

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

PR Docket No. 93-231

In the Matters of

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

Nov 2 3 34 PM '94

and

Revocation of License of

DISPATCH BY

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

**Appearances**

*Kenneth E. Hardman*, on behalf of Capitol Radiotelephone Company, Inc.; *Frederick M. Joyce* and *Christine McLaughlin*, on behalf of Ram Technologies, Inc.; and *Ralph A. Haller*, *Charles E. Dziedzic*, *Y. Paulette Laden* and *Carol Fox Foelak*, on behalf of the Private Radio Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW  
JUDGE JOSEPH CHACHKIN**

Issued: October 21, 1994;

Released: October 31, 1994

**PRELIMINARY STATEMENT**

1. Capitol<sup>1</sup> is the licensee of the above captioned public mobile radio service stations and was the licensee or applicant for private carrier paging (PCP) station WNSX-646 and associated private land mobile stations WNDA-400 and

<sup>1</sup> The above-captioned corporate licenses are collectively referred to as "Capitol"

WNWW-636.<sup>2</sup> The *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, (HDO)*, 8 FCC Rcd 6300 (1993), specified 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.

(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 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/licensees 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.

<sup>2</sup> Capitol's license for PCP station WNSX-646 was granted on September 12, 1990. The grant was subsequently set aside and the application returned to pending status. Capitol's request to dismiss the application was granted by *Memorandum Opinion*

and WNWW-636 are licenses for a frequency used as a link between the PCP station's transmitter sites in Charleston and Huntington (Cap. Ex. 15, pp. 4-6; Tr. 1029-1031). The licenses cancelled automatically pursuant to Section 90.157(a) of the

(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 capitol 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 WNJN-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.<sup>3</sup>

2. The Private Radio Bureau (PRB) and Ram Technologies, Inc. (RAM) were named parties to this proceeding. The HDO placed the burden of proceeding and the burden of proof on the PRB with respect to all the issues except for the now deleted issue n.

3. The prehearing conference was held on October 29, 1993, and the hearing was held on February 1, 2, 3, 4, 7, 8 and 9, 1994. The record was closed at the conclusion of the hearing on February 9. *Order*, FCC 94M-68, released Feb. 14, 1994. Proposed findings and conclusions were filed April 8, 1994 and Replies were filed May 6, 1994.

### FINDINGS

4. Capitol is a radio common carrier providing common carrier paging and mobile radio services under various licenses issued under Part 22 of FCC rules. (CAP-01 at p. 1). These licenses authorize the provision of mobile radio service predominately in the area around Charleston, West Virginia, as well as radio paging services throughout much of the state of West Virginia and into a portion of Ohio. (*Id.*). Capitol has been an FCC licensee for 30 years, and it is also certificated and regulated by the West Virginia Public Service Commission. (*Id.*).

5. By far the biggest component of Capitol's business is its common carrier paging business, with approximately 2,900 customers and 10,000 units in service. (CAP-01 at p. 2; Raymond Tr. 831). Capitol also has provided telephone answering service in Charleston since the early 1950s; and

it also provides a variety of ancillary services such as facsimile transmissions and mail drops. (CAP-01 at p. 2; Raymond Tr. 1401).

6. Capitol's entry into the PCP business initially was the idea of J. Michael Raymond, Capitol's Vice President - Chief Operating Officer. (CAP-01 at pp. 1-2)., Capitol's motive in doing so was to supplement its existing paging services with a lower-cost paging service. (CAP-01 at p. 2).

7. Establishing a separate PCP for this purpose was preferable to the alternatives for a variety of regulatory, technical and cost reasons (CAP-01 at pp. 2-5). The frequency 152.48 MHz was chosen because it was the only VHF PCP frequency on which high-powered paging transmitters were allowed and it offered the possibility of networking. (*Id.*). Capitol's analysis and strategy decisions in this regard were typical of many other RCCs in the industry. (CAP-23 at pp. 5-8; Peters Tr. 1214).

8. According to Capitol's expert witness, Arthur K. Peters,<sup>4</sup> existing RCC operators, such as Capitol, use PCPs as a means to provide low cost paging alternatives. Typically, in starting a PCP operation, RCCs use surplus equipment or equipment which can be obtained inexpensively. Once the subscriber load has built sufficiently, new or better equipment can be deployed. PCPs enjoy an obvious regulatory advantage over RCCs. Peters pointed out that for a RCC operator in a regulated state such as West Virginia to change its rates, it may have to subject itself to a full rate hearing. On the other hand, in general, PCPs enjoy unrestricted movement with respect to prices, transmitter locations and state regulatory agencies. (CAP-25 at pp. 6-8).

9. The only major difference between PCP and RCC systems is the requirement that PCP operations share their channels with each other. An RCC operation has a guaranteed service area which is protected from interference by federal regulation. However, while a PCP operator must share a channel, there is very little federal definition concerning the method or mechanism by which a channel is shared. Channel sharing by its very nature reduces the amount of channel time available to the sharing entities and thus potentially caps income in addition to degrading service. As noted by Peters, for operators who had a large number of subscribers on a channel, it is also inevitable that they do whatever is necessary or whatever they can to protect their business interests. (CAP-25 at pp. 6-7).

