

from the Verifier can be reproduced on paper. (Id.; PRB-16; PRB-17).

48. Monitoring of the paging channels occurred in late August 1992 and in October 1992. (PRB-09; Blatt Tr. 376). The monitoring by RAM personnel determined that some digital pages transmitted on 152.48 MHz were duplicates of pages that previously had been transmitted by Capitol on its wide area RCC paging system on 152.51 MHz. (Blatt Tr. 376-77). The delay between the duplicate transmissions varied, but ranged from approximately 30 seconds to 4 or 5 minutes. (Blatt Tr. 413).

49. These pages were deemed by RAM personnel to occupy channel time unnecessarily, and thus to unnecessarily delay transmission of RAM's pages. (Bobbitt Tr. 608). However, they were held until channel time was available and did not "walk" on RAM's transmissions. (Id.). RAM accused Capitol of causing the duplicate transmissions before the Bureau but never advised Capitol of its complaint. (CAP-01 at p. 21; PRB-09; Capehart Tr. 324, 362; Stipulation Tr. 632-34).

50. On July 27, 1993 the Commission issued its agenda for the August 3, 1993 meeting which stated that it would consider adoption of a hearing designation order and order to show cause against Capitol. (CAP-01 at p. 21). The Commission then issued a press release on August 3, 1993 outlining the action it had decided to take at the request of the Private Radio Bureau; and the text of the order

itself was issued on August 31, 1993. (Id.). Capitol obtained a copy of the text of the order on September 2, 1993, and discontinued operation of its PCP station that same day on advice of counsel. (Id.).

PROPOSED CONCLUSIONS OF LAW

A. The Testimony of RAM-Affiliated Witnesses Concerning Alleged Instances of Interference by Capitol is Entitled to No Weight whatsoever Due to Obvious Bias and Bad Character on the Part of RAM.

51. At the outset, Capitol respectfully submits that the Presiding Judge properly should discount entirely the testimony offered by Witnesses Moyer, Capehart, Blatt and Bobbitt (the "RAM-affiliated" witnesses) concerning alleged instances of interference to RAM's operations on 152.48 MHz by Capitol. This is so, first, because the evidence overwhelmingly establishes that, from the very outset of Capitol's application for a PCP license, RAM embarked on a calculated course of conduct to prevent Capitol from ever getting a license in the first instance, or to drive it off the frequency if ever licensed. RAM's resulting bias in this case is thus so patent and pervasive that the testimony offered by RAM-affiliated witnesses is inherently unreliable.

52. RAM's campaign started with the allegation before NABER that 152.48 MHz was simply too busy with RAM's transmissions to license Capitol on the frequency. Each time its argument or strategy failed to produce the desired result,

RAM simply ratched its attack on Capitol up another notch and resumed its campaign. The inference is overwhelming that RAM's complaints of interference were simply additional components of RAM's campaign against Capitol, rather than a genuine product of RAM's experience with Capitol as a co-channel licensee.

53. Moreover, the evidence establishes that RAM is utterly cynical and does not hesitate to violate Commission rules in order to advance its own agenda. RAM first abused the Commission's processes with pleadings designed to prevent Capitol from obtaining a PCP license.¹⁰ Subsequently, when confronted with allegedly interfering transmissions by Capitol (which RAM personnel themselves eventually concluded were caused by some sort of malfunction of Capitol's busy monitor receiver), RAM violated Commission rules by disabling its own monitoring receiver in order to "blot out" co-channel transmissions. Additionally, Witness Moyer, the President and owner of RAM, decided to install a two-minute time-out device on its monitor which he knew was illegal at the time, but did it anyway.

