PROCEEDING, pursuant to Section 309 of the Communications Act of 1934, as amended, upon the following issues:

(a) to determine the facts and circumstances surrounding the lack of usage of frequency 454.025 MHz by Station KCC480, including any discontinuance of service;

(b) to determine on a comparative basis, the nature and extent of service proposed by each applicant 11/ including the dates, charges, maintenance, personnel, practices, classifications, regulations, and facilities pertaining thereto;

(c) to determine on a comparative basis, the areas and populations that each applicant will serve within the prospective 39 dBu contours, based upon the standards set forth in Section 22.504(a) of the Commission's Rules, 12/ and to determine the need for the proposed services in said areas; and

(d) to determine, in light of the evidence adduced pursuant to the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

19. IT IS FURTHER ORDERED, That, with respect to issue (a), the burden of proof and the burden of proceeding with the introduction of evidence is placed on A, F & L.

20. IT IS FURTHER ORDERED, That with respect to issues (b) and (c) the burden of proof and the burden of introduction of evidence is placed on each of the applicants as the issues affect them, and that the ultimate burden of proof with respect to issue (d) is similarly placed on each of the applicants.

11/ Section 22.504(a) of the Commission's Rules and Regulations describes a field strength contour of 39 decibels above one microvolt per meter as the limits of the reliable service area for base stations engaged in two-way communications service on frequencies in the 450 MHz band. Propagation data set forth in Section 22.504(b) are the proper bases for establishing the location of service contours F(50,50) for the facilities involved in this proceeding.

12/ The comparative analyses may include past performance of the applicants.

21. IT IS FURTHER ORDERED, That the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

22. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

23. IT IS FURTHER ORDERED, That the applicants may avail themselves of an opportunity to be heard by filing with the Commission pursuant to Section 1.221(c) of the Rules within 20 days of the release date hereof, a written notice stating an intention to appear on the date for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

24. The Secretary shall cause a copy of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

CERTIFICATE OF SERVICE

I, Frederick M. Joyce, do hereby certify that on this 29th day of March, 1990, copies of the foregoing Petition to Deny, or Request to Amend Application were mailed, postage prepaid, to the following:

Ralph Haller, Chief
Private Radio Bureau
Federal Communications Comm.
2025 M Street, NW, Room 5002
Washington, D.C. 20554

Jay Kitchen, President
National Association of
Business & Educational Radio
1501 Duke Street, Suite 200
Alexandria, VA 22314

Richard J. Shiben, Chief
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Private Radio Bureau
Federal Communications Comm.
2025 M Street, N.W., Room 5202
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Terry L. Fishel, Chief
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Frederick M. Joyce

EXHIBIT CAP-03

ORIGINAL

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

In re:

Application of Capitol Radio-telephone Co., Inc. for 152.48 MHz Private Carrier Paging facilities, Huntington/Charleston, West Virginia	)	File No.:_____

To: Chief, Licensing Division
Chief, Land Mobile & Microwave Division

MOTION FOR STAY OF APPLICATION

RAM Technologies, Inc. (RAM), through its attorneys, and pursuant to Section 1.102(b)(2) of the Commission's Rules, 47 C.F.R. § 1.102(b)(2), hereby moves the Private Radio Bureau's Licensing Division and Land Mobile & Microwave Division for an order staying any action with respect to the above-referenced application, pending the Federal Communications Commission's consideration of RAM's accompanying Petition to Deny the referenced application. For reasons herein stated, RAM respectfully submits that a grant of this Motion would be in the public interest.

Statement of Interest

RAM has been authorized by the FCC since approximately May of 1989 to provide Private Carrier Paging (PCP) services on the 152.48 MHz frequency at various locations throughout the States of

Federal Communications Commission

Docket No. 93-231 Exhibit No. Cap 3

Presented by Capital

FEB 02 1994

Disposition
- Identified
- Received ✓ 2/4/94
- Rejected

Reporter A. Wilson

FEB 02 1994

Kentucky, Ohio, and West Virginia. At present, RAM provides interference-free service to over 2000 local subscribers, and 3000 Network USA nationwide subscribers. RAM has invested hundreds of thousands of dollars in constructing and operating its PCP service.