10. At the time Capitol filed its PCP application, RAM was a PCP licensee on 152.48 MHz at various locations in Kentucky, Ohio and West Virginia under the call sign WNJN621, including Charleston, West Virginia and the Ashland, Kentucky/Huntington, West Virginia area. (CAP-18 at p. 3; CAP-20 at pp. 2, 12-15). RAM started its PCP business in early 1989. (Moyer Tr. 87). Its PCP business was highly successful. RAM claims to have had 5,578 paging units as of February 1990. (Tr. 870; CAP - 2 at p. 28). As reflected in its actions discussed, *below*, RAM was determined not to share the channel with Capitol or other competitors, notwithstanding it was required by law to do so.

<sup>3</sup> Issue (n) was deleted in light of the dismissal of Capitol's application. *Memorandum Opinion and Order*, FCC 93M-763, released Dec. 22, 1993.

<sup>4</sup> Peters has been engaged in the communications and broadcast industries since 1956. After serving as a consultant with

Hammett and Edison, he formed his own consulting firm in 1970 and represents numerous RCC and PCP paging clients. Peters' is a full member of the Association of Federal Communications Consulting Engineers (AFCCE) and the IEEE and is registered Professional Engineer. CAP-25 at p. 2).

11. After Capitol sent in its application to NABER<sup>5</sup> for frequency coordination in December 1989, RAM promptly protested the application, arguing that 152.48 MHz was too busy from RAM's use of the channel to permit Capitol to be licensed. (CAP-01 at p. 6; CAP-18 at pp. 3-8, 11-18).<sup>6</sup> Nonetheless, NABER coordinated Capitol's application for 152.48 MHz on March 22, 1990, and forwarded the application to the Commission for processing and grant., (CAP-01 at p. 7; CAP-18 at p. 1).

12. Immediately thereafter, RAM started filing a steady stream of protests at the FCC attempting to prevent Capitol's application from being granted. (CAP-01 at p. 7; CAP-02; CAP-03; CAP-04; CAP-05). These protests included a Petition to Deny pursuant to Section 309(d) of the Communications Act (CAP-02), and a companion Motion for Stay of Application (CAP-03), notwithstanding that Section 309(d) petitions are not even permitted to be filed against PCP applications. (CAP-06 at p. 1).

13. In these protests RAM claimed that Capitol was applying for its proposed PCP license for the purpose of "caus[ing] harmful co-channel interference" to RAM's operations. (E.g., CAP-02 at pp. 3-5). This type of allegation by RAM was not unique to Capitol; RAM made similar allegations to NABER about the intentions of another competitor, Communication Service, Inc. (CSI), about this same time, after the competitor complained to NABER that RAM's operations on 152.48 MHz were violating Commission rules. (CAP-18 at pp., 21-23).<sup>7</sup>

14. On August 9, 1990, the Bureau initially rejected RAM's various protests against Capitol as erroneous, unfounded and unsupported. (CAP-06). However, RAM was undeterred and promptly filed a petition to overturn the Bureau's decision, along with another motion seeking to stay the proceedings on Capitol's application. (CAP-07; CAP-08; CAP-09).

15. After the Bureau rejected RAM's protest, RAM recruited Carl C. Perkins, a Member of Congress from Kentucky, to lobby the Commission on RAM's behalf. (CAP-18 at p. 20). Subsequently, Congressman Perkins repeatedly intervened with the Commission on RAM's behalf. (CAP-10; CAP-01 at p. 9).

16. One of the actions Perkins requested the Commission to take was to require Capitol to move its proposed PCP operation to the frequency 157.74 MHz, which had recently been made available for high-powered PCP transmitters. (CAP-10). However, making that frequency switch was

undesirable for Capitol because it understood that Union Carbide, one of Capitol's largest common carrier paging customers, was using 157.74 MHz for an emergency service in the Charleston area. (CAP-01 at pp. 9-10).

17. Capitol understandably did not want to risk alienating Union Carbide by initiating a PCP service on that frequency. ( *Id.* ). Also, moving to 157.74 MHz was undesirable for Capitol because it would limit Capitol's eventual ability to network with other PCP systems. (CAP-01 at p. 10).

18. Notwithstanding Congressional intervention on RAM's behalf, Capitol was granted its initial PCP license for base station facilities on 152.48 MHz at Charleston, West Virginia and Huntington, West Virginia, Call Sign WNSX646, on September 12, 1990., (CAP-15 at p. 1). Thereafter, RAM filed a written complaint with the Commission in November 1990, alleging that Capitol was retransmitting pages from 152.51 MHz (Capitol's wide area RCC paging frequency) on the frequency 152.48 MHz, and that such transmissions were causing harmful interference to RAM's operations. (CAP-01 at p. 10; CAP-11 at p. 2). According to RAM, the alleged retransmissions caused an almost perfect "stereo effect" when RAM personnel simultaneously monitored the frequencies 152.51 MHz and 152.48 MHz. (Moyer Tr. 75; Capehart Tr. 284; Bobbitt Tr. 466-468).<sup>8</sup> Upon receipt of RAM's complaint, Capitol prepared and submitted a declaration by J. Michael Raymond, Vice President and Chief Operating Officer, under penalty of perjury, categorically denying RAM's allegations. (CAP-11 at pp. 2-3).

