evidence of *any* conviction for misconduct constituting a felony will be relevant to our evaluation of an applicant's or licensee's character."⁴⁹ The *1990 Policy Statement* expressly referenced the fact that the terminology used by a state is not controlling, explaining that "[u]nder federal law, a felony is a crime punishable by death or imprisonment for a term exceeding a year."⁵⁰ It thus does not matter for our purposes whether the State of Washington labels these juvenile crimes as felonies; it is undisputed that Titus was confined for over a year for each of these offenses,⁵¹ and thus they are relevant to the Commission's analysis.⁵² These convictions demonstrate that Titus's single adult felony conviction was not an isolated offense and is therefore all the more egregious and disqualifying.

13. *ALJ's analysis of rehabilitation evidence.* Although we agree with the ALJ that other factors, including in particular rehabilitation, are relevant to the ultimate assessment of Titus's character qualifications, we find that the ALJ erred in the manner in which he handled rehabilitation in this matter. Under section 312(d) of the Communications Act,⁵³ the Commission (here represented by EB) has the burden of proceeding with the introduction of evidence and the overall burden of proof in a revocation proceeding. But the ALJ erred as a matter of law in holding that EB must prove by a preponderance of the evidence that Titus was not rehabilitated. Rehabilitation is in essence a defense to EB's affirmative case.⁵⁴ Accordingly, once EB demonstrated misconduct that would be disqualifying absent a defense or counterargument by Titus, EB has met its burden of showing by a preponderance of the evidence that Titus lacked the basic character qualifications required to hold an FCC license. In order to avoid revocation, Titus then had to discredit or rebut EB's evidence by, for example, showing that he was rehabilitated sufficiently to outweigh the disqualifying evidence presented by EB.⁵⁵ Therefore, the ALJ erred in suggesting that the burden was on EB to demonstrate specifically Titus's "non-rehabilitation."⁵⁶

⁴⁷ See Initial Decision, 25 FCC Rcd at 2397 ¶ 21.

⁴⁸ *Id.*

⁴⁹ *1990 Policy Statement*, 5 FCC Rcd at 3252 (emphasis added; footnotes omitted). The Commission further specifically noted that it also "retain[s] the discretion to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions." *Id.* at 3254 n.3.

⁵⁰ *Id.* at 3254 n.2; see also, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1686-87 (2013) (whether alien's state conviction for possession of marijuana constitutes an aggravated felony justifying deportation is governed by federal not state characterization of the offense); *Ewing v. California*, 538 U.S. 11, 28-29 (2003) (for purposes of the "three strike rule" fact that court had discretion to treat grand theft as a misdemeanor under state law is not determinative where felony sentence was actually imposed).

⁵¹ See Initial Decision, 25 FCC Rcd at 2397 ¶ 21.

⁵² The ten-year statute of limitations on which the ALJ relied applies to allegations of FCC-related misconduct. See *1986 Policy Statement*, 102 FCC 2d at 1229. Indeed, under the *1990 Policy Statement*, the Commission generally does not even consider allegations of non-FCC-related misconduct. See *1990 Policy Statement*, 5 FCC Rcd at 3252 ("it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated by another agency or court.").

⁵³ 47 U.S.C. § 312(d).

⁵⁴ The Supreme Court has made clear that once a party having the burden of proof comes forward with a *prima facie* and substantial case, that party will prevail unless its case is discredited or rebutted. See *Steadman v. SEC*, 450 U.S. 91, 101 (1981).

⁵⁵ This treatment is consistent with the fact that the licensee is necessarily in a better position to provide evidence of his or her rehabilitation than the licensing authority is to provide evidence of his or her non-rehabilitation. In this

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14. The ALJ's more consequential error, however, was the manner in which he evaluated the evidence in reaching the conclusion that Titus was rehabilitated. In conducting that analysis, the ALJ discounted EB's evidence of Titus's status as a designated high risk sex offender almost entirely—let alone the evidence that the State had elevated Titus's assigned risk level after Titus's release from prison—holding that it was offset by Titus's showing of rehabilitation. We agree with EB that the ALJ did not properly credit the State's determination that Titus remains a continuing risk to the community.