RAM's Petition to Deny presents the FCC with sworn evidence that Capitol has applied for the subject authorization with the intention of causing harmful interference to RAM's co-channel operations. Thus, should Capitol's application to operate on the 152.48 MHz frequency be granted, RAM and its customers will suffer from resultant harmful electrical interference. This economic injury of a direct, tangible, and substantial nature affords RAM standing as a party in interest in this licensing proceeding. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

Statement of Facts

Attached to RAM's Petition are a number of sworn declarations, not only from RAM employees, but from RAM's competitors, which show that Capitol has applied for the referenced PCP facilities with the intent to cause harmful interference to RAM's PCP operations. In addition, RAM's Petition presents evidence that Capitol has repeatedly made malicious misrepresentations of fact about PCP service in print, radio, and

television advertisements. This evidence strongly shows that Capitol has no intention of operating PCP facilities in good faith.

There are at least 11 other PCP frequencies and over 25 RCC frequencies available in the Huntington/Charleston area for Capitol's use. Moreover, Capitol is already authorized to operate on several PLMS frequencies. Nevertheless, Capitol has chosen to file for a frequency that already services over 2000 local and over 3000 nationwide customers. RAM's investment, and its customers' high-quality service, will face imminent threat if Capitol proceeds with its documented plans to cause harmful interference to RAM's operations.

Discussion

The public interest warrants a stay of any action on the subject application until the FCC has had an opporunity to respond to the allegations of Capitol's harmful intent. A stay would also provide an opportunity for other interested parties, including co-channel licensees, and potentially aggrieved subscribers, to present evidence concerning Capitol's intentions, and to respond to NABER's frequency recommendation concerning Capitol's application.

Ample authority exists, under Section 1.102 (b)(2) of the Commission's rules, and the familiar "four-part test" established by Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921

(D.C. Cir. 1958), to stay the Licensing Division's processing of this application pending a full and complete airing of the allegations. As was the case in Arizona Mobile Telephone Company, 66 F.C.C.2d 691 (1977), a stay order here would be "a proper means of maintaining the status quo pending final action on the petition[] ...." Id. at 695 (footnote omitted).

This request can be granted under the four-part test in that: (1) RAM is likely to prevail on the merits of its opposition to Capitol's application; (2) RAM and other interested parties will be irreparably harmed should the stay be denied; (3) no harm will result to other interested parties if the stay is granted; and (4) the public interest warrants that a stay be granted.

1. RAM is Likely to Prevail on the Merits

Sworn Declarations attached to RAM's Petition to Deny aver that Capitol intends to cause harmful co-channel interference to existing subscribers on the 152.48 MHz frequency. Moreover, the Petition explains that Capitol's course of conduct, both before and after filing its PCP application, leaves little room to doubt that the application was filed with bad intent.

For instance, Capitol has placed a number of print, radio and television advertisements that disparagingly refer to PCP service as "party line" service. While aggressively maligning PCP service on the one hand, Capitol has concurrently applied for PCP

authorization on the same "party line" frequency as its competitor, RAM. Capitol's application is even more suspect in light of the availability of numerous other PCP frequencies in the Huntington/Charleston area, and the fact that Capitol already holds several PLMS paging license authorizations.

For these reasons, the FCC is likely to determine that a grant of Capitol's request to operate on the 152.48 MHz frequency would not be in the public interest. Accordingly, RAM's petition is likely to prevail on the merits.

2. RAM Will Suffer Irreparable Harm if Capitol's Application is Granted

RAM, and its thousands of subscribers, will be harmed irreparably if Capitol is given the opportunity to cause harmful interference on the 152.48 MHz frequency. RAM provides essential paging services to doctors, lawyers, sales and trades people, among many others, throughout its Tri-State wide-area system. These subscribers receive interference-free service on demand because of careful engineering by the incumbent licensees.