19. In fact, Capitol had not even started operating its PCP system by that time and it did not cause the alleged "retransmissions", (CAP-01 at p. 22; Raymond Tr. 813-814, 1013, 1303-1304). In this connection, in response to a PRB inquiry, Capitol had previously reported that Station WNSX-646 was placed into operation the latter part of March 1991. (PRB Ex. 11, p 1). No evidence has been offered rebutting this assertion. The "stereo effect" phenomenon which ostensibly caused RAM to complain to the Commission probably was an instance of intermodulation, of which Capitol had no knowledge and would not have discovered upon inspection after RAM's complaint. (Peters Tr. 1095-1099).<sup>9</sup>

20. RAM next filed a complaint of interference at the Commission against Capitol on March 5, 1991, claiming that Capitol's station identification on 152.48 MHz was

<sup>5</sup> NABER is the FCC recognized frequency coordinator for private carrier paging systems. (CAP-18 at p. 1).

<sup>6</sup> RAM owns an interexchange carrier providing private line circuits serving Kentucky, Ohio and West Virginia. Capitol was a customer of RAM's private line circuits. In January 1990, while Capitol's PCP's application was being coordinated at NABER, RAM terminated Capitol's use of its private line circuits. As a result of RAM's strong-armed tactic, Capitol suffered a financial hardship by having to use a long distance carrier at additional cost. (Tr. 536-538; 812-813).

<sup>7</sup> In response to allegations of interference contained in a complaint filed with PRB in March 1991, Capitol submitted a declaration from CSI President, Calvin R. Basham. Basham detailed RAM's history of causing harmful interference to CSI's operation. Basham asserted that as a result of RAM's interference, CSI lost all of its customers on 152.48 MHz. (CAP-12, p. 7). Inexplicably, the record indicates that PRB never investigated Basham's allegations before instituting the instant revocation proceeding against Capitol.

<sup>8</sup> Other than the field inspection conducted during the week of August 12, 1991 by James G. Walker and Donald W. Bogert of the Baltimore Field Office, PRB's case rests solely on the testimony of RAM's principals and employees. No evidence from a disinterested witness corroborating RAM's charges has been offered.

<sup>9</sup> Walker disagreed with Peters' opinion to a certain extent, evidently because in Walker's experience intermodulation has been accompanied with audio degradation that would be discernible at least to a trained technician. (Walker Tr. 1483-1484). Peters testified that in his experience there have been instances of intermodulation where the audio is "almost perfectly pure". (Peters Tr. 1204-1205). Walker agreed, however, that there evidently were problems with intermodulation on 152.48 MHz at other times (Walker Tr. 1484), which supports Peters' opinion that this incident likely was caused by intermodulation as well. In any event, the record does not support RAM's claim that Capitol was responsible for the alleged "retransmissions".

interfering with RAM's paging transmissions. (CAP-01 at pp. 10-11; CAP-12 at p. 3). This time A. Dale Capehart, currently RAM's Corporate Vice President (Capehart Tr. 277), had called Raymond on March 4, 1991, to complain about Capitol's station ID transmissions prior to filing the written complaint at the Commission. (CAP-12 at p. 3).

21. At that time Capitol was in the process of installing and testing its PCP system, and was getting ready to initiate commercial service. (CAP-01 at p. 11). Its system consisted of a base station transmitter at Capitol's Nease Drive site in Charleston, and at Capitol's site in Huntington. (*Id.*). Capitol's paging terminal was connected to the PCP base station at Nease Drive by dedicated telephone line, and a UHF control link located at Nease Drive was used to simulcast the Charleston and Huntington transmitters. (*Id.*).

22. A Relm transceiver was modified to function as a fixed tuned receiver monitoring 152.48 MHz and "inhibiting" Capitol's PCP transmitter from operating whenever a co-channel signal was detected by the receiver. (CAP-01 at p. 11; CAP-21). This "inhibitor" was in place and functioning in Capitol's PCP system throughout Capitol's operation, both in the initial constructing and testing stages and after commercial operation started. (CAP-01 at p. 11; Raymond Tr. 1341; CAP-21). Accordingly, Raymond believed that the purpose of Capehart's call on March 4, 1991 was to try to "set Capitol up" rather than solve a legitimate interference problem. (CAP-01 at p. 12).

23. Nonetheless, Raymond attempted to be cooperative with Capehart to resolve the alleged problem, and the upshot of their telephone conversation on March 4th was that Raymond agreed to try to get a technician out to investigate the problem that day. (CAP-12 at pp. 3-4). Raymond was unable to do so, but the alleged interference stopped later that same day anyway. (CAP-12 at p. 4; Capehart Tr. 281). That tended to confirm in Raymond's mind that Capehart's call was not a bona fide complaint about interference by Capitol. (CAP-12 at p. 4).

24. During this same period of time, Capehart admitted in telephone conversations with Raymond that RAM had completely disabled its own "inhibitor" on 152.48 MHz, so that it could blot out any "interference" from other transmitters. (CAP-01 at p. 12; CAP-12 at p. 5; Raymond Tr. 1014, 1302-1303, 1345-1346). As a result, when Capitol attempted to start its commercial PCP service on March 12, 1991, RAM repeatedly initiated paging transmissions on its system while a paging transmission by Capitol was in progress. (CAP-12 at pp. 5-6). That is, RAM would "walk" on Capitol's PCP pages. (*Id.*).<sup>10</sup>

25. Another issue of concern to Capitol at the time was that RAM would transmit on 152.48 MHz for long periods of time, sometimes up to 15 or 20 minutes in a row, before relinquishing the channel to co-channel users. (CAP-01 at pp. 14-15; CAP-12 at p. 5). Capitol had been advised by NABER that FCC rules required PCP licensees to shut down their system after three minutes to allow other li-

icensees to use the channel, and it was obvious to Capitol that RAM was not doing so. (CAP-01 at pp. 14-15). Capitol considered this another form of interference to its operations by RAM, because it prevented Capitol from transmitting its pages. (CAP-01 at pp. 14-15; CAP-12 at p. 5).<sup>11</sup>

26. On April 2, 1991, the Private Radio Bureau held a meeting at its offices in Washington, D.C. with counsel for Capitol, counsel for RAM, principals of RAM and a representative from the Office of Congressman Perkins. (HDO at ¶ 4 & n.8). At that meeting the staff bluntly told RAM and Capitol to cut out their fighting and obey the rules, or all of their licenses would be revoked by the FCC. (CAP-01 at p. 14). Raymond states that Capitol did not interpret this threat as being directed solely against it. According to Raymond, Capitol did not believe it was doing anything wrong and it was sincerely trying to comply with its obligations for sharing the channel and the rules governing PCP operations. Raymond felt that the only thing needed for RAM and Capitol to "get along" was for RAM to use its inhibitor and to shut down after 3 minutes to let Capitol transmit. Raymond states in this regard, that RAM would tie up the PCP channel for long periods of time, sometimes 15 or 20 minutes in a row, before releasing the channel and allowing Capitol to transmit. (*Id.*). RAM does not dispute that it ties up the PCP channel for long period of time. In fact, according to Raymond Bobbitt, senior Vice President of networking services for RAM, during the busiest parts of the day, RAM transmits 50 or more minutes per hour for a stretch of 4 or 5 hours (Bobbitt Tr. 493, 528-529).

27. An outgrowth of this meeting, however, was a letter from the Chief, Land Mobile and Microwave Division, to Capitol advising that RAM was not bound by the "three-minute" rule because its system was not "interconnected" within the meaning of the rules. (CAP-14, at pp. 1, 2). The Commission's data base reflected at the time, however, that RAM was fully authorized for interconnected (FB6C) operations. (CAP-20 at pp. 2, 13-15).

28. During this period of time, Raymond also called Walker at the Commission's Field Operations Bureau in Baltimore from time to time to complain about RAM transmitting on top of Capitol's pages and holding the channel for long periods of time. (CAP-01 at p. 15).<sup>12</sup> Capehart also was making similar calls on RAM's behalf complaining about interference by Capitol. (Walker Tr. 109, 150-151).

29. In late March 1991, during this sequence of complaints, RAM's employees came to the conclusion that the reason Capitol would transmit over RAM's pages was there was some sort of technical "problem in the receiver of [Capitol's] busy monitor". (CAP-20 at pp. 5, 7). RAM's conclusion in this regard evidently was never contemporaneously communicated to Capitol.<sup>13</sup>

30. Instances of interference are common in the radio business, but rarely are deliberate; and Walker did not believe the allegations of deliberate interference by either

<sup>10</sup> As noted, *supra*, CSI also complained of similar tactics by RAM, resulting in the loss of all his customers. (CAP-12 at pp. 7-8).

<sup>11</sup> CSI made similar complaints (CAP-12, pp. 7-8).

<sup>12</sup> Raymond sent Walker a copy of a videotape which Raymond claimed showed RAM's interfering transmissions, which Walker refused to look at. Raymond asserted he sent the tape to Walker and RAM in the hope of demonstrating that Capitol was

operating properly and RAM was the real problem. (CAP-01 at p. 15).

<sup>13</sup> The letter from Capehart to Walker does not show that a copy was sent to Capitol (CAP-20 at p. 6); and Capehart could not recall whether he sent a copy to Capitol. (Capehart Tr. 229-230). Raymond recalls "some conversations" with RAM personnel around March 1991 concerning interference complaints, without any indication that RAM had apprised Capitol of

Capitol or RAM. (Walker Tr. 151-152). Walker generally refused to get involved in the dispute between RAM and Capitol. (CAP-01 at p. 15).

31. In light of the staff's admonitions at the April 2 meeting and the lack of response by the staff to Capitol's concerns, Capitol eventually stopped registering its complaints, notwithstanding that RAM did not alter its conduct. (CAP-01 at pp. 14-15).

32. In addition to the interference by RAM's transmissions, Capitol also experienced continuing technical difficulty with its system which affected the reliability of its service from the beginning of its operation in March 1991 until at least July 1992. (CAP-01 at pp. 16-18; CAP-15 at pp. 2-6). This technical difficulty related to interfering transmissions on Capitol's UHF "link" frequency from sources other than RAM, and to the reliability of the transmission path for the radio link frequency between the Charleston base station and the Huntington base station. (*Id.*).

33. Because of these technical difficulties, RAM's interfering transmissions, and its continuous use of the channel for long periods of time without relinquishing it for co-channel users, Capitol experienced considerable turnover of customers that tried the PCP service and found it unsatisfactory. (CAP-01 at pp. 16-18; Raymond Tr. 1416-21; Harrison Tr. 711-712, 742-744). For these same reasons Capitol had only a small handful of customers on its PCP system in August 1991. (Raymond Tr. 1380, 1417-1418).

34. On July 19, 1991, RAM again complained orally to the Commission that Capitol was maliciously interfering with RAM's PCP system, claiming that Capitol had a "device that is patched in to its paging base station that imitates the sound of a tone page transmission". (CAP-19). RAM further claimed that this "device used by Capitol is paging station testing equipment" which "is capable of being removed in less than one minute". (*Id.*). However, Capitol was not served with a copy of any such complaint, nor was it made aware of any such complaint by RAM at the time. (CAP-01 at p. 18).

35. Capitol asserts it never had and never used such a device. (Raymond Tr., 810). No evidence has been offered by PRB showing Capitol used such a device. Nonetheless, as a result of this complaint, the Private Radio Bureau immediately requested the Field Operations Bureau to conduct an inspection of Capitol for the purpose of finding grounds to revoke Capitol's licenses. (CAP-19; Walker Tr. 1477).

36. In response to the Private Radio Bureau's request, James Walker and Donald Bogert, engineers employed at the FCC Baltimore Field Office, made a field trip to the Charleston/Huntington area to conduct monitoring of 152.48 MHz and inspections of Capitol's and RAM's PCP

stations during the period August 12-15, 1991. (Walker Tr. 114, 1477-1479). On Monday, August 12, 1991 the inspectors monitored 152.48 MHz and kept logs a "good portion of the day;" on Tuesday morning, August 13 logs were also kept, but not in the afternoon;<sup>14</sup> on Wednesday, August 14, they monitored while driving to Ashland to inspect RAM's station;<sup>15</sup> and on Thursday, August 15, they monitored in the morning before arriving in Charleston to inspect Capitol's PCP station. (Walker Tr. 133; PRB-03 at pp. 1-2).

37. When they monitored 152.48 MHz they heard predominantly digital transmissions which they identified as transmissions by RAM, and fewer tone paging transmissions which they identified as transmissions by Capitol. (Walker Tr. 112. A third transmitter on 152.48 MHz was also monitored, which the inspectors identified as WNLM930. (PRB-03 at p. 2).

38. When the inspectors monitored 152.48 MHz, the tone transmissions identified as Capitol transmissions appeared to be identical sequences of tones -- a set of two sequential tones repeated once, followed by a second and third set of sequential tones. (PRB-03 at p. 2). The inspectors also observed morse code station identifications by Capitol at the rate of approximately seven words per minute. (PRB-03 at p. 2). This speed translates into about 15 seconds of air time per identification. (Walker Tr. 183).

39. According to the inspectors, the tone sequences identified as Capitol transmissions were transmitted approximately once a minute when the channel was available, but, when it was busy, the tones were held until air time was available on the channel. (PRB-03 at p. 2; Walker Tr. 112-113, 136, 145; Bogert Tr. 254). These transmissions were legitimate test transmissions by Capitol. (CAP-22; Harrison Tr. 732-735; Raymond Tr. 1311-1322, 1418-1421). Walker Tr. 180.<sup>16</sup> Also Peters, who is an expert on paging, testified that the amount of testing by Capitol was not excessive (Peters Tr. 1125, 1130, 1142-1143, 1179-1182). The Bureau offered no expert of its own with like experience to rebut Peters' testimony.

40. During their monitoring the inspectors observed instances of RAM initiating transmissions before Capitol ceased transmitting (i.e., instances of RAM "walking" on Capitol's transmissions), as well as instances of Capitol "walking" on RAM's transmissions. (PRB-03 at p. 1). The inspectors observed that RAM "walked" on Capitol's transmissions more than vice versa (Walker Tr. 157); in fact, their logs show that such instances were caused 90 percent of the time by RAM and only 10 percent of the time by Capitol. (CAP-23 at p. 11).

41. The reason for RAM "walking" on Capitol's transmissions was discovered during inspection of RAM's PCP station; RAM had installed a device on its frequency monitor to delay RAM's paging transmissions for only a maxi-

RAM's conclusions in this regard. (CAP-01 at p. 12). The inference is compelling, therefore, that RAM in fact communicated its conclusions regarding Capitol's busy monitor only to the Commission and not to anyone at Capitol.

<sup>14</sup> In response to Capitol's interrogatories, Walker stated that monitoring on the channel was conducted from 11:40 a.m. to 4:30 p.m. on August 12 and from 10:49 a.m. to 11:45 a.m. on August 13. (Walker Tr. 153-154).

<sup>15</sup> On August 14, the field inspectors were also on unrelated assignments. (Walker Tr., 154).

<sup>16</sup> Among other things, Capitol tested the "link frequency" and for "coverage". Capitol also tested to get the "group call" and

"chaining" features to work to provide service to the Greenup County Rescue Squad located near Ashland, Kentucky on the Kentucky-West Virginia border. CAP-22; Harrison Tr. 733; Raymond Tr. 1332-1333. In this connection, the HDO stated that information before the Commission suggests that the Rescue Squad "never sought any relationship with Capitol for the provision of paging services in connection with its public safety function" (par. 17) and that Capitol made misrepresentations in stating otherwise (par. 19). However, at the hearing, the Bureau did not offer any evidence in support of the assertions in the HDO. Incredibly, the Bureau did not call anyone from the Greenup County Rescue Squad to testify on its behalf.

num of two minutes whether or not anyone else was using the channel. (PRB-03 at p. 2; Bogert Tr. 259).<sup>17</sup> The decision to install such a device was made by Robert Moyer, the owner of RAM, and he knew when he installed it that doing so was unlawful. (Capehart Tr. 357-358).

42. By contrast, the inspectors never were able to determine why Capitol occasionally "walked" on RAM's transmissions. (Walker Tr. 167, 173; Bogert Tr. 259). The explanation probably is that transient factors such as local traffic, signal fades and the like, prevented Capitol's monitor from detecting RAM's signal in particular situations. (CAP-23 at p. 11; Bogert Tr. 259-260). Walker does not believe that Capitol knowingly transmitted while RAM was already on the air. (Walker Tr. 172).

43. The inspectors inspected Capitol's facilities on Thursday, August 15, 1991. (PRB-03 at p. 3). During the inspection Bogert had a telephone discussion about the switch settings on the terminal card, relating to the speed of the morse code identification, directly with a representative of the manufacturer of the card. (CAP-01 at p. 19; Bogert Tr. 257, 271-272).

44. At the end of this conversation Bogert made a statement to Raymond to the effect that the switch settings must be the right ones. (CAP-01 at p. 19; Bogert Tr. 273; Walker Tr. 1451-1452). Raymond believed on the basis of this exchange that the inspectors had been satisfied, and did not pursue the matter further at the time. (CAP-01 at p. 19).<sup>18</sup>

45. At no time during the inspection did the inspectors communicate to Capitol that they had observed Capitol interfering with RAM. (CAP-01 at p. 20). When they left at the end of the inspection, Capitol assumed that it had passed the inspection and that it did not need to take any further action. (*Id.*).

46. In the course of the inspection, Walker inquired of William D. Stone, Capitol's president and owner, whether he had any subscribers. (Tr. 1450). According to Walker, Stone replied that Marshall University was one of his largest. (Tr. 1450). Walker does not remember how he phrased his question to Stone nor did he know whether Stone understood him to be referring by his inquiry only to PCP paging customers rather than paging customers in general (Walker Tr. 164-165).<sup>19</sup> In the course of that same inspection, Capitol employees were asked by Walker on August 15 to provide a list of the current subscribers. The list, which was given to Walker on August 15-16 is contained in Bureau Ex. 5. (Walker Tr. 174-175). The information on page 1 of PRB Ex. 5 was prepared by Harrison's secretary in the Huntington office (Harrison Tr. 726-727).<sup>20</sup> The information on pages 2 and 3 were prepared by someone at Capitol's corporate headquarters in Charleston. Walker doesn't recall who in the Charleston office he asked for the information or who furnished the data to him. (Walker Tr. 174-177; Tr. 1451). The list supplied does not include Marshall University as a PCP customers. (PRB Ex 5). Neither Harrison's secretary or the preparer of the list at the Charleston office was called as a witness.<sup>21</sup>

47. On May 19, 1992, the Bureau sent a Section 308(b) inquiry as a result of the field inspection in August 1991. (PRB-10). The inquiry requested information, *inter alia*, as to Capitol's first ten customers following the date the station was placed in operation, the names of subscribers during the August 12-15, 1991 period and current users. (*Id.* at pp. 1-2). Capitol responded to the Bureau's inquiry on June 17, 1992 (PRB-11). In responding to the staff request to reconstruct its subscriber base for different points in time, some long after the fact, Capitol personnel searched several filing cabinets for extant PCP service agreements. (Raymond Tr. 1370-1371). Capitol only supplied the names of past subscribers which they could validate with a service agreement. Capitol's search for information about past subscribers was hampered by the fact that there had been a substantial turnover of customers in the preceding months and, as a matter of policy, Capitol does not retain sales agreements after a customer cancels. (Raymond Tr. 1368-1369). No evidence has been adduced which disputes Raymond's assertion that Capitol provided the most accurate information it could furnish and that Capitol did not intend to mislead the Commission concerning its PCP customers. (Raymond Tr. 1380, 1392; CAP-1, pp. 24-27).

48. On July 30, 1992, the Bureau issued a Notice of Apparent Liability for Forfeiture (NALF) alleging "willful and repeated ... malicious[ly] interfere[nce]" by Capitol to RAM and other "egregious misconduct." (PRB-12 at pp. 1-2). The Bureau alleged that forfeitures totalling \$42,000 were warranted for malicious interference in violation of Section 333 of the Communications Act; "forfeitures totalling \$6,000 were warranted for failure to take reasonable steps to avoid harmful interference, in violation of Section 90.403(e) of the Commission's rules; and forfeitures were warranted totalling \$3,000 each for violation of Sections 90.405(a)(3) and 90.425(b)(2) of the rules (excessive testing and morse code identification slower than the prescribed rate of 20-25 words per minute, respectively). PRB-12 at p. 3). The Bureau then reduced the calculated total forfeiture from \$54,000 to \$20,000 so that the NALF could be issued under delegated authority. (*Id.*).

49. Simultaneously with the NALF issued to Capitol, the Bureau issued a warning letter to RAM that use of the two-minute time-out device on its system was improper. (CAP-25). However, no forfeiture of any kind was sought by the Bureau. (*Id.*).

50. After the NALF was issued by the Bureau, RAM personnel started monitoring the PCP channel 152.48 MHz and Capitol's wide area RCC channel 152.51 with a pair of Hark Verifiers. (Blatt Tr. 373-376). The Hark Verifier is an electronic device with a radio receiver that can be tuned to a particular paging frequency, and a decoder that deciphers information contained in a paging signal. (Blatt Tr. 373-374). When connected to a printer, the decoded output from the Verifier can be reproduced on paper. (*Id.*; PRB-16; PRB-17).

<sup>17</sup> This device will sometimes hereinafter be referred to as a "two-minute time-out" device.

<sup>18</sup> The inspectors dispute that Raymond should have been left with that impression, despite Bogert's statement about the factory settings. It is not necessary to resolve this conflict in the testimony, however, because the inspectors corroborate Raymond's testimony that the reason for the slow speed was Capitol's good faith reliance on the correctness of the factory

settings for the dip switches (CAP-01 at p. 24), and not some plot to interfere with RAM by deliberately slowing down the identification transmissions.

<sup>19</sup> Stone did not testify in the proceeding.

<sup>20</sup> Harrison first saw the list at the hearing (Harrison Tr. 727).

<sup>21</sup> The Bureau made no effort to ascertain the persons responsible for the list. (Tr. 1384).

51. Monitoring of the paging channels is said to have occurred in late August 1992 and in October 1992. (PRB-09; Blatt Tr. 376). However, the only actual data from the monitoring that was introduced into the record was for October 28, 1992 (PRB-16; PRB-17). 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. 376-377). The delay between the duplicate transmissions varied, but ranged from approximately 30 seconds to 4 or 5 minutes. (Blatt Tr. 413).

52. 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. 632-634).

53. Capitol has denied causing the duplicate transmissions. (Raymond Tr. 814-815). Peters, an expert on paging and intimately familiar with Capitol's operation as its long standing consultant, is also of the view that Capitol was not responsible. (Peters T. 1252-1254). Peters points out that RAM never verified that Capitol's transmitter was the source of the "dummy" pages on 152.48 MHz. (Peters T. 1096, 1116-1117, 1253-1254).<sup>22</sup>

54. 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.*).

### CONCLUSIONS

55. The HDO requires a determination whether Capitol willfully violated the Commission's Rules and whether Capitol misrepresented facts and lacked candor in its dealings with the Commission. PRB has the burden of proceeding and proof on all the designated issues. PRB has failed to satisfy its burden. The evidentiary record convincingly establishes that Capitol has not "willfully" or "repeatedly" violated the Commission's Rules, that it has not intentionally deceived the Commission, and that it has been candid and forthcoming in its dealing with the Commission. It is therefore concluded that there is no justification for revoking any of Capitol's licenses or for imposing a forfeiture.

### PRB Failed To Show A Credible Motive For Capitol's Alleged Scheme

56. Capitol, an FCC licensee for thirty years with an unblemished record, sought entry into the PCP business. Capitol's motive in establishing a "budget" paying service was to be able to offer service to customers that otherwise would not subscribe to Capitol's RCC service -- either because they could not afford or would not choose to pay the price. When Capitol decided to enter the PCP business, it was charging approximately \$30.00 per month per unit for its RCC transmission service and equipment, while RAM was charging somewhere on the order of \$6.00 per month for its PCP business. (E.g., Raymond Tr. 871). PRB advances the theory that Capitol engaged in its PCP business merely to cause interference to RAM. PRB asserts that RAM and Capitol "compet[e] for the same group of customers," and that Capitol's motive for the alleged scheme to interfere "was to disrupt RAM's business in the hopes of attracting customers to the competing RCC service." (PRB Findings at §§1-2).

57. The Bureau's conclusion, premised solely on speculation, is flatly belied by the evidence in this case. While it is true that RAM and Capitol were both competitors in the general sense, it is not true that Capitol's RCC service and RAM's PCP service effectively competed "for the same group of customers", as speculated by the Bureau. In fact, the different pricing strategies adopted by RAM and Capitol resulted in somewhat different niches of the paging market. Thus, it would have been entirely pointless for Capitol to have engaged in such a scheme as alleged by PRB. *Assuming arguendo* that Capitol's actions would have had the effect of driving any of RAM's customers off its system, the fact remains that any such customers would not have then become customers of Capitol's RCC system due to its price.

58. PRB's theory does not make any sense for other reasons as well. Capitol has been in the paging business and an FCC licensee for 30 years. Surely, competition is not new to it. Why should RAM's appearance on the scene suddenly cause Capitol to assume such a new and bizarrely different character? Moreover, the alleged scheme occurred in the midst of unprecedented growth and success of Capitol's RCC paging business, by far the biggest part of its business. Why would Capitol jeopardize its successful business by attempting to cause interference to a company that was not in fact causing Capitol any measurable competitive harm? PRB offers no explanation.

59. Finally, even *assuming arguendo* that Capitol would have sought to engage in such a scheme as PRB alleges, it is totally implausible that Capitol would have engaged in the particular conduct in this case. As Bobbitt, one of RAM's employees admitted, interference that is actually harmful or destructive in paging is the simultaneous transmission (i.e., "walking" on another licensee's transmissions); minor delays in transmissions are not significant. Yet, in this case the most serious allegations against Capitol center around transmissions that occurred during *otherwise unoccupied* channel time. Significantly, when RAM or oth-

<sup>22</sup> Raymond and Peters have expounded possible causes for the retransmissions. According to Raymond, a saboteur would have been able to cause the retransmissions without Capitol's knowledge, by tapping into its system with a computer terminal via a dial-up phone line which Capitol maintained for other purposes. (Raymond Tr. 814-818; 989-1010). Peters is of the view,

however, that the evidence submitted by the RAM-affiliated witnesses points to another transmitter entirely, a "pirate" transmitter that was connected to a Hark Verifier and a personal computer programmed with relatively simple instructions (Peters T. 1091, 1115-1119).

er licensees were transmitting, the alleged "interference" by Capitol was held until channel time became available. In this connection, PRB has failed to cite a single case where transmissions during unoccupied channel time have been held to constitute "harmful interference." PRB's reliance on *Henry C. Armstrong, III*, 92 FCC 2d 485 (Rev. Bd. 1983) and *Gary W. Kerr*, 91 FCC 2d 107 (Rev., Bd 1982) is misplaced on their facts. These cases hold, contrary to PRB's assertions, that findings of harmful interference for purposes of FCC rule violations have been confined historically to instances of intentional and repeated "jamming" or "walking" on transmissions of other licensees. That is not the situation in this case.

