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

FCC MAIL SECTION  
FCC 93M-722  
40333  
Nov 22 2:59 PM '93

PR DOCKET NO. 93-231  
FILED BY

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 )  
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 )  
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 )

**MEMORANDUM OPINION AND ORDER**

Issued: November 19, 1993

Released: November 22, 1993

1. Under consideration is "Joint Motion For Approval Of Consent Agreement" filed October 28, 1993 by The Chief, Private Radio Bureau, Capitol

Radiotelevision, Inc. (Capitol) and RAM Technologies, Inc. (RAM). <sup>1</sup>

2. By Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing (HDO) the Commission (1) designated for hearing the application of Capitol Radiotelephone Inc. for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia for hearing, (2) ordered Capitol to show cause why the radio station licenses set forth in the caption should not be revoked, and (3) provided Capitol with an opportunity for hearing on whether an Order of Forfeiture should be issued against Capitol. The HDO was based on allegations concerning Capitol's application for and operation of private carrier paging (PCP) station WNSX646 in the Private Land Mobile Radio Services, and Capitol's responses to Commission inquiries regarding its application for and operation of station WNSX646. In addition to the issues dealing with rule violations (issues a to g) issue h requires a finding whether Capitol and its affiliates have misrepresented facts to the Commission and/or was lacking in candor. The conclusory issues specifically require a determination, based on the findings, whether Capitol and its affiliates have the requisite basic character qualifications to continue to remain Commission licensees (issue j).

3. Now pending before the Presiding Judge is a proposed Consent Agreement which is intended to resolve all issues specified in this proceeding. Under the proposed Consent Agreement, Capitol agrees to dismiss its applications <sup>2</sup> for a PCP facility in Huntington/Charleston, West Virginia and has promised to refrain from obtaining a license for a PCP facility for any shared frequency in the states of West Virginia, Ohio and Kentucky for five years. <sup>3</sup> Also, Capitol has agreed to admit to violations of Section 90.405(a)(3) <sup>4</sup> and Section 90.425(b)(2) <sup>5</sup> and to pay a forfeiture in the amount of \$10,000. <sup>6</sup> The Consent Order further provides that except with respect to Capitol's admission of violations of Sections 90.405(a)(3) and 90.425(b)(2), no findings or conclusions would be reached upon the merits including whether Capitol and its affiliated companies misrepresented fact to the Commission and/or was lacking in candor.

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<sup>1</sup> On November 5, 1993, Capitol and the Bureau filed briefs in support of the Joint Motion.

<sup>2</sup> These applications include its original application and subsequent modifications.

<sup>3</sup> Transmitting communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken

<sup>4</sup> Identifying transmissions by Morse Code at a rate less than 20-25 words per minute.

<sup>5</sup> The Agreement specifies that Capitol is not barred from applying for and holding any other type of licenses issued by the Commission.

<sup>6</sup> The HDO calls for a possible forfeiture of \$20,000 for these violations and an amount not to exceed \$75,000 for each of the continuing rule violations set forth in subparagraph 9 of paragraph 28 of the HDO.

4. The proposed Consent Agreement contravenes the provisions of Section 1.93 of the Rules, is prohibited by Commission case precedent, and must be rejected. In adopting consent procedures, the Commission made clear that consent procedures would be available "... on issues involving violations of law, rules or policy other than issues involving his basic qualifications to be a licensee...." Amendments of Parts 0 and 1 of the Commission's Rules With Respect to Adjudicatory Re-regulation Proposals, 36 RR 2d 1203, 1208 (1976). Consistent with the Commission's intent, Section 1.93(b) specifically provides: "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license (see 47 U.S.C. 308 and 309)." This limitation on the use of consent procedures, spelled out in Section 1.93(b), has been affirmed by the Commission. Thus, in Talton Broadcasting Company, 66 FCC 2d 974 (1977), the Commission overturned the grant of a Consent Order, holding that the consent procedures could not be used since the designated issues were basic, qualifying issues requiring resolution. See also A.S.D. Answer Service, Inc., 56 RR 2d 1518, 1520 (1984). Similarly, consent procedures can not be used in this case since the designated misrepresentation/lack of candor issue, which remains unresolved, directly relates to Capitol's basic character qualifications. None of the cases cited by the parties support the grant of the proposed Consent Order. All are inapposite. Most of the cases cited do not involve the use of consent procedures. Moreover, for the most part, they involve Commission resolution of cases following adjudication of the designated issues. Further, the Consent Order cases cited involve rule violations, which Section 1.93 was intended to deal with; not basic qualification issues which require resolution in order to determine whether the licensee is fit to retain its license.

Accordingly, IT IS ORDERED, That the "Joint Motion For Approval Of Consent Agreement" IS DENIED and the Consent Agreement IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin  
Administrative Law Judge