The evidence suggest that the moment Capitol begins operating on the 152.48 MHz frequency, harmful interference will occur, subscribers will begin to miss important pages, and RAM will lose customers and revenues. That damage will be irreparable; it is of absolutely no consolation that the incumbent licensees may complain

to the Commission after the fact if Capitol follows-through with its documented plans to cause harmful interference.

RAM's system is carefully coordinated with all other co-channel licensees, to avoid harmful co-channel interference. RAM built its system from the ground up in technical coordination with these co-channel licensees. Now that the frequency is becoming heavily loaded with users, this coordination is at its most sensitive (attached to RAM's Petition to Deny, as Exhibit Eight, is a traffic study which shows that the 152.48 channel is loaded to over 93% of its capacity at the busy hour). RAM's Petition shows that Capitol cannot be relied on to construct and coordinate its PCP system to avoid co-channel interference. Thus, this stay should be granted until the allegations have been answered.

The risk to the doctors, lawyers, plumbers, laborers, and thousands more who use the 152.48 MHz frequency, is simply too great to be trusted to Capitol. Once the interference commences, neither Capitol nor the Commission will be able to make these parties "whole" for the harm caused. Thus, a stay should be granted pending review of RAM's Petition.

3. No Harm to Other Interested Parties

Probably the only interested party that would object to a stay in this proceeding would be Capitol. As the attached Exhibit One shows, however, Capitol is already licensed, and presumably operating, on numerous frequencies throughout West Virginia. Moreover, there are many Part 22 and Part 90 paging frequencies currently available in Capitol's service areas. Finally, it is unlikely that Capitol would be harmed by any stay of the processing of its application. Under the circumstances, a stay of the processing of that application, which is bound to protect thousands of subscribers, will cause no harm to Capitol.

4. A Stay Will be in the Public's Interest

The overriding purpose of a stay is to protect the public interest from injury or destruction while remedies are being pursued. The Evening Star Broadcasting Company et al., 68 FCC 2d 158,163 (1978). There could be no clearer comparison of the interests at stake than this: the imminent threat of service outages to thousands of professionals and laborers throughout RAM's service areas, versus the inchoate needs of an applicant that already holds FCC license authorizations. It is respectfully submitted that the balance of interests in this case clearly weighs toward protecting current subscribers. The stay will enable the FCC to marshall all the facts, and then determine whether a grant of Capitol's application would be in the public interest.

CONCLUSION

WHEREFORE, the foregoing premises considered, it is respectfully submitted that a grant of this Motion will be in the public interest, and that the Private Radio Bureau should stay its licensing decision in this matter until all interested parties are given notice and an opportunity to respond to RAM's Petition, and until such time as the FCC can determine whether a grant of Capitol's application will be in the public interest.

Respectfully submitted,
RAM TECHNOLOGIES, Inc.

By: Frederick M. Joyce
Its Counsel

JOYCE & JACOBS
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(202) 457-0100

Date: March 29, 1990

CERTIFICATE OF SERVICE

I, Frederick M. Joyce, Esq., do hereby certify that on this 29th day of March, 1990, copies of the foregoing Motion for Stay of Application were mailed, postage prepaid, to the following:

Ralph Haller, Chief
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2025 M Street, NW, Room 5002
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Jay Kitchen, President
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Mary Beth Hess, Chief
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Kenneth E. Hardman, Esq.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036

Frederick M. Joyce, Esq.

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

In re:

Application of Capitol Radio-telephone Co., Inc. for 152.48 MHz Private Carrier Paging facilities, Huntington/Charleston, West Virginia	)	File No.: 19027

To: Chief, Licensing Division
Chief, Land Mobile & Microwave Division

REPLY TO OPPOSITION TO MOTION FOR STAY OF APPLICATION

RAM Technologies, Inc. (RAM), through its attorneys, hereby replies to Capitol Radiotelephone Company's ("Capitol") "opposition" to RAM's Motion for a stay of the processing of the captioned application. Capitol has not shown why, as a matter of fact or law, RAM's Motion should be denied. Accordingly, for reasons set forth in its Motion for Stay, RAM respectfully submits that a grant of this Motion would be in the public interest.