60. In short, PRB has failed to suggest a credible motive for the scheme it alleges, much less demonstrate such motive by evidence. On the other hand, RAM's motives for attempting to run Capitol and other competitors off the PCP channel are self evident. RAM has a very successful PCP business and it is determined not to share the channel with other competitors, notwithstanding that it is required by law to do so. As noted by Peters, operators with a large number of subscribers will do whatever they can to protect their business interests.

61. Consistent with its anti competitive objectives, 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 campaign started with the allegation before NABER that 152.48 MHz was too busy with RAM's transmissions to license Capitol on the frequency. At the same time, RAM employed the coercive tactic of terminating Capitol's use of its private license circuits to Capitol's financial detriment. When this strategy failed to produce the desired result, RAM launched a paper war at the Commission accusing Capitol of applying for its proposed PCP license for the purpose of causing harmful interference to RAM's operations. This type of allegation by RAM was not unique to Capitol. RAM made similar allegations to NABER about the intentions of another competitor. CSI, when CSI complained to NABER that RAM's operations on 152.48 MHz were violating Commission rules.<sup>23</sup> Even after PRB rejected RAM's various protests as erroneous, unfounded and unsupported, RAM did not cease its efforts to drive out its potential competition so that it could continue to monopolize the "shared" channel.

62. After PRB rejected RAM's protest, RAM enlisted the aid of a Congressman who repeatedly intervened with the Commission on RAM's behalf. Notwithstanding such intervention, Capitol received its PCP license. Undaunted, RAM proceeded to bombard the Commission with complaints that Capitol was causing interference to its operation which ultimately proved successful in removing Capitol from the channel. Capitol, in defense, complained to PRB that RAM was "walking" on Capitol's pages and that RAM was transmitting for long periods of time before relinquishing the channel, which RAM has not denied. Notwithstanding that RAM's charges were uncorroborated. PRB has accepted RAM's versions of the facts without question. On the other hand, Capitol's complaints about RAM's conduct, which are corroborated by CSI (see CAP-12, p. 7), have consistently received a deaf ear. In this connection, the marching

order to the field inspectors recites: "If you can establish malicious interference, he [Dick Shibben] wishes to follow up with revocation of all Capitol's licenses and/or the imposition of a substantial forfeiture." (CAP-19). No mention is made of Capitol's complaints about RAM's action, which is indicative of the uneven treatment accorded to RAM's and Caitol's complaints.

#### Record Reflects RAM's Unwillingness To Cooperate With Capitol In Sharing Channel

63. With respect to the sharing of PCP channels, the Commission has made clear that "licensees must cooperate in their use", 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 at 7566 (1991). The record reflects on the basis of Capitol's dealings with other competitors and the statements of Raymond that Capitol would have been reasonably cooperative in attempting to establish a channel sharing arrangement. (See Blatt Tr., 439-444, 451; Raymond Tr. 975-976). The uncontradicted evidence of record evinces no such inclination on the part of RAM. Contrary to the holding in *Nu-Page*, RAM's actions establish that it was not interested in cooperating with Capitol in the use of the channel. Rather, it was determined not to share the channel with Capitol notwithstanding that it was required by law to do so. As pointed out by Peters, channel sharing reduces the amount of channel-time available to the sharing entities. In light of RAM's large number of subscribers, it is clearly in RAM's economic interest to have the channel all to itself, rather than to share the channel with a competitor such as Capitol.

64. The record shows only one attempt by RAM at cooperation, and that was when RAM suggested tying its and Capitol's terminal together with a dedicated wireline. (CAP-13). 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. 1226-1230).

65. At all other times when RAM claimed to suffer an interference problem, the record demonstrates that RAM chose to complain to PRB, rather than cooperate with Capitol to resolve their differences. The evidence is persuasive that RAM's complaints of interference were actually products of a predetermined campaign to drive Capitol from its licensed PCP channel. Thus, in November 1990, RAM concluded 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 contacting 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. In March 1991, Capehart, RAM's Corporate Vice President, contacted Capitol to complain of alleged interference from Capitol's morse code station identification. Raymond agreed to get a technician out to investigate and fix the alleged problem; and in fact the problem

<sup>23</sup> RAM claims that Capitol is the only party with which RAM has ever had any trouble sharing the channel (RAM Findings at § 92). RAM has conveniently forgotten about CSI's complaints,

ignored by PRB, that RAM was operating in violation of the Rules.

stopped later that evening even though Raymond had been unable to dispatch the technician by that time. Nonetheless, the next day RAM filed another complaint of written interference at the Commission, challenging the *bona fides* of Capitol's actions. Further, after March 1991, when Capitol first initiated commercial operation, RAM never bothered to contact Capitol when RAM allegedly experienced interference problems. Instead, RAM 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.

**PRB Failed To Establish That Capitol Violated The Rules Or Misrepresented Facts And/Or Lacked Candor**

66. Turning to the designated issues in this case, apart from the field investigation in August 1991, PRB's case rests entirely on the testimony offered by Moyