

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

In the matters of )  
 )  
Application of )  
 )  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
 )  
For a Private Carrier Paging )  
Facility on 152.480 MHz in )  
Huntington/Charleston, WV )  
 )  
Imposition of Forfeiture re )  
 )  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
 )  
Former Licensee of Station )  
WNSX646 in the PLMRS )  
 )  
Revocation of Licenses of )  
 )  
CAPITOL RADIO TELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
 )  
Licensee of Stations WNDA400 )  
and WNWW636 in the PLMRS )  
 )  
Revocation of Licenses of )  
 )  
CAPITOL RADIOTELEPHONE COMPA- )  
NY, INC. d/b/a CAPITOL PAGING )  
 )  
Licensee of Stations KWU373, )  
KUS223, KQD614 and KWU204 in )  
the PMRS )

PR Docket No. 93-231

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: Administrative Law Judge Joseph Chachkin

MEMORANDUM IN SUPPORT OF JOINT  
MOTION FOR APPROVAL OF CONSENT AGREEMENT

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol  
Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a  
CAPITOL PAGING ("Capitol"), by its attorneys and pursuant to  
the invitation of the Presiding Judge at the Prehearing

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Conference on October 29, 1993, respectfully submits the following memorandum in support of the Joint Motion for Approval of Consent Agreement and annexed Consent Agreement filed on October 28, 1993 by all parties to the captioned proceeding. In support thereof, Capitol respectfully shows:

Summary of Position

Capitol's position is that reported Commission precedent clearly establishes the principle that enforcement hearing proceedings involving alleged misrepresentation and lack of candor issues (and hence the basic qualifications of a party to be a licensee) may be settled by consent agreement when the alleged offending party is (1) denied the "fruits" of its alleged misconduct; and is (2) significantly penalized financially or otherwise such that similar misconduct by other parties is deterred. Those conditions have been satisfied in the case at bar. Thus, the consent agreement should be approved in all respects.

Moreover, even if the Presiding Judge is not completely satisfied with the Consent Agreement in light of the fact that a hearing has not transpired, Capitol respectfully submits that the appropriate course would be to direct that further actions be taken to address his concerns, rather than threshold rejection of the proposed agreement.<sup>1</sup> Such

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<sup>1</sup> Section 1.94(d) of the Commission's rules, 47 C.F.R. §1.94, authorizes the Presiding Judge to "suggest that negotiations continue on such portion of the agreement as he considers unsatisfactory or on matters not reached in the agreement".

action could be to direct the parties to submit offers of proof on the lack of candor and misrepresentation issues, or, alternatively, to hold a limited hearing on those issues prior to ruling on the proposed agreement. If, as Capitol believes will be the case, the Presiding Judge is then satisfied that the Consent Agreement is in the public interest, he can then approve the agreement and terminate the proceeding.

#### Background

This hearing proceeding involves three components (1) Capitol's application for a Private Carrier Paging (PCP) station in Charleston and Huntington, WV, on 152.48 MHz, a frequency shared among multiple licensees in the area; (2) a proposed forfeiture to be imposed against Capitol by reason of alleged violation of Commission operating rules governing stations on 152.48 MHz; and (3) potential revocation of other private radio and common carrier station licenses held by Capitol if the evidence establishes that it engaged in misrepresentation and exhibited lack of candor in connection with the Commission's investigation of Capitol's PCP operations such that it is concluded that Capitol does not possess the requisite character qualifications to remain a Commission licensee. Capitol respectfully submits that both the forfeiture and revocation portions of the proceeding intimately relate to the Private Radio Bureau's enforcement

responsibilities. In turn, those responsibilities lie at the core of the Commission's consent order provisions.<sup>2</sup>

The claims upon which the revocation portion of the proceeding is based are outlined at ¶¶19-20 of the Hearing Designation Order (HDO),<sup>3</sup> but discovery has not been initiated upon them because of the the Consent Agreement before the Presiding Judge for approval. Nonetheless, the Private Radio Bureau -- which made the allegations in the first place and, thus, is fully aware of their basis -- has joined in the Consent Agreement that would terminate the proceeding without making any findings on these issues.