The Commission's Inherent Authority to Stay This Application

Capitol argues that RAM's motion is without procedural standing, that is, the FCC may not stay the processing of the referenced application under Section 1.102 of the Commission's Rules. See Capitol Opposition at 2. Capitol has not, and could not, cite to a statute or rule that prohibits such motions. It is axiomatic that the Commission's power to to set-aside or stay a

decision is inherent in its power to decide. See e.g., Albertson v. FCC, 182 F. 2d 397, 399 (D.C. Cir. 1950). That authority is not derived from any particular rule, but "from the implied powers arising out of the [Communications] Act." Id. at 400.

Moreover, consistent with prior FCC practice, the Commission could consider RAM's Motion for Stay, as well as its Petition to Deny, as informal requests for Commission action under Section 1.41 of the Commission's rules. 47 C.F.R. Sec. 1.41; see Western Telecommunications, Inc., FCC mimeo 88-337, n.1 (Nov. 1, 1988). In short, RAM's request for a stay is procedurally proper.

A Stay is Warranted by the Facts

Capitol argues that RAM's Motion for Stay and Petition to Deny are unsupported by "demonstrable facts." Capitol Opposition at 6. RAM has provided the Commission with eight sworn Declarations of fact, as well as other documentation concerning Capitol's bad faith intentions. Capitol's Opposition contains no affidavits or other evidence to refute these allegations, other than the startling assertion that it intends to show that PCP service "is a potentially lower quality service than common carrier paging on exclusive frequencies." Capitol Opposition at 4 (emphasis supplied).

Capitol has yet to explain why it would want to share what it claims is a "lower quality frequency," particularly since Capitol

already operates on allegedly "superior" RCC frequencies. Moreover, RAM's Declarations have established a prima facie showing that Capitol has applied to use the subject PCP frequency for the purpose of causing harmful interference to RAM. Capitol's direct response to these allegations of fact would be far more enlightening than irrelevant polemics. In the meantime, a stay of the processing of this application, to maintain the status quo pending Commission review of the substantial allegations of harm, would be in the public interest.

CONCLUSION

WHEREFORE, the foregoing premises considered, it is respectfully submitted that Capitol's Opposition should be denied, and RAM's Motion for Stay of Application should be granted.

Respectfully submitted,
RAM TECHNOLOGIES, Inc.

By: Frederick M. Joyce
Its Counsel

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Date: April 9, 1990

CERTIFICATE OF SERVICE

I, Frederick M. Joyce, Esq., do hereby certify that on this 9th day of April, 1990, copies of the foregoing Reply to Opposition to Motion for Stay of Application were mailed, postage prepaid, to the following:

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Frederick M. Joyce, Esq.

EXHIBIT CAP-04

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

ORIGINAL

In re:

Application of Capitol Radio-telephone Co., Inc. for 152.48 MHz Private Carrier Paging facilities, Huntington/Charleston, West Virginia.	)	File No.: 19027

To: Chief, Licensing Division
Chief, Land Mobile & Microwave Division

SUPPLEMENT TO PETITION TO DENY, OR, REQUEST TO AMEND APPLICATION

RAM Technologies, Inc. ("RAM"), through its attorneys, hereby submits this Supplement to its Petition to Deny or, in the alternative, Request to Amend ("Petition") the above-referenced application of Capitol Radiotelephone Co., Inc. ("Capitol" or "Applicant"). The purpose of this Supplement is to provide the Commission with newly discovered evidence that bears upon the allegations in this proceeding, and to respond to Capitol's April 11, 1990 opposition to RAM's Petition.