15. In particular, the record shows that upon Titus's release from prison in 1995, a committee of the Seattle Police Department chaired by Detective Robert Shilling reviewed and assessed Titus's risk to the community. The committee designated Titus as a Level 2, or moderate risk, offender.⁵⁷ Subsequently, in 2004, the Seattle Police Department issued a "Sex or Kidnapping Offender Release Bulletin," indicating that it had determined that Titus should be reclassified as a Level 3, or high risk, offender.⁵⁸ We find that our licensing decision here should give due regard to local authorities' determination that Titus poses an ongoing "high risk" to the community. As we held in *Spanish Radio Network*,⁵⁹ local authorities responsible for keeping the peace and enforcing the law are better positioned to make the determination whether an individual poses a danger to the community than is the Commission.

16. It is especially appropriate to defer to state judgments about sex offenders, in view of the fact that many states treat sex offenders differently from other felons.⁶⁰ For example, in managing risks

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case, for example, Titus presented testimony from his psychiatrist and several character witnesses. It is also consistent with the burden to prove rehabilitation in numerous other licensing contexts. For example, in a moral character proceeding before the California State Bar, an applicant for a law license "must first establish a prima facie case that he or she possessed good moral character; the State Bar may then rebut that showing with evidence of bad moral character"; and "[i]f it does so, the burden then shifts back to the applicant to demonstrate his or her rehabilitation." *In re Joseph Menna*, 905 P.2d 975, 984 (Cal. 1995); see also *In re The Matter of the Application of Donald D. Nash for Reinstatement as an Active Member of the Oregon State Bar*, 855 P.2d 1112, 1113 (Or. 1993) (holding that an attorney seeking reinstatement after being disbarred for sodomizing a former client's six-year-old child "has the ultimate burden of proof to establish good moral character"); *Daly v. The Mississippi Bar*, 83 So.3d 1262, 1266 (Miss. 2011) ("The attorney petitioning for reinstatement has the burden to prove by clear and convincing evidence that he has rehabilitated himself and possesses the requisite moral character to entitle him to reinstatement to the practice of law.").

⁵⁶ See Initial Decision, 25 FCC Rcd at 2398 ¶ 22.

⁵⁷ See EB Exh. 2 at 5. Detective Shilling testified that the facts probably warranted giving Titus a Level 3 (high risk) classification, but that the committee recognized that risk assessment was relatively new in Washington. See Tr. at 709. In this regard, the record contains a "Treatment Summary," dated October 10, 1994 (shortly before Titus's release), prepared by officials of the Sex Offender Treatment Program, Twin Rivers Correction Center, which concludes that Titus was a high risk to reoffend both sexually and violently. See EB Exh. 4 at 27. Detective Shilling testified that the treatment summary was part of the "totality of the circumstances" he examined. See Tr. at 943.

⁵⁸ See EB Exh. 5. This action was based on the incidents discussed *supra* at paragraph 4.

⁵⁹ 10 FCC Rcd 9954, 9959 ¶ 22 (1995).

⁶⁰ See *Smith v. Doe*, 538 U.S. 84, 93 (2003) (recognizing the risk of re-offense and protecting the public from sex offenders as a "primary governmental interest" in upholding the Alaska registration law); Matthew S. Miner, *The Adam Walsh Act's Sex Offender Registration and Notification Requirements and the Commerce Clause: A Defense of Congress' Power to Check the Interstate Movement of Unregistered Sex Offenders*, 56 Vil. L. Rev. 51, 60 (2011) (explaining that the push for sex offender registration registries was driven by acknowledgement that sex offenders will often commit further sex crimes after their release); Center for Sex Offender Management, *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners* 5 (2007) (explaining that the management of sex offenders is of critical importance because of the "potentially volatile community responses to sex offenders" and the "irrefutable harm" that re-offense would cause potential victims). In terms of the impact of the presence of sex offenders in the community, it has been recognized that sex offenses may

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associated with the presence of sex offenders in the community, states rely on strategies that include assessment, supervision, treatment, registration and community notification.⁶¹ Moreover, the measures adopted by a particular state often reflect the state's judgment, based on specialized knowledge that the Commission lacks, as to what particular methods and approaches are appropriate in that jurisdiction.⁶² Given the greater expertise of local authorities in evaluating the risks that sex offenders pose to their communities, we will not question the state's judgment and the exercise of its discretion in this area.