In relevant part, the Consent Agreement requires Capitol to dismiss its application for the PCP station on 152.48 MHz and to surrender any associated licenses; to agree not to seek any PCP licenses for five years in the states of

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<sup>2</sup> Section 1.93(b) of the rules, 47 C.F.R. §1.93(b), notes that consent orders are to serve "the interests of timely enforcement or compliance" and authorizes an operating Bureau to negotiate a consent order with a party "to secure future compliance with the law in exchange for prompt disposition of a matter". By contrast, Talton Broadcasting Company, 66 F.C.C.2d 974 (FCC 1977), recon. den. 42 R.R.2d 930, involved renewal of a broadcasting license. The Commission ruled that Section 309 of the Act required a public interest finding in that proceeding in order to grant renewal, which statutory finding could not be satisfied by a consent agreement. Here, there is no need for any Section 309 finding in this case since the consent agreement provides for dismissal of Capitol's pending application. Thus, properly construed, Talton does not bar approval of the consent agreement herein.

<sup>3</sup> Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 93-381, Adopted August 3, 1993 and Released August 31, 1993 (hereinafter cited as the "HDO").

West Virginia, Ohio and Kentucky (a considerably larger area than Capitol now serves); to admit to violations of Sections 90.405(a)(3) (excessive testing) and 90.425(b)(2) (slow station identification) of the rules, 47 C.F.R. §§90.405(a)(3), 90.425(b)(2); to pay a forfeiture of \$10,000 by reason of such admitted violations; and to make a contribution to the United States Treasury in the amount of \$17,500 in aid of the Commission's enforcement efforts for PCP stations.

By the settlement, therefore, Capitol would be entirely denied the "fruits" of its alleged misconduct, i.e., the ability to provide a PCP service; and would suffer a substantial financial penalty by reason of the alleged misconduct. Further, the proposed settlement would send a clear message to the PCP industry that misconduct in operating PCP stations will not be tolerated by the Commission and will be dealt with quickly and severely -- an important deterrent to misconduct by others. Finally, the settlement would resolve the proceeding quickly, without the necessity of expending substantial, already-strained Commission resources to try the case and litigate any post-hearing appeals.

#### Argument in Support of Joint Motion

At the outset, Capitol respectfully submits that the only genuine issue raised by the proposed settlement is the basis for resolving the claims of misrepresentation and lack of candor (and, derivately, the basic qualifications issue) by consent rather than adjudicated findings and conclusions.

However, A.S.D. Answer Service, Inc., 1 FCC Rcd 753 (FCC 1986); George E. Cameron, Jr., 56 R.R.2d 825 (FCC 1984); RKO General, Inc. (WHBQ-TV), 5 FCC Rcd 638 (FCC 1990); and RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642 (FCC 1990), all involved adjudicated findings of lack of candor and misrepresentation which were nonetheless resolved by consent.<sup>4</sup>

Indeed, in those cases the relevant adjudicatory findings were actually vacated as necessary or otherwise modified to the extent necessary to facilitate the consent resolution. Here, by contrast, there are no findings of either misrepresentation or lack of candor. Capitol respectfully submits that this case thus is even more clearly appropriate for resolution by consent than the cited cases.

As outlined above, the common thread among these cases is that a consent agreement should be approved in an enforcement proceeding, notwithstanding misrepresentation and lack of candor issues, if (1) the alleged offender is deprived of the "fruits" of the alleged misconduct, and if (2) the alleged offender suffers a substantial financial or

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<sup>4</sup> Also relevant in this regard is Spanish International Communications Corporation, 2 FCC Rcd 3336 (FCC 1987), aff'd sub nom. Coalition for Pres. of Hispanic Broadcasting, 931 F.2d 73, 80 (D.C.Cir., en banc 1991). In that case the Commission permitted a licensee to renew its station licenses pursuant to a settlement agreement, notwithstanding adjudicated findings that the licensee did not have the basic qualifications to be a licensee because of foreign ownership and/or control. The Commission did so notwithstanding its own precedent that an unqualified licensee has "forfeited" its existing license and thus has nothing left to be renewed or assigned. Again, there are no such adjudicated findings in this case.

other penalty, so as to deter misconduct by others. Another obvious public interest benefit supporting consent resolution in those cases was the cessation of costly and time-consuming litigation. Since all of those principles are observed in the proposed settlement at bar, in addition to the benefit of sending a clear message to the PCP industry that misconduct will not be tolerated, Commission precedent amply supports approval of the agreement.

In this regard, Capitol is aware that hearings were held in the cited cases, and initial decisions issued, prior to settlement by consent. In Capitol's view, however, that distinction in no way derogates from the appropriateness of settlement by consent in this case. Indeed, if anything the distinction reinforces the conclusion that the proposed consent agreement in this case should be approved.

In the A.S.D. and RKO cases, extremely expensive and time consuming hearings had already been conducted prior to resolution of the cases by consent. Yet the Commission cited the avoidance of the time and expense of further litigation as a factor pointing toward approval of the consent resolution. The settlement here is even more beneficial, since substantially all of the costs of litigation would be avoided by the proposed consent agreement.

Moreover, in this case Capitol respectfully submits that incurring the cost of a hearing is not necessary to justify the settlement as being in the public interest. The

Private Radio Bureau, which knows what the claims of alleged misrepresentation and lack of candor consist of, has joined in the proposed consent agreement. With that knowledge it is thus nonetheless sufficiently satisfied from an enforcement standpoint that revocation of Capitol's remaining licenses is not warranted under the circumstances. The only other party, RAM Technologies, likewise is sufficiently satisfied so as to join in the proposed settlement.

Under these circumstances, there is no basis for concern that the failure to make findings on the misrepresentation and lack of candor issues in this case somehow compromises the Commission's public interest responsibilities under the Communications Act. This is especially so since the Commission has been willing to vacate adjudicated findings of misrepresentation and lack of candor in the cited cases in order to approve their resolution by consent.

The Commission has stressed in the cited cases that whether to revoke other licenses for misconduct is a matter within the enforcement discretion of the Commission. As to such matter there is no statutory requirement of a public interest finding under Section 309 of the Act, unlike the situation in Tulkin. Thus, properly interpreted, a consent agreement is forbidden only when the proceeding in question requires a Section 309 public interest finding, and not when the issue involves the discretionary selection of an appropriate remedy in an enforcement proceeding.

Finally, if the Presiding Judge still believes that further action is necessary, there are other appropriate alternatives to threshold rejection of the proposed agreement. For example, the Judge could require the Bureau and Capitol to submit offers of proof on the misrepresentation and lack of candor issues,<sup>5</sup> which would permit the Judge to further evaluate the appropriateness of the proposed settlement prior to ruling on it. Alternatively, a limited hearing could be held on the misrepresentation and lack of candor issues, again for the purpose of evaluating the appropriateness of the proposed settlement prior to ruling upon it. In any event, Capitol respectfully submits that neither the Commission's rules, its precedents nor the relevant public interest considerations require the Presiding Judge to throw out the proposed settlement entirely, along with its clear public interest benefits.

#### Conclusion

For the reasons stated above, the proposed settlement agreement conforms to Commission precedents for settling enforcement cases that contain allegations of misrepresentation and lack of candor. The proposed settlement agreement accordingly should be approved. Alternatively, appropriate further proceedings should be had on the proposed settlement

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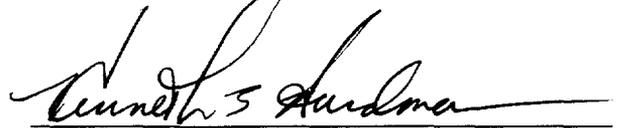
<sup>5</sup> In such case the Bureau would need to submit its offer first and Capitol would need some time to respond with its offer, since discovery has not been had and Capitol knows only what is outlined on these issues in the HDO.

prior to ruling thereon; the settlement has substantial public interest benefits and should not be simply rejected.

Respectfully submitted,

CAPITOL RADIOTELEPHONE COMPANY,  
INC. d/b/a CAPITOL PAGING

By:



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November 5, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of November, 1993, served the foregoing Memorandum in Support of Joint Motion for Approval of Consent Agreement upon the Federal Communications Commission by delivering a true copy to Administrative Law Judge Joseph Chachkin, 2000 L Street, N.W., Room 226, Washington, D.C. 20554 and to John J. Borowski, Esquire, 2025 M Street, N.W., Room 5202, Washington, D.C. 20554, and upon RAM Technologies, Inc. by mailing a true copy to Frederick M. Joyce, Esquire, Joyce & Jacobs, 2300 M Street, N.W., Suite 130, Washington, D.C. 20037.



Kenneth E. Hardman