I. <u>The FCC is Empowered Under the Act to Review RAM's Allegations of Fact</u>.

In an April 11, 1990 letter to the Commission, Capitol stated that RAM's Petition should be "wholly disregarded" as without procedural standing. The letter did not respond to any of RAM's allegations of fact.

Federal Communications Commission

Docket No. 93-231 Exhibit No. Cap-04

Presented by Capital 02

Disposition
- Identified
- Received ✓ 2/4/94
- Rejected

Reporter A. Wilmer

Date FEB 02 1994

The Commission's authority to consider the allegations raised in RAM's Petition derives from the Communications Act, not from any particular rule. See e.g., Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950). Moreover, consistent with previous PCP proceedings, the Commission could treat RAM's Petition as an informal complaint. Arch Capitol District, 3 FCC Rcd. 6191, 6193 n.2 (1988). Finally, consistent with FCC practice, RAM's request for revocation of Capitol's PLMS licenses may be treated as an informal request for Commission action under Section 1.41 of the Rules. See Western Telecommunications, Inc., FCC mimeo 88-337, n.1 (Nov. 1, 1988) (citations omitted). Thus, RAM's Petition is procedurally proper.

II. Capitol Has Continued to Make Misrepresentations of Fact Concerning the FCC's Rules.

Capitol has continued to make misrepresentations of fact concerning the FCC's rules, and PCP operations, since the day that RAM filed its Petition to Deny. On or about April 4, 1990, Bruce Kelleck, a RAM account executive, was notified by Capitol Paging that a customer of RAM's, Mutual Wholesalers, had cancelled its paging service agreement with RAM. Mr. Kelleck contacted the customer to determine why he had cancelled his service agreement. See Declaration of Bruce Kelleck, attached hereto as Exhibit A.

The customer explained that Capitol Paging had told him that he was using a "party line" frequency which would cause him to miss his pages due to frequent "busying out." Id.

Capitol Paging also sent the customer by telefax a copy of Section 90.475 of the Commission's rules (a copy of which was provided by the customer to Mr. Kelleck and is attached to his Declaration). Capitol's General Manager told RAM's customer that this FCC rule requires RAM to transmit for only three minutes at a time, then to cease transmitting for a three minute period, thus causing further delays to a customer's pages. Id.

Section 90.475 governs the "operation of internal transmitter control systems in specially equipped systems." This rule clearly has absolutely nothing to do with the amount of "airtime" during which a PCP system can remain active. Yet, a typical paging customer, who has little or no knowledge of the FCC's rules, apparently could be misled to believe Capitol's intentional misrepresentation of this rule. RAM respectfully requests that the Commission investigate Capitol's willful misrepresentations of the Commission's rules as soon as possible, to put an end to this sort of malicious conduct before Capitol can cause further harm to RAM's licensed operations.

III. Capitol Has Made Misrepresentations Concerning Available Airtime.

RAM recently determined that Capitol had submitted to NABER, the PCP frequency coordinator, evidence in the form of sworn

declarations, inter alia, to show that the 152.480 MHz frequency was not experiencing heavy paging "traffic" at the time that Capitol's application was under NABER's consideration. (RAM recently requested copies of all the materials from NABER's Capitol application file. NABER denied this request, stating that it would only release this information at the FCC's request. See NABER correspondence (April 5, 1990), attached hereto as Exhibit B. RAM hereby asks the Commission to request these files from NABER, since the information therein may assist the Commission in its review of these allegations.)

At or about the time that NABER was considering Capitol's application, RAM provided NABER with traffic load studies of its own (RAM Petition to Deny, Exhibit Eight). RAM's study, however, showed that the subject frequency was experiencing heavy traffic during the busy hour, so that it would not be wise to coordinate another carrier in the pertinent service areas.