17. Thus, the ALJ erred when he supplanted the judgment of local authorities regarding the risk that Titus posed to the community with his own evaluation of that risk.⁶³ Instead, the ALJ should have acknowledged that the Seattle Police Department was lawfully exercising its primary responsibility in this area when it classified Titus as a Level 3 (or high-risk) sex offender in 2004.⁶⁴ In short, we agree with EB that "[t]he ALJ should not have second-guessed the discretion and lawful authority of the Seattle Police Department in an area in which they have expertise," and instead "should have focused on 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."⁶⁵

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be distinguishable from other crimes because of their distinctive psychological effect on potential and actual victims. See Roxanne Lieb, Vernon Quinsey, Lucy Berliner, *Sexual Predators and Social Policy*, 23 *Crime & Just.* 43, 48 (1998).

⁶¹ See, Center for Sex Offender Management, *The Comprehensive Assessment Protocol: A Systemwide Review of Adult and Juvenile Sex Offender Strategies* (Jul. 2007) (*Assessment*). Detective Shilling was a contributor to this project, sponsored by the U.S. Department of Justice. See *id.* at 6.

⁶² See *Assessment* at 20 (recognizing that sex offender management is a highly specialized area requiring specialized knowledge about sex offenders, victims, and effective interventions); *id.* at 75 (recognizing that, because of the diversity of offenders, a "one size fits all" approach is not appropriate and that careful consideration of varied levels of risk, needs, development, and functioning of individuals is needed to determine what to do with particular offenders).

⁶³ See Initial Decision, 22 FCC Rcd at 2400-01 ¶¶ 29-32. For example, the ALJ had no authority to second guess the state's classification of Titus as a level 3 offender by questioning Detective Shilling's reliance on the so-called WASOST inventory. According to the ALJ, the WASOST is flawed because it is untimely—*i.e.*, it does not consider a convicted sex offender's offense-free time in the community. See Initial Decision, 25 FCC Rcd at 2395 ¶ 12 (stating that a "WASOST score has little accuracy in predicting recidivism" and was wrongfully used to upgrade Mr. Titus to Level 3 'high risk'); *id.* at 2401 ¶ 29 (describing the WASOST as "a non-probative, defective test"). In so finding, the ALJ attacked the tool that the State of Washington uses to classify *all* sex offenders, not just Titus. See *id.* at 2401 ¶ 29 (quoting Detective Shillings' testimony that state law requires use of the WASOST). The ALJ's independent assessment of the State of Washington's system for classifying sex offenders is contrary to the Commission's policy of deferring to local authorities on law enforcement matters—particularly in cases like this one, where the ALJ (and the Commission) have no specific expertise regarding sex offenders and recidivism.

⁶⁴ Our analysis, however, would not differ significantly if Titus were judged a Level 2 offender rather than a Level 3 offender.

⁶⁵ See Exceptions at 12. The statement in the *1990 Policy Statement* that we will "refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated," *1990 Policy Statement*, 5 FCC Rcd at 3252, is not to the contrary. Although the 2002 and 2004 occurrences are not independent bases for making the Commission's licensing decision here, the State of Washington's classification of Titus as a high-risk sex offender is relevant (in particular to Titus's assertion that he has been rehabilitated), and is appropriately considered. We also take administrative notice of the fact that in September 2008, Titus petitioned the Superior Court of Benton County to lift the requirement that he register as a sex offender and to reinstate his civil rights. After hearing, the presiding judge refused to lift that requirement. See Exceptions at 22 n.118; Order, *State v. Titus*, Benton No. 93-1-00035-2 (Sept. 8, 2008) (official notice taken). This decision expresses the State's continuing judgment, after a full airing of the evidence, that Titus should still be deemed a risk to the community. We see no reason to substitute our judgment for the State's.

18. We acknowledge that Titus also introduced evidence that the ALJ took into account in finding that Titus had been rehabilitated. That evidence included the length of time since Titus's adult felony conviction,⁶⁶ the testimony of Dr. Douglas J. Allmon, a consulting psychologist,⁶⁷ the testimony of character witnesses,⁶⁸ and Titus's own expressions of contrition.⁶⁹ Notwithstanding the foregoing, authorities in the State of Washington continue to believe that Titus presents a risk to the community.⁷⁰ While the passage of time may in some cases diminish the significance of a felony conviction, we do not believe that is the case where the offender is currently designated as a high risk sex offender, signifying that local authorities consider him to be an ongoing risk to the community. Were we (like the ALJ) to find that Titus has been rehabilitated, we would effectively contravene the judgment of those entities and undermine their primary authority to evaluate Titus's risk to the community. We decline to do so in the narrow context of this license revocation proceeding.

19. We therefore find that Titus has not rebutted EB's showing that he committed misconduct that is disqualifying, rendering him unqualified to be a Commission licensee. In focusing on the impact of Titus's misconduct on his qualifications to hold an amateur radio license, we conclude that we would be remiss in our responsibilities as a licensing authority if we continue to authorize Titus to hold an amateur radio license that could be used to put him in contact with children.⁷¹ Accordingly, we find that, by a preponderance of the evidence, Titus is unqualified, and we revoke Titus's license for station KB7ILD. In light of this conclusion, it is not necessary to consider EB's other exceptions to the ALJ's Initial Decision.

IV. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED That the Motion to Accept Reply to Opposition to Motion to Enlarge the Time to File Reply to Exceptions to Initial Decision, filed May 11, 2010, by David L. Titus IS DENIED; the Motion to Enlarge the Time to File Reply to Exceptions to Initial Decision, filed April 26, 2010, by David L. Titus, IS DENIED; and the Reply to Exceptions to Initial Decision, filed April 26, 2010, by David L. Titus, IS STRICKEN.

21. IT IS FURTHER ORDERED, That the Enforcement Bureau's Exceptions to the Initial Decision, filed April 8, 2010, ARE GRANTED; the Initial Decision of Chief Administrative Law Judge

⁶⁶ Titus's conviction was in 1993. He received his amateur radio license in 1989, when he was 14 years old. *See* Titus Exh. 1. His license was renewed in 1999. *See* EB Exh. 1.

⁶⁷ *See* Titus Exh. 2; Tr. at 959, 965, 1019-20, 1041-42.

⁶⁸ *See* Titus Exh. 3-13.

⁶⁹ The ALJ credited Titus' testimony that he had no sexual contact with a minor since he was charged with a felony, that he was no longer sexually attracted to children, that he knows he harmed his victims, that he regrets his past conduct, and that he knows about appropriate relationships and boundaries. *See* Initial Decision at 2395 ¶ 14, 2401 ¶ 33.

⁷⁰ We note that the Commission has in the past deferred to a state's finding that a licensee *has* been rehabilitated. *See Richard Richards*, 77 Rad. Reg. 2d (P&F) 1282, 1282 ¶ 2, 1289 ¶ 28 (Rev. Bd. 1995) (reversing ALJ holding that applicant convicted of possession of marijuana not qualified to hold license, finding significant, among other factors, that federal court found that plea agreement was not intended to affect defendant's ability to apply for receive federal benefits, including an FCC license); *Swan Broadcasting Ltd.*, 6 FCC Rcd 17, 22 ¶ 23 (Rev. Bd. 1991) (granting application where applicant's principal, who had pled guilty to manslaughter, had received a full pardon from the state); *Alessandro Broadcasting Co.*, 99 FCC 2d 12, 23 ¶ 33 (ALJ 1984) (applicant who committed second degree murder qualified to hold license where court reinstated his civil rights and recommended a pardon). It is entirely appropriate, then, to give similarly weight to a state's determination that a licensee has *not* been rehabilitated.

⁷¹ *See* notes 44, 46, *supra*.

Richard L. Sippel, FCC 10D-01, released March 9, 2010, 25 FCC Rcd 2390, IS REVERSED; and David Titus's license to operate Amateur Radio Station KB7ILD IS REVOKED .

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary