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ORIGINAL

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

SEP 1 3 54 PM '93

DISPATCHED BY PB Docket No. 93-231

In the Matters of

Application of

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

For a Private Carrier Paging Facility
on the Frequency 152.480 MHz in
Huntington/Charleston, West Virginia

and

Imposition of Forfeiture Against

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Former Licensee of Station WNSX-646
in the Private Land Mobile Radio
Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Licensee of Station WNDA-400 in the
Private Land Mobile Radio Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Licensee of Station WNWW-636 in the
Private Land Mobile Radio Services

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KWU-373 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
P.O. Box 8305
South Charleston, West Virginia 25303

Licensee of Station KUS-223 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Co., Inc.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KQD-614 in the
Public Mobile Radio Service

and

Revocation of License of

Capitol Radiotelephone Company, Inc.
1420 Kanawha Boulevard
East Charleston, West Virginia 25301

Licensee of Station KWU-204 in the
Public Mobile Radio Service

**HEARING DESIGNATION ORDER,
ORDER TO SHOW CAUSE AND NOTICE
OF OPPORTUNITY FOR HEARING**

Adopted: August 3, 1993;

Released: August 31, 1993

By the Commission:

INTRODUCTION

1. The Commission has under consideration the above-captioned private land mobile radio station application and licenses of Capitol Radiotelephone Inc. and Capitol Radio Telephone Inc. d.b.a. Capitol Paging (Capitol): application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia, sta-

tion WNSX-646, station WNDA-400 and station WNWW-636. The Commission also has under consideration the above-captioned public radio station licenses licensed to Capitol Radiotelephone Company, Inc. and Capitol Radiotelephone Co., Inc. (Capitol): station KWU-373, station KUS-223, station KQD-614 and station KWU-204.¹

BACKGROUND

2. This matter involves the facts and circumstances surrounding the operation of private carrier paging (PCP) station WNSX-646 by Capitol. Capitol filed an application for this station, located at sites Huntington and Charleston, West Virginia in late March 1990.² Capitol sought to operate this station on the frequency 152.480 MHz, a shared private land mobile paging channel already authorized at these geographic locations to RAM Technologies (RAM) as licensee of station WNJN-621. Capitol and RAM were (and are) competitors in these particular markets in the provision of paging services. Capitol had been providing radio common carrier paging service and RAM had been providing private carrier paging service.

3. RAM filed a Petition to Deny and Motion for Stay objecting to grant of Capitol's application.³ RAM contended that Capitol sought a PCP license for the sole purpose of causing harmful interference to RAM's PCP operations.⁴ RAM's Petition to Deny and Motion for Stay was denied on the basis that RAM had at that time failed to prove that Capitol planned to intentionally interfere with RAM's station.⁵ On August 31, 1990 RAM filed a Petition for Reconsideration of the action denying its Petition to Deny and Motion for Stay. Capitol was granted a license for station WNSX-646 on September 12, 1990 subject to the outcome of RAM's pending Petition for Reconsideration.

4. After Capitol initiated operation of station WNSX-646, RAM repeatedly complained of the very interference that it had previously anticipated.⁶ Capitol was aware of these complaints.⁷ On April 2, 1991, a meeting was convened by

the Chief, Land Mobile and Microwave Division, Private Radio Bureau, in an effort to resolve these interference complaints.⁸ The meeting concluded with an apparent settlement. RAM and Capitol agreed to cooperate to resolve harmful interference. RAM agreed to withdraw its Petition for Reconsideration. Subsequently, however, RAM continued to complain of harmful interference from Capitol and never withdrew its Petition for Reconsideration.

5. In this *Order* we grant RAM's Petition for Reconsideration. Capitol's application that resulted in grant of a license to operate station WNSX-646 is returned to pending status. Accordingly, Capitol is without authority to operate station WNSX-646. The August 9, 1990, denial of RAM's Petition to Deny is vacated. Although Petitions to Deny generally do not lie against Private Radio applications, we are treating RAM's Petition to Deny as an informal objection.