NABER's decision to coordinate Capitol's application suggested that Capitol had convinced NABER of its basic premise: that there was sufficient airtime on the 152.480 frequency to accommodate another carrier without causing harmful interference to existing subscribers. Because of Capitol's advocacy of that position, RAM was understandably stunned to learn recently that Capitol had given a copy of RAM's traffic load study to one of RAM's customers. See Declaration of Bruce Kelleck, Exhibit A. Moreover, Capitol told RAM's customer that the traffic study showed the 152.48 frequency

to be full, and that this would cause pages to be delayed. Id.

Apparently, Capitol has continued to make copies of RAM's traffic study, and is distributing them to RAM's customers to suggest that they will be receiving inferior paging service on RAM's PCP system. See Declaration of Bruce Kelleck, attached hereto as Exhibit C.

Ultimately the FCC, not Capitol, will determine whether the 152.48 frequency is "too busy" or not; however, Capitol cannot make two completely different statements about the same set of facts, without misrepresenting the truth to someone. Capitol's recent statements to RAM's customer suggest that it has intentionally misrepresented facts concerning traffic levels either to NABER or to RAM's customers. Capitol's motives for misrepresenting the truth are easy to surmise: it did so in order to improperly obtain an FCC license authorization, or, to unlawfully interfere with RAM's contractual relations.

A review of NABER's Capitol application file will indicate whether Capitol provided false traffic load evidence to the frequency coordinator. In the meantime, Capitol's continued prosecution of its PCP application is demonstrative evidence that Capitol believes there will be no harmful interference on the 152.48 frequency with the addition of new subscribers. Thus, Capitol should be ordered to cease and desist from making disparaging statements about PCP service to RAM's customers.

Capitol's malicious statements concerning available airtime have harmed many more interested parties than RAM alone. Though Capitol lightly dismissed RAM's concern for its PCP customers, see Capitol Opposition to Motion for Stay at 7, there is no question that Capitol has intentionally sowed doubt and confusion about the desirability and availability of FCC licensed, high-quality PCP service.

If other RCC operators view Capitol's course of conduct with approval, then the FCC can expect to see many more RCC/PCP disputes of this sort well into the next millennium. While recognizing that the FCC's processes require time, and a full airing of both sides of the issues is necessary, it is respectfully submitted that Capitol's actions have exceeded all acceptable limits for an FCC licensee's conduct. Thus, RAM respectfully requests the Commission to investigate Capitol's apparent misrepresentations of fact concerning available airtime, and to order Capitol to cease and desist from its continuing disparagement of PCP service.

IV. Capitol's False and Misleading Statements Concerning Frequency Coordination Data.

Capitol has recently, directly implicated NABER's frequency coordination processes in its unlawful attempts to interfere with RAM's licensed operations. Attached to Bruce Kelleck's Declaration is a copy of NABER's 152.48 frequency coordination printout, which

Capitol telefaxed to RAM's paging customer. See Exhibit A. Apparently, Capitol submitted NABER's study to RAM's customer, and stated that the NABER study shows that a PCP frequency is like a "party line," and that "co-channel interference was likely to delay pages or cause them not to be received at all." Declaration of Bruce Kelleck, Exhibit A. Of course, Capitol is listed in that coordination study, and Capitol has yet to explain why it would want a PCP license if the service is as inferior as a "party line."

Capitol's malicious use of NABER's coordination study could establish a disturbing precedent. NABER has unwittingly provided Capitol with the ammunition -- its coordination study -- that Capitol has used in a blatant and deceptive attempt to cause RAM competitive harm. RAM, on the other hand, has explicitly asked NABER for information that RAM could use to refute Capitol's contentions; yet NABER has refused to provide RAM with this information. See Exhibit B. Surely, this is not what the FCC had in mind when it assigned the PCP coordination task to NABER.

The point to be drawn here is not academic: if there are systemic defects in the PCP coordination process which have lately come to light, RAM cannot afford to wait for a formal FCC rulemaking proceeding to rectify them. The FCC should be alarmed at the prospect that other RCCs may emulate Capitol's conduct, manipulate information from NABER's database, disseminate that information to unsophisticated customers, and undermine PCP service and the frequency coordination process for their own commercial