54. By itself, such blatant and cynical disregard for the law evidenced by RAM throughout this proceeding should

¹⁰ The Commission has reaffirmed that such abuse of process "threatens the integrity of the Commission's licenses processes" and reflects on the "character" of the party engaging in such conduct, i.e., the "truthfulness" and "reliability" of such party. Character Qualifications, 102 F.C.C.2d 1179, 1209, 1211 (FCC 1986).

totally destroy any lingering credibility of the testimony of the RAM-affiliated witnesses on the issue of alleged misconduct by Capitol.¹¹ Combined with RAM's obvious bias as demonstrated by its calculated campaign against Capitol, the unreliability and lack of credibility of such testimony is beyond reasonable doubt.

B. RAM's Conduct so Poisoned the Atmosphere that Cooperation by Capitol as Contemplated by the Commission's Rules was Impossible as a Practical Matter.

55. With respect to the sharing of PCP channels, the Commission has expressly held that "both parties must be cooperative and flexible in arriving at a mutually satisfactory channel sharing arrangement," and that the "first licensee on the channel has no greater right than subsequent licensees with regard to satisfactory sharing of the channel." Nu-Page of Winder, 6 FCC Rcd 7565, 7566 at ¶¶6-7 (FCC 1991). (Emphasis partially in original).

56. The evidence overwhelmingly establishes that RAM violated its duty as a PCP licensee to be "cooperative and flexible" with Capitol. The evidence also overwhelmingly establishes that RAM's unrelenting hostility toward Capitol so poisoned the atmosphere that RAM made it impossible, as a

¹¹ The Commission has expressly acknowledged the relationship between violations of the Communications Act or Commission rules or policies and the character traits of truthfulness and reliability. E.g., Character Qualifications, supra, 102 F.C.C.2d at 1209 (FCC 1986). Accordingly, RAM's admissions of such violations in this case should totally destroy the credibility of its adverse testimony.

practical matter, for the channel sharing between RAM and Capitol to ever work.

57. Throughout the license application proceedings at the Commission, RAM not only opposed Capitol's application, but it also sought to impugn, without reasonable justification, Capitol's character and motives in seeking a PCP license. Having engaged in this type of excessive, ad hominem advocacy against Capitol, RAM can hardly be heard to complain that Capitol did not respond to RAM's "overtures" with unflinching cooperation and flexibility. Quite to the contrary in fact, it was entirely reasonable under the circumstances for Capitol to view with great suspicion the limited and half-hearted attempts by RAM at cooperation with Capitol; and Capitol actually cooperated with RAM far better than RAM's conduct toward Capitol warranted.

58. Indeed, the record shows really only one attempt at all by RAM at cooperation, and that was when RAM suggested tying its and Capitol's terminal together with a dedicated wireline. (CAP-13). However, that suggestion was by no means a panacea for the interference alleged by RAM, and Capitol was amply justified on technical, economic and operational grounds in declining RAM's suggestion. (CAP-23 at pp. 12-13; Peters Tr. 1226-30).

59. At all other times RAM claimed to suffer an interference problem, the record demonstrates that RAM made no effort whatsoever to be cooperative or flexible with Capi-

tol. In November 1990, RAM jumped to the conclusion that an intermodulation problem on 152.48 MHz was deliberate interference by Capitol, and immediately filed a written complaint with the Commission. RAM did so without troubling to contact Capitol to try to find out what was going on. In fact, Capitol had not even started operating its PCP system at that time and could not have been at fault.

60. When RAM allegedly experienced interference from Capitol's morse code station identification on March 4, 1991, Witness Capehart did make the gesture of calling Witness Raymond to "request" that the problem be fixed. Raymond agreed in that conversation to try to get a technician out to investigate and fix the alleged problem; and in fact the problem stopped later on that evening, notwithstanding that Raymond had been unable to dispatch the technician by that time.

61. Nonetheless, the next day RAM filed another written complaint of interference at the Commission, challenging the bona fides of Capitol's actions. RAM again did so notwithstanding that so far as RAM was aware, Capitol had fixed the problem when informed of it.

62. After March 1991, when Capitol first initiated commercial operation, RAM never even bothered to contact Capitol when RAM allegedly experienced interference problems. Instead, RAM simply continued to file complaints with the Commission attacking Capitol's actions and its bona

fides. In fact, RAM even failed to advise Capitol when RAM's personnel independently concluded that the problem RAM had been experiencing was due to a technical problem with Capitol's "inhibitor" receiver.

63. Absent RAM's continuing and unrelenting hostility toward Capitol, there is every reason to believe that Capitol would have been reasonably cooperative and flexible in attempting to establish a mutually satisfactory channel sharing arrangement. The uncontradicted evidence of record shows that Capitol exhibits just such demeanor with other competitors, even when that competitor is causing interference to Capitol and is unable to determine its cause.

(Blatt Tr. 439-444, 451; Raymond Tr. 975-76).

64. A maxim in equity holds that he who would have equity must also do equity. The Commission has suggested that a similar principle applies to PCP channel sharing when it states that "both parties must be cooperative and flexible in arriving at a mutually satisfactory channel sharing arrangement". In this case, however, RAM utterly failed to comply with its duty to be "cooperative and flexible," and the record convincingly demonstrates that its failure in this regard was the direct and proximate cause of the failure of channel sharing to occur as prescribed by the Commission's rules.

C. Capitol's PCP Operation was a Bona Fide Business Venture at all Times, with no Hidden Agenda to Interfere with RAM.

65. The bona fides of Capitol's PCP business venture are overwhelmingly established by the testimony of Witness Raymond and corroborated by the testimony of Witness Peters. (CAP-01; CAP-23). There is not a shred of evidence to the contrary. In fact, the only hidden agenda demonstrated in the record at all is RAM's intention to drive Capitol from the PCP channel no matter what it would take to do so.

66. Thus, the evidence is persuasive that RAM's complaints of interference by Capitol were actually products of a predetermined campaign by RAM to drive Capitol from its licensed PCP channel. In this campaign, any legitimate technical problems that may have occurred were simply seized upon as pretexts by RAM and used to advance its own hidden agenda, rather than to genuinely facilitate a resolution of the problem.

D. HDO Issue No. 1 -- Capitol did not Cause Harmful Interference to RAM During the Period October 1990 Through July 19, 1991, in Violation of Section 90.403(e) of the Rules or Section 333 of the Communications Act.

67. HDO Issue No. 1 inquires 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," Capitol caused harmful interference to RAM in violation of Section 90.403(e) of the rules and/or Section 333 of the Communica-

tions Act. (HDO at ¶28.a). Section 90.403(e) requires Capitol to "take reasonable precautions to avoid causing harmful interference ... includ[ing] monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing harmful interference."

68. In turn, "harmful interference" is defined for this purpose in relevant part as "any emission, radiation, or induction which specifically degrades, obstructs, or interrupts [a] service provided by [RAM's PCP] station[]." 47 C.F.R. §90.7. Additionally, Section 333 of the Communications Act prohibits any person from "willfully or maliciously interfer[ing] with or caus[ing] interference to any radio communications of any station licensed or authorized by or under this Act". 47 U.S.C. §333.

69. The evidence wholly fails to establish any violation by Capitol of Section 90.403(e) of the rules or Section 333 of the Communications Act, much less any violation during the period specified in HDO Issue No. 1. Capitol was not operating its PCP station during 1990 and could not have caused any such interference in October or November of 1990.

70. Moreover, there is no evidence of any kind of interference to RAM during October 1990, and the evidence of the "stereo effect" phenomenon during November 1990 is too general in any event to fairly establish that such phenomenon occurred on the specific dates of November 15, 1990

through November 18, 1990. More importantly, of course, the evidence also establishes that the "stereo effect" phenomenon was actually an incidence of intermodulation for which Capitol was not at fault, not an instance of interference by Capitol to RAM.

71. The only evidence proffered specifically in regard to March 4, 1991 was the testimony of Witness Capehart. To the extent his testimony is adverse to Capitol, it is entitled to no weight whatsoever for the reasons stated in Section A above. Moreover, even if the testimony is credited, it does not establish a violation of either Section 90.403(e) of the rules or Section 333 of the Communications Act.

72. The evidence is undisputed that Capitol had an air monitor or "inhibitor" in place and functioning on March 4, 1991, which is a standard industry practice for complying with the monitoring requirements prescribed by Section 90.403(e) of the rules. The alleged interference on March 4th stopped before Capitol was able to get a technician out to investigate, which tended to confirm Capitol's suspicion that the complaint was not bona fide to begin with. Thus, Capitol understandably was not able to determine that it was causing any interference to RAM when it did investigate the complaint. (See Raymond Tr. 1014-15).

73. Under these circumstances, there is no basis in the record for concluding that Capitol knowingly engaged in

one or more acts on March 4, 1991 that caused harmful interference to RAM's PCP service. Similarly, there is no basis for concluding that Capitol failed in any respect in complying with the requirement to monitor before transmitting on 152.48 MHz on that date, or to otherwise take reasonable steps to avoid causing harmful interference to RAM.

74. The only evidence relating to March 19, 1991 is the letter from Witness Capehart to Witness Raymond, Exhibit CAP-13. That exhibit does not necessarily establish the truth of the matters asserted therein, except to the extent it may constitute an admission by RAM.

75. In any event, the most it shows, under any conceivable interpretation or analysis, is that both Capitol and RAM had their "inhibitors" in place and functioning on that day, but that both paging systems nonetheless would sometimes attempt to seize the channel for transmissions simultaneously. Thus, the letter itself expressly refutes any finding that Capitol failed to monitor as required by Section 90.403(e), or that it knowingly transmitted while RAM transmissions were in progress.

76. Finally, to the extent the testimony offered by the RAM witnesses concerning July 1991 can be credited at all (see Section A above), it is also entirely too general and conclusory to support any finding of violations by Capitol during the period July 17, 1991 through July 19, 1991.

E. HDO Issue No. 2 -- Capitol did not Cause Harmful Interference to RAM During the Period August 12-15, 1991, in Violation of Section 90.403(e) of the Rules or Section 333 of the Communications Act.

77. HDO Issue No. 2 inquires as to the same substantive violations as HDO Issue No. 1, but changes the relevant time to the period during which the Commission inspectors conducted their field visit. (HDO at ¶28.b). There are two substantive matters to be considered under HDO Issue No. 2: (1) Capitol's repeated tone transmissions for testing purposes, and (2) the occasional instances where Capitol "walked" on RAM's transmissions. Both of these transmissions were testified to by Commission inspectors Walker and Bogert after monitoring 152.48 MHz during the period August 12-15, 1991.

78. Addressing them in reverse order, the instances where Capitol "walked" on RAM's transmissions do not constitute "willful" or "malicious" interference by Capitol, nor do they constitute a failure to comply with Section 90.403(e) of the rules. There is no dispute that Capitol's "inhibitor" was in place and functioning during this period of time, and that most of the time Capitol's transmissions were in fact held until channel time was available.¹² The inspectors admitted in their testimony that they were never able to determine the reason for Capitol "walking" on RAM's

¹² What they thought at the time was a defect in the inhibitor's design (PRB-03 at p. 5 & #3) was actually a mistake by the inspectors. (See CAP-21).

transmissions, nor could they identify any malfunction in Capitol's equipment. (Walker Tr. 197).

79. Witness Peters opined that the cause of these incidents likely was transient factors affecting reception in particular instances. (CAP-23 at p. 11). This is consistent with Witness Bogert's impression that he may have observed some noise in the inhibitor's receiver during the inspection. (Bogert Tr. 259-60). Witness Raymond's testimony also is uncontradicted that during their inspection, Witnesses Walker and Bogert did not advise Capitol that some of its transmissions were causing interference to RAM. (See CAP-01 at p. 23).

80. The HDO affirms that to establish grounds for a forfeiture, the evidence must show that "the licensee knew that he was doing the acts in question". (HDO at ¶11). Similarly, as shown by its express language, the gist of a violation of Section 333 of the Communications Act is a deliberate act with actual intent to cause interference to a licensee's transmissions.

81. This view is underscored by the legislative history of the section, which makes clear that the underlying purpose of the statute is to prohibit actions that are expressly designed to cause interference, such as "intentional jamming" and "deliberate transmission on top of the transmissions of authorized operators" in order to "obstruct their communications." See H.R. Rept. No. 316, 101st Cong.,

2d Sess. 8, reprinted in 1990 U.S. CODE CONG. & ADM. NEWS
1294, 1301.

82. Under these circumstances, the evidence clearly establishes that the instances of Capitol "walking" on RAM transmission during August 12-15, 1991, were not "willful" or "malicious" acts of interference, nor were they the result of any failure by Capitol to take "reasonable precautions ... includ[ing] monitoring the transmitting frequency for communications in progress". Accordingly, no violation of Section 333 of the Act or 90.403(e) of the rules occurred by reason of such transmissions.

83. The same conclusion is reached with respect to the tone transmissions by Capitol. Capitol does not understand that there is any serious dispute about the fact that the tone transmissions were bona fide test transmissions; certainly, Capitol's evidence that they were bona fide tests is not contradicted.

84. Witness Walker, who does not claim to be an expert on paging (Walker Tr. 150), opined that the testing was excessive, but did not challenge Capitol's evidence that they were good faith test transmissions. On the other hand, Witness Peters, who is an expert on paging, testified forcefully that the testing was not excessive. (Peters Tr. 1125, 1130, 1142-43, 1179-82).

85. The issue of whether or not Capitol's testing was excessive is relevant to HDO Issue No. 2 only if "excessive"

testing per se also constitutes "harmful interference" within the meaning of the definition in Section 90.7 of the rules. In turn, any excessive testing by Capitol could constitute "harmful interference" only if it can be said to "specifically degrade[or] obstruct[]" the paging service provided by RAM.

86. The evidence does not support any such finding in this case. Witness Peters testified that Capitol's test transmissions neither "degraded" nor "obstructed" RAM's service as those terms are commonly understood. (Peters Tr. 1100-03). Even assuming arguendo that Capitol's testing could be said to be "excessive" as an abstract proposition, the most that could be said is that such tests might have delayed RAM's transmissions momentarily; but there is no evidence whatsoever that they caused any measurable disruption of RAM's service.

87. Capitol respectfully submits as a general proposition that attempting to label "excessive" testing as a form of harmful interference, for purposes of Section 90.403(e) and Section 333 violations, would embark the Commission on an extremely slippery slope which it could not reasonably navigate. The gist of such "harmful interference" would be that it delayed a page from being transmitted and hence "degraded" or "obstructed" service provided by other licensees on the channel.

88. However, similar and even more extensive delays can result from many causes wholly internal to a PCP system, including the number of subscribers on a channel and the mix of paging units on a channel. (Bobbitt Tr. 521-25). Thus, it would be practicably impossible for the Commission to fairly attribute particular delays to the fact that "testing" was deemed to be "excessive," rather than, say, the fact that the affected licensee itself had an "excessive" number of voice pagers in service that resulted in even a greater delay of paging transmissions.¹³

89. It also should be observed in this regard that the concept of "excessive" testing is specifically dealt with in a separate rule section, namely Section 90.405(a)(3). Thus, there is simply no need to strain the outer limits of Section 90.403(e) of the rules or Section 333 of the Act by attempting to import notions of excessive testing into the concept of "harmful interference" otherwise proscribed by those provisions. If "excessive testing" is a violation of Commission rules, it should be dealt with as a direct viola-

¹³ Witness Raymond noted in his testimony that it was strange that RAM had so many voice pagers on its new paging service, when the trend in the industry was to avoid voice paging as much as possible in favor of more air-efficient types. (Raymond Tr. 936). Witness Peters also testified to the incentives that incumbent licensees have in a shared channel situation to use up as much channel time as they can. (Peters Tr. 1106, 1112). RAM's incentives to load up on voice pagers thus was to try to limit or prevent sharing of the channel with others.

tion of Section 90.405(a)(3) rather than indirectly as a form of "harmful interference".

90. Finally, in this regard, the evidence in this case simply does not support any finding that the tone testing by Capitol during August 12-15, 1991 "degrade[d]" or "obstruct[ed]" RAM's service so as to constitute "harmful interference" to that service. Witness Walker testified that when the inspectors monitored 152.48 MHz it was busy "75 percent of the time". (Walker Tr. 155). This necessarily included both RAM's and Capitol's transmissions, and the transmissions observed from WNLM930 as well. Thus, 25 percent of the time the channel still was not in use by anyone during the period the inspectors monitored, even with Capitol's test transmissions. Accordingly, RAM had ample opportunity to transmit its pages on a timely basis during this period.

91. This conclusion is underscored by the admissions of Witness Bobbitt. He specifically distinguished in his testimony between a situation where two minutes worth of pages were lost due to simultaneous co-channel transmissions (i.e., situations where pages are "walked" on by a co-channel user) and the situation where pages were delayed from being transmitted for two minutes due to waiting for the channel to become available. (Bobbitt Tr. 494). Bobbitt testified that the former situation would be "significant" but admitted that the wait for air time in the latter situation "is not excessive". (Id.).

92. Under these circumstances, even if it is assumed arguendo that "excessive testing" could be a form of "harmful interference" within the meaning of Section 90.403(e) of the rules or Section 333 of the Communications Act, the evidence in this case establishes that the testing engaged in by Capitol during the period August 12-15, 1991 does not come close to rising to such level. Therefore, again, no violation of those provisions by Capitol occurred by reason of its testing transmissions during the period August 12-15, 1991.

F. HDO Issue No. 3 -- Capitol did not Violate Section 90.405(a)(3) of the Rules During the Period November 15, 1990 Through July 19, 1991.

93. HDO Issue No. 3 inquires whether "from November 15, 1990 through November 18, 1990, on March 4, 1991, and/or from July 17, 1991 through July 19, 1991," Capitol transmitted "communications for testing purposes" that "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. (HDO at ¶28.c). The evidence of record wholly fails to establish that any such violations occurred.

94. In relevant part, Section 90.405(a)(3) of the rules provides:

(a) Stations licensed under this part may transmit only the following types of communication:
* * * * *

(c) 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.

95. Section 90.405(a)(3) thus establishes two independent duties which may be violated: (1) communications for testing purposes must be kept "to a minimum," and (2) in conducting such tests the licensee must "employ every measure to avoid harmful interference". The evidence does not show that Capitol violated either duty in this case, particularly with respect to the period of time covered by HDO Issue No. 3.

96. As noted above, the evidence establishes that Capitol was not even operating its PCP station in 1990 and, hence, was not testing at all. Therefore, it could not have violated Section 90.405(a)(3) during this period. Additionally, the only allegations relating to March 4, 1991 concerned morse code station identifications by Capitol, not testing transmissions. Therefore, again, Capitol could not have violated Section 90.405(a)(3) under any conceivable analysis of the evidence.

97. With respect to July 17-19, 1991, the only evidence proffered for that period of time was by RAM-affiliated witnesses who are not credible for the reasons stated in the discussion in Section A above. Additionally, their testimony is too general in any event to support a finding of a violation during the specific period July 17-19, 1991.

Therefore, HDO Issue No. 3 likewise should be resolved in Capitol's favor.

G. HDO Issue No. 4 -- Capitol did not Violate Section 90.405(a)(3) of the Rules During the Period August 12-15, 1991.

98. HDO Issue No. 4 inquires as to the same rule violation as Issue No. 3, but again changes the relevant period to the time the Commission inspectors conducted their field visit. (HDO at ¶28.d). Again, however, Capitol respectfully submits that the evidence fails to establish a violation by Capitol and, hence, that this issue similarly should be resolved in Capitol's favor.

99. It is undisputed that, with the exceptions discussed above in the Section E, Capitol's inhibitor was functioning properly during this period of time and held the test pages until channel time was available. (E.g., Walker Tr. 112; Bogert Tr. 254). There is thus no substantive issue as to whether Capitol employed every measure to avoid harmful interference within the meaning of the second duty prescribed by Section 90.405(a)(3).

100. The only matter meriting any discussion under this issue is whether Capitol kept its tests "to a minimum," i.e., whether it engaged in "excessive" testing. On this issue the probative evidence is conflicting, as noted above in the discussion in Section E. Witness Walker, who does not claim to be an expert on paging, opined that the testing

was excessive; while Witness Peters, who is an expert on paging, opined that it was not excessive.

101. If the Presiding Judge deems it necessary to resolve this conflict, the opinion of Witness Peters should be afforded greater weight due to his expertise in the paging industry. Witness Walker viewed Capitol as a "bad guy[]" before the field visit commenced and was "looking very closely for violations". (Walker Tr. 1479-80; 109). Accordingly, the inspectors were immediately "suspicious" of the transmissions by Capitol. (Walker Tr. 1479-80). This erroneous predisposition combined with his lack of claimed expertise in the nature of testing properly required in the paging industry, should tip the balance in favor of the evidence provided by Witness Peters.¹⁴

102. Additionally, the issue may be resolved in Capitol's favor even without resolving the conflict in the testimony of Witnesses Walker and Peters. The Private Radio Bureau has the burden of proof with respect HDO Issue No. 4. (HDO at ¶30). The most that can be fairly said is that the evidence on this issue is equally divided and the Bureau

¹⁴ Witness Peters did not speak to the issue of the time the automatic testing program was inadvertently left on all night by Capitol. (See, e.g., CAP-22 at p. 4). However, the uncontradicted evidence is that this incident was neither "willful" nor "repeated". Thus, imposition of a forfeiture for this incident is not warranted.

thus failed to carry its burden of proof.¹⁵ Therefore, whether the conflict in testimony is resolved or not, HDO Issue No. 4 should be resolved in favor of Capitol.

H. HDO Issue No. 5 -- Capitol did not Willfully Identify its Transmissions in Violation of Section 90.425(b)(2) of the Rules.

103. HDO Issue No. 5 inquires whether from August 12 through August 15, 1991, Capitol "willfully and/or repeatedly" caused its PCP station to identify its transmissions in morse code at a rate less than the 20-25 words per minute prescribed by Section 90.425(b)(2) of the rules. (HDO at ¶28.e). While Capitol did identify its station in morse code at a rate less than the prescribed 20-25 words per minute, it did not do so "willfully" during this period of time. Therefore, this issue likewise should be resolved in favor of Capitol.

104. Although it is undisputed that Capitol was identifying its station at the rate of approximately seven words per minute rather than the prescribed 20-25 words per minute during August 12-15, 1991, it likewise is undisputed that

¹⁵ Even if the Presiding Judge disagrees and deems the evidence proffered by Witness Walker sufficient to establish a violation of Section 405(a)(3) of the rules, only a warning to Capitol, and not a forfeiture, would be warranted. The Private Radio Bureau deemed it sufficient to only issue a warning to RAM for installing the two-minute time-out device, notwithstanding that installing such a device was a rather serious violation of the rules. (See CAP-25). Here, by contrast, the most that could be said is that Capitol made a good faith error of judgment in the amount of testing it did. Even-handed treatment of the two parties thus would suggest that no forfeiture should be imposed on Capitol.

this was due to an erroneous setting of the terminal card at the factory and a mislabeling of the settings on the card by the manufacturer. (CAP-01 at p. 19; Bogert Tr. 257, 271-73). The first time Capitol was alerted to the existence of a possible problem was during the inspection of Capitol's facilities on August 15, 1991, the last day of the period specified in HDO Issue No. 5. Therefore, there is no evidence whatsoever that Capitol "willfully" transmitted its identification too slowly on August 12, 13 and 14, 1991, as inquired by the HDO.

105. No such finding should be made with respect to August 15, 1991 as well. Even after the problem was brought up at the inspection, the evidence is unclear as to how the matter was left after Witness Bogert talked to the manufacturer. The inspectors may have felt that they made it clear that there was still a problem notwithstanding the exchange with the manufacturer, but Witness Raymond testified that he believed the inspectors had been satisfied and thus did not pursue the issue further at that time. (CAP-01 at p. 19).

106. Moreover, the inspectors occupied Raymond's time and attention the rest of the day completing their inspection of Capitol's facilities, so it is clear that Raymond had no chance the rest of that day to consider the matter further and order corrective action to be taken. Under these circumstances, again, there is no warrant for finding

that Capitol "willfully" identified its PCP station too slowly, even on August 15, 1991.

- I. HDO Issue No. 6 -- Capitol did not Transmit on 152.48 MHz from November 15-18, 1990 in Violation of Sections 90.173(b), 90.403(c) or 90.415(b) of the Rules.

107. HDO Issue No. 6 inquires whether "from November 15, 1990 through November 18, 1990" Capitol transmitted on 152.48 MHz "for purposes other than completing private carrier pages" or to transmit "common carrier paging traffic," in violation of Sections 90.173(b), 90.403(c) or 90.415(b) of the rules. (HDO at ¶28.f). No extended discussion is required in order to resolve this issue in favor of Capitol.

108. As pointed out repeatedly above, the evidence conclusively establishes that Capitol was not operating on 152.48 MHz in November 1990 for any purpose. Thus, it could not have done so in violation of the specified rules.

- J. HDO Issue No. 7 -- Capitol did not Transmit on 152.48 MHz on or After August 27, 1992 in Violation of Sections 90.173(b), 90.403(c) or 90.415(b) of the Rules.

109. Similarly to Issue No. 6, HDO Issue No. 7 inquires whether "on or about August 27, 1992 and continuing to the present" Capitol transmitted on 152.48 MHz "for purposes other than completing private carrier pages" or to transmit "common carrier paging traffic," in violation of Sections 90.173(b), 90.403(c) or 90.415(b) of the rules. (HDO at ¶28.g). Although in some respects this turned out to be the

most intriguing issue in the case, it likewise should be resolved in favor of Capitol.

110. The evidence on this issue centered around Witness Blatt's use of two Hark Verifiers to simultaneously monitor the frequencies 152.51 MHz (Capitol's wide area common carrier paging frequency) and 152.48 MHz. Monitoring is said to have occurred beginning in late August 1992 and at other times later that fall. However, the only actual data from the monitoring that was introduced into the record was for October 28, 1992. (PRB-16; PRB-17).

111. On the basis of this monitoring the RAM-affiliated witnesses claimed that Capitol was selectively retransmitting on 152.48 MHz some common carrier pages from 152.51 MHz. The HDO alleges, in turn, that such retransmissions violate various of the Commission's rules, including Sections 90.173(b), 90.403(c) and 90.415(b).

112. It is unnecessary to analyze those rule requirements in detail, because the evidence persuasively establishes that Capitol simply did no such thing. In fact, to the extent a reason for the retransmissions must be found in this case, the most plausible explanation is that RAM itself caused the retransmissions in order to "frame" Capitol with another violation, as part of RAM's continuing campaign to drive Capitol off 152.48 MHz.

113. Wholly apart from the contention that testimony of the RAM-affiliated witnesses should not be credited at all,