6. Information before the Commission suggests that private land mobile radio station WNSX-646 willfully and repeatedly violated the Communications Act of 1934, as amended (the Act), and the Commission's Rules (the Rules). Much of this information was developed by Commission field personnel dispatched to the location of station WNSX-646 in West Virginia from August 12, 1991 through August 15, 1991. Commission field personnel investigated repeated complaints of RAM, licensee of co-channel PCP station WNJN-621 in the same geographic area, that station WNSX-646 was causing willful and repeated harmful interference to station WNJN-621, as well as committing other violations of the Act and the Rules.

7. On July 30, 1992 the Chief, Land Mobile and Microwave Division, Private Radio Bureau, issued a Notice of Apparent Liability (NAL) for monetary forfeiture to Capitol in the amount of \$20,000 for willful and repeated violation of Section 333 of the Act and Sections 90.403(e), 90.405(a)(3) and 90.425(b) of the Commission's Rules⁹ based on the operation of PCP station WNSX-646 on August 12, 13, 14 and 15, 1991. Capitol replied to this NAL

¹ For the purposes of this *Order*, the above-captioned corporate licenses are collectively referred to as "Capitol."

² FCC File No. 190207.

³ This pleading, filed on March 30, 1990, was supplemented April 13, 1990 and July 26, 1990.

⁴ RAM submitted several affidavits in support of this contention. Sgt. Wendell Adkins of the Barboursville, West Virginia Police Department stated that Capitol employees told him that RAM had to share frequencies with other companies and that the Police Department would have trouble with busy signals if it stayed with RAM. Other affidavits described conversations in which Capitol employees represented to the affiants that Capitol intended to "busy" the 152.480 MHz frequency to the detriment of RAM's customers.

⁵ Letter of August 9, 1990, from Carol Fox Foelak, Chief, Compliance Branch, Land Mobile and Microwave Division, Private Radio Bureau, to Frederick M. Joyce, Esquire.

⁶ See, e.g., letter of November 27, 1990, from Frederick M. Joyce to Jerold Feldman (referencing, on behalf of RAM, oral complaint made to the FCC of harmful interference by Capitol); letter of November 28, 1990 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol's retransmission of common carrier pages on 152.490 MHz from November 15, 1990 through November 18, 1990); letter of February 19, 1991 from Hon. Carl C. Perkins to Ralph A. Haller, Chief, Private Radio Bureau (com-

plaining, on behalf of RAM, of Capitol interference to RAM that occurred in October 1990, and further complaining that "Capitol has apparently refused to contact RAM to cooperate in engineering its system to avoid harmful co-channel interference"); letter of March 5, 1991 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol on March 4, 1991); and letter of March 19, 1991 from A. Dale Capehart to Mike Raymond (RAM complaint of interference on that date sent directly to Capitol).

⁷ See, e.g., letter dated December 4, 1990 from Kenneth E. Hardman on behalf of Capitol to Donna R. Searcy (response to RAM's November 28, 1990 interference complaint in which "Capitol Paging absolutely and categorically denies RAM's allegations") and letter dated March 15, 1991 from Kenneth E. Hardman on behalf of Capitol to Donna R. Searcy (response to RAM's March 5, 1991 interference complaint stating "the complaint is no more than another trumped up charge by RAM").

⁸ Those attending included Richard J. Shiben, Chief, Land Mobile and Microwave Division (LMMD), Private Radio Bureau (PRB); Carol Fox Foelak, Chief, Compliance Branch, LMMD, PRB; Frederick M. Joyce, counsel for RAM; Kenneth E. Hardman, counsel for Capitol; certain principals of RAM; and a representative of the office of the Honorable Carl C. Perkins, member, U.S. House of Representatives.

⁹ 47 C.F.R. §§ 90.403(e), 90.405(a)(3) and 90.425(b)(2).

by filing a Rebuttal Statement.¹⁰ Matters that were the subject of this NAL, as well as other related matters, are now the subject of consideration in this proceeding. The following discussion details the gravamen of each of the issues designated for hearing.

DISCUSSION

8. *Interference.* Information before the Commission, including complaints from RAM that in some instances were accompanied by supporting affidavits, suggests that throughout the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and from July 17, 1991 through July 19, 1991, PCP radio station WNSX-646 willfully, maliciously and repeatedly transmitted on the frequency 152.48 MHz in the areas of Charleston, West Virginia and Huntington, West Virginia in a manner that caused harmful interference to the transmissions of PCP station WNJN-621,¹¹ in apparent violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e),¹² and Section 333 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 333.¹³

9. Additional information before the Commission, including Commission monitoring and inspection, suggests that on August 12, 13, 14, and 15, 1991 PCP radio station WNSX-646 willfully, maliciously and repeatedly transmitted on the frequency 152.48 MHz in the areas of Charleston, West Virginia and Huntington, West Virginia in a manner that caused harmful interference to the transmissions of PCP station WNJN-621,¹⁴ in apparent violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and Section 333 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 333. Inspection and monitoring of station WNSX-646 by Commission field personnel during the period August 12-15, 1991 suggests that its transmissions were not for the purpose of conveying actual pages for subscribers. Indeed, although Commission monitoring indicated that station WNSX-646 frequently transmitted during this four-day period, not one of its transmissions appeared to be related to an actual page for a customer.

10. Capitol claims that its transmissions on August 12, 13, 14, and 15, 1991, were legitimate "test" transmissions.¹⁵ Information before the Commission, however, including inspection and monitoring of station WNSX-646 by Commission field personnel during the period August 12-15,

1991 suggests that its transmissions were not primarily for the purpose of conducting tests. Because these transmissions were apparently neither for actual pages nor primarily for testing, it appears that instead the primary purpose of these transmissions was to cause harmful interference.

11. Capitol also contends that any harmful interference it may have caused was not "willful" because it had no deliberate intent to cause interference.¹⁶ For purposes of revocation under Section 312(a) (or a forfeiture under Section 503(b)) of the Act, however, establishing that a violation of the Act or the rules is willful does not require us to establish that the licensee knew he was acting wrongfully; but only that the licensee knew that he was doing the acts in question.¹⁷ Willful (and/or repeated) interference constitutes justification to impose sanctions, including revocation, without the need to establish a "deliberate attempt" to interfere.¹⁸ Information before the Commission suggests that Capitol was aware of what it was doing when it transmitted on PCP station WNSX-646 and caused harmful interference. Such a factual finding alone would warrant a legal finding of willful violation of the Commission's Rules for the purposes of Sections 312(a) and 503(b) of the Act. Moreover, the extended duration of the transmissions, the content unrelated to completing actual pages or testing, and the repetitiveness of the interference also appear to indicate that Capitol did indeed have actual intent to deliberately interfere with RAM. Such a factual finding would support an additional finding of willful or malicious interference in violation of Section 333 of the Act.¹⁹

12. Finally, Capitol states that it took reasonable precautions to avoid causing harmful interference by having a "properly functioning inhibitor,"²⁰ and that with this inhibitor its test transmissions could not have caused harmful interference.²¹ Commission on-site monitoring coupled with use of sophisticated direction-finding techniques, however, indicate that on August 12, 13, 14 and 15, 1991 Capitol's station repeatedly transmitted when RAM's station was transmitting pages, causing harmful interference to those pages.²² Other information before the Commission indicates that harmful interference occurred on other occasions despite the existence of this "inhibitor" as well. Inspection of Capitol's facilities by Commission field personnel on August 15, 1991 indicated that this "inhibitor" consisted of a modified scanning receiver with a totally

¹⁰ The decision regarding whether a forfeiture should be ordered in an amount not to exceed a total of \$20,000 for these apparent violations on August 12, 13, 14 and 15, 1991 is incorporated into this hearing proceeding.

¹¹ These transmissions may also have caused harmful interference to the transmissions of PCP station WNLM-930, licensed to Communication Service, Inc.

¹² Section 90.403(e) provides: "Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing harmful interference."

¹³ Section 333 of the Communications Act provides: "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government." The legislative history to this section makes clear that this section specifically prohibits harmful, intentional interference. See H.R. Rep. No. 316, 101st Cong., 1st

Sess., at 8-9 (1989).

¹⁴ These transmissions may also have caused harmful interference to the transmissions of PCP station WNLM-930.

¹⁵ Capitol asserted this claim at the time of inspection of station WNSX-646 by Commission field personnel on August 15, 1991, in response to Commission correspondence, and in its Rebuttal Statement.

¹⁶ Rebuttal Statement at 2.

¹⁷ Southern California Broadcasting Company, 6 FCC Rcd 4387 (1991).

¹⁸ Raymond C. Standing, 68 FCC 2d 1021, 1023 (1978).

¹⁹ 47 U.S.C. § 312(a)(3) and (4); see note 13, *supra*.

²⁰ Capitol refers to this "inhibitor" as a device intended "to lock out" its transmitter when other co-channel licensees are transmitting pages." Rebuttal Statement of Capitol at 3-4.

²¹ Rebuttal Statement of Capitol at 4.

²² This interference included interruption of RAM's pages with the resultant inability on the part of RAM to complete its pages at that time or in a timely fashion thereafter.

functioning front panel squelch control.²³ The existence of such a device does not mitigate the charge of harmful interference, especially where, as here, the harmful interference was not an isolated occurrence.

13. Capitol and RAM are competitors in the provision of paging services in Charleston and Huntington, West Virginia. Capitol has thousands of paging subscribers on its common carrier paging stations in these areas. RAM has thousands of paging subscribers on its private carrier paging (PCP) stations in the same areas. It appears, however, that at no time since it was initially licensed has Capitol had more than 22 subscribers to the PCP services it provides on station WNSX-646, licensed on the same frequency as RAM. Capitol's apparent willful, malicious and repeated interference to co-channel station WNJN-621, coupled with this information about the number of its subscribers, would appear to indicate that Capitol sought to degrade RAM's quality of service so that RAM's customers would take paging service from Capitol.

14. *Test transmission violations.* Information before the Commission, including complaints by RAM supported by affidavits, suggests that "test" transmissions conducted by station WNSX-646 in the Charleston and Huntington, West Virginia areas from November 15, 1990 through November 18, 1990,²⁴ on March 4, 1991²⁵ and from July 17, 1991 through July 19, 1991²⁶ were not kept to a minimum and did not employ sufficient measures to avoid harmful interference, in apparent violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).²⁷

15. Information before the Commission, including Commission monitoring and inspection, also suggests that "test" transmissions conducted by station WNSX-646 on August 12, 13, 14, and 15, 1991, in the Charleston, West Virginia, and Huntington, West Virginia, areas were not kept to a minimum and did not employ sufficient measures to avoid harmful interference, in apparent violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3). This information further suggests that an element of failure to keep "test" transmissions to a minimum included transmission of Morse code identification of station WNSX-646 on August 12, 13, 14, and 15 in the

Charleston, West Virginia, and Huntington, West Virginia, areas at a rate of approximately seven (7) words per minute (wpm), in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).²⁸

16. Capitol admits that its station was transmitting at a Morse code setting that was too slow, but contends that this was an inadvertent mistake.²⁹ Capitol then alleges that because it was not aware that a Morse Code setting at this speed constituted a rule violation, its conduct was not willful and no forfeiture should be assessed.³⁰ To the contrary, Capitol's violation of this rule was willful under Sections 312(a) and 503(b) of the Act simply because Capitol caused its station to transmit communications at a Morse Code setting that was too slow.³¹ Capitol's use of an unnecessarily slow Morse code identification during alleged testing inherently prolonged use of airtime to the detriment of co-channel licensees.

17. Capitol alleges that repeated testing was necessary to attempt to implement a "group call" service to a public safety organization -- the Greenup County Rescue Squad.³² Information before the Commission, however, suggests that the Greenup County Rescue Squad itself never sought any relationship with Capitol for the provision of paging services in connection with its public safety function. Rather, it appears that a few individual members of the Squad sought paging service from Capitol for their own purposes.³³ Additional information before the Commission suggests that any testing that occurred related to these individuals took place before the transmissions the Commission monitored on August 12, 13, 14 and 15, 1991 and was not related to these transmissions.

18. *Improper Retransmissions.* Information before the Commission also suggests that from November 15, 1990 through November 18, 1990, and on or about August 27, 1992 and continuing to the present, Capitol willfully and repeatedly caused station WNSX-646 to transmit previously completed Radio Common Carrier (RCC) and PCP pages on the frequency 152.480 MHz, in apparent violation of Sections 90.173(b), 90.403(c) and 90.415(b) of the Commission's Rules, 47 C.F.R. §§ 90.173(b), 90.403(c) and 90.415(b).³⁴ It appears that some of this prior paging traffic

²³ This is significant because the squelch setting affects whether the receiver detects a signal. This particular piece of equipment could be, for all intents and purposes, completely functionally disabled by an improper squelch setting on the front panel. More reliable methods of providing for transmitter inhibitor circuitry such as use of a fixed tuned receiver or dedicated phone line are available.

²⁴ On these dates, it appears that Capitol operated on the frequency 152.480 MHz to cause retransmission of a steady stream of digital transmissions. See affidavits of Robert A. Moyer, Jr. and Raymon A. Bobbitt dated November 26, 1990, appended to letter of November 28, 1990 from Frederick M. Joyce, Counsel for RAM Technologies, Inc. to Carol Fox Foelak, Chief, Compliance Branch, Private Radio Bureau.

²⁵ On this date, it appears that Capitol operated on the frequency 152.480 MHz to cause repeated transmission of the station call sign without monitoring co-channel traffic. See Declaration of A. Dale Capehart dated March 5, 1991, appended to a March 5, 1991 letter from Frederick M. Joyce, Counsel for RAM Technologies, Inc. to Carol Fox Foelak, Chief, Compliance Branch, Private Radio Bureau.

²⁶ On these dates, it appears that Capitol operated on the frequency 152.480 MHz to cause station WNSX-646 to repeat four separate tones in sequence every 90 seconds without in-

terruption, using a device patched into the paging base station that imitates the sound of a tone page transmission.

²⁷ Section 90.405(a)(3) provides, in pertinent part: "(a) Stations licensed under this part may transmit only the following types of communication: ... (3) Communications for testing purposes required for proper station and system maintenance. However, each licensee shall keep such tests to a minimum and shall employ every measure to avoid harmful interference."

²⁸ Section 90.425(b)(2) states: "The Morse code transmission rate shall be maintained between 20 and 25 words per minute."

²⁹ Rebuttal Statement of Capitol at 6-7.

³⁰ Rebuttal Statement of Capitol at 7.

³¹ See discussion of "willful" at paragraph 10, *supra*.

³² Rebuttal Statement of Capitol at 5-6.

³³ Generally, individual persons are not eligible to hold private land mobile licenses under Part 90 and therefore are not eligible for service from a PCP system such as Capitol's operating on the 152.480 MHz band.

³⁴ Section 90.173(b) provides in pertinent part: "All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities." Section 90.403(c) provides: "Each licensee shall restrict all transmissions to the minimum practicable transmission time and shall employ an

was traffic not initially transmitted by Capitol.³⁵ It further appears that these transmissions were not made for a legitimate business purpose, but were unnecessary and non-essential communications calculated to reduce the amount of time available for RAM as a paging competitor to complete its legitimate pages on the same frequency.

19. *Misrepresentation.* In its June 17, 1992 reply to a letter pursuant to 47 U.S.C. § 308(b),³⁶ in its *Rebuttal Statement* to the subsequent NAL,³⁷ in providing information at the time of field inspection on August 15, 1991, in written and oral replies made to the Commission and its staff regarding complaints of harmful interference from RAM, and in other discussions with Commission personnel regarding the operation of station WNSX-646, it appears that Capitol made misrepresentations to the Commission, including (1) representations about the existence and number of paging subscribers of station WNSX-646 that were both internally inconsistent and inconsistent with information developed by Commission field personnel by monitoring and inspection of station WNSX-646 from August 12, 1991 through August 15, 1991; and (2) representations about attempting to provide public safety-related communications to Greenup County Rescue Squad. Capitol's apparent repeated misrepresentations suggest violation of Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, and raise questions regarding whether Capitol has the requisite character qualifications to continue to remain a Commission licensee.³⁸

20. *Lack of Candor.* It further appears that throughout this matter in dealing with the Commission and other licensees that Capitol has been less than forthcoming in representing the status of station WNSX-646 and Capitol's intentions with regard to the operation of that station, including being less than completely candid about (1) whether station WNSX-646 was engaged in legitimate testing during various instances of harmful interference to RAM; (2) whether station WNSX-646 was the source of particular instances of harmful interference to RAM; (3)

the efficacy, use and operation of the "inhibitor" associated with station WNSX-646; (4) making subscriber billing data available to Commission personnel³⁹ and (5) whether Capitol became a licensee of station WNSX-646 primarily for the purpose of causing harmful interference to station WJNJ-621.⁴⁰ Capitol's apparent repeated lack of candor in this matter raises questions regarding whether Capitol has the requisite character qualifications to continue to remain a Commission licensee.⁴¹

ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by RAM IS GRANTED, that the license of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for station WNSX-646 on the frequency 152.480 MHz in the Huntington/Charleston, West Virginia area IS RESCINDED, and that the underlying application for that station (File No. 0190207) IS RETURNED TO PENDING STATUS.

22. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e),⁴² that the application of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) IS DESIGNATED FOR HEARING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the issues set forth in paragraph 28 of this Order.

23. IT IS FURTHER ORDERED that, regardless of whether the hearing record warrants an Order denying Capitol's application, IT SHALL BE DETERMINED, pursuant to Sections 503(b)(2)(C) and 503(b)(3)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 503(b)(2)(C) and 503(b)(3)(A),⁴³ and Section 1.80(g) of the Commission's Rules, 47 C.F.R. § 1.80(g), whether an ORDER OF FORFEITURE shall be issued against Capitol in

efficient operating procedure designed to maximize the utilization of the spectrum." Section 90.415(b) provides in pertinent part: "Stations licensed under this part shall not: ... (b) Render a communications common carrier service...."

³⁵ For example, RAM discovered some of its previous pages were being transmitted when its customers began to attempt to answer them. RAM informed its customers that no such pages were currently pending. Upon further investigation and monitoring, RAM concluded that its old pages were being transmitted by Capitol on the shared PCP channel.

³⁶ Letter of Richard J. Shiben, Chief, Land Mobile & Microwave Division, Private Radio Bureau, to Capitol Radiotelephone Inc., dated May 19, 1992.

³⁷ Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Capitol Radiotelephone Inc. dated July 30, 1992 (7320-13/91186, 217XX0007).

³⁸ Section 1.17 of the Rules provides in pertinent part: "No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." The Commission has revoked licenses for misrepresentations to the agency. See, e.g., *Pass Word, Inc. v. F.C.C.*, 673 F.2d 1363 (D.C. Cir. 1982).

³⁹ In response to the 308(b) letter's request for representative billing invoices, Capitol responded: "Our computer system does not generate hard copies of customer invoices for our files, and

a hard copy cannot be provided." Letter from J. Michael Raymond, Vice President, Capitol Paging, to Federal Communications Commission, dated June 17, 1992. Upon inspection of station WNSX-646 on August 15, 1991, however, Capitol was able to provide field personnel with a computer printout of other business information.

⁴⁰ Additionally, obtaining a license for this purpose is an abuse of the Commission's processes. Misconduct which threatens the integrity of the Commission's licensing processes is considered as bearing on character. Character Qualifications, 102 FCC 2d 1179, 1211 (1986).

⁴¹ Lack of candor not arising to the level of misrepresentation is nonetheless actionable. See *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (1982).

⁴² Section 309(e) of the Act gives the Commission authority to formally designate an application for a license for hearing if a substantial and material question of fact is presented or the Commission for any reason is unable to find that it is in the public interest, convenience and necessity to grant the application.

⁴³ Section 503(b)(2)(C) of the Act gives the Commission authority to impose a forfeiture penalty not to exceed \$10,000 for each violation or each day of a continuing violation (not to exceed a total of \$75,000 for a single act) against a private radio licensee that willfully or repeatedly fails to comply with any provisions of the Act or rules. Section 503(b)(3)(A) of the Act gives the Commission authority to make this determination after notice and an opportunity for hearing before an Administrative Law Judge.

an amount not to exceed \$20,000 for the apparent violations referred to in the July 30, 1992 Notice of Apparent Liability for Monetary Forfeiture and/or in an amount not to exceed \$75,000 for each of the continuing rule violations set forth in subparagraph (g) of paragraph 28 of this Order.⁴⁴

24. Additionally, pursuant to Sections 312(a)(2), 312(a)(3), 312(a)(4) and 312(c) of the Act, 47 U.S.C. §§ 312(a)(2), 312(a)(3) 312(a)(4) and 312(c),⁴⁵ Capitol IS ORDERED TO SHOW CAUSE why its captioned station licenses should not be revoked. The decision whether to revoke Capitol's captioned licenses will be based upon the issues set forth in paragraph 28 of this Order.

25. IT IS FURTHER ORDERED that because these matters involve substantially the same facts and issues they ARE CONSOLIDATED FOR HEARING pursuant to Section 1.227 of the Commission's Rules, 47 C.F.R. § 1.227.⁴⁶

26. IT IS FURTHER ORDERED that to avail itself of the opportunity to be heard with respect to its application designated for hearing, Capitol, pursuant to Section 1.221(c) of the Commission's Rules, in person or by its attorney(s), within 20 days of the mailing of this Order, SHALL FILE in triplicate a WRITTEN APPEARANCE stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified with respect to its pending application in this Order.^{47 48} Capitol may, instead, within 20 days of the mailing of this Order, choose to dismiss its pending application without prejudice. Failure to file a written appearance or to dismiss this application without prejudice within 20 days of the mailing of this Order will result in dismissal of the application designated for hearing with prejudice for failure to prosecute.

27. IT IS FURTHER ORDERED that with respect to the revocation and forfeiture matters involved in this proceeding, Capitol may choose either to present evidence at a hearing or to waive its right to a hearing. If Capitol wishes to present evidence at a hearing before an Administrative Law Judge on the revocation and forfeiture matters, it SHALL FILE in triplicate a WRITTEN APPEARANCE stating this intention within 30 days from the release of this Order.^{49 50} If such a request is made, a time, place and Presiding Judge will be designated by later order.⁵¹ If Capitol does not wish to present evidence at a hearing before an Administrative Law Judge on the revocation and forfeiture matters, it may file a statement within 30 days from the release of this Order waiving the right to a

hearing.⁵² If Capitol submits a timely statement waiving the right to a hearing on the revocation and forfeiture matters, it may also submit a further written statement (within 30 days from the release of this Order) either denying or seeking to mitigate or justify the matters alleged in this Order. If Capitol fails to respond to this Order within 30 days from its release requesting a hearing on the revocation and forfeiture matters set forth in this Order, Capitol will be deemed to have waived its right to a hearing on these matters. If Capitol waives its right to a hearing on the revocation and forfeiture matters, the Chief Administrative Law Judge will certify these aspects of the case to the Commission, and non-hearing administrative procedures will determine whether revocation should occur or whether a forfeiture should be issued.

28. IT IS FURTHER ORDERED THAT, based upon the information set forth in this Order, this case will be decided upon the following issues:

- a. Whether, during the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.
- b. Whether, on August 12, 13, 14, and 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.

⁴⁴ All the other alleged violations are beyond the one-year statute-of-limitations period for forfeitures under Section 503(b) of the Act.

⁴⁵ Section 312(a)(2) of the Act gives the Commission authority to revoke a station license for matters coming to its attention which would have prevented granting the original application. Section 312(a)(3) of the Act gives the Commission authority to revoke a station license for willful or repeated failure to operate substantially as set forth in the license. Section 312(a)(4) of the Act gives the Commission authority to revoke a station license for willful or repeated violation of the Act or rules. Section 312(c) of the Act provides that these determinations shall be made pursuant to this Order to Show Cause.

⁴⁶ See also 47 U.S.C. § 154(j).

⁴⁷ If by filing such a written appearance Capitol intends to request a hearing on all three aspects of this case (the application, revocation and forfeiture matters), it must clearly indicate this (see paragraph 27).

⁴⁸ A copy of this written appearance should be sent to the Federal Communications Commission, Private Radio Bureau, Land Mobile and Microwave Division, STOP 1700A1, Washington, D.C. 20554.

⁴⁹ A copy of this written appearance should be sent to the Federal Communications Commission, Private Radio Bureau, Land Mobile and Microwave Division, STOP 1700A1, Washington, D.C. 20554.

⁵⁰ If by filing such a written appearance Capitol intends to request a hearing on all three aspects of this case (the application, revocation and forfeiture matters), it must clearly indicate this (see paragraph 26).

⁵¹ If Capitol chooses to continue to prosecute the application at issue, then one consolidated hearing on the application, revocation and forfeiture matters will occur.

⁵² In this instance, such a waiver would constitute waiver of Capitol's right to any hearing *de novo* before any administrative body or court regarding the forfeiture matters at issue.

c. Whether, from November 15, 1990 through November 18, 1990, on March 4, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

d. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

e. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to identify its transmissions by Morse code at a rate less than 20-25 words per minute, in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).

f. Whether from November 15, 1990 through November 18, 1990 Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

g. Whether, beginning on or about August 27, 1992 and continuing to the present, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

h. Whether in written and/or oral statements to the Commission or its staff with respect to the above matters, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.) Inc., and/or any of these entities doing business as Capitol Paging misrepresented facts to the Commission and/or was lacking in candor.

i. Whether, in light of the findings under paragraph (h), any of the above captioned applicants/licenseses willfully or repeatedly violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

j. In light of the findings under paragraphs (a) through (i), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging have the requisite basic character qualifications to continue to remain Commission licensees.

k. In light of the findings under paragraphs (a) through (j), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging are qualified to retain each of their respective licenses set forth in the caption of this proceeding.

l. In light of the findings under paragraphs (a) through (k), whether any or all of the captioned radio station licenses should be revoked.

m. In light of the findings under paragraphs (a) through (l), whether Capitol Radiotelephone Inc. d.b.a. Capitol Paging filed an application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) primarily for the purpose of obtaining a license in order to cause harmful interference to station WJN-621 licensed to RAM Technologies Inc.

n. In light of the findings under paragraphs (a) through (m), whether the application of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) should be granted.

29. IT IS FURTHER ORDERED that the Private Radio Bureau and RAM Technologies, Inc. (RAM) ARE MADE PARTIES to this proceeding.

30. IT IS FURTHER ORDERED that Capitol Radiotelephone Inc. d.b.a. Capitol Paging has the burden of proof and the burden of proceeding with respect to the matter of its application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207). IT IS FURTHER ORDERED that with respect to all other matters in this proceeding the Private Radio Bureau has the burden of proof and the burden of proceeding.

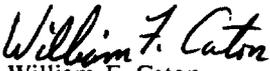
31. IT IS FURTHER ORDERED that a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record appearing on behalf of the Chief, Private Radio Bureau. Parties may inquire as to the identity of the counsel of record by calling the Land Mobile and Microwave Division, Private Radio Bureau at (202) 632-7125. Such service shall be addressed to the named counsel of record,

Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, STOP 1700A. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this *Order* shall also be served on the Chief, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, STOP 1700.

32. IT IS FURTHER ORDERED that the Secretary of the Commission send a copy of this *Order* by *Certified Mail -- Return Receipt Requested* to Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., Capitol Radiotelephone Co., Inc., and RAM Technologies Inc. at their respective addresses of record as licensees.

33. IT IS FURTHER ORDERED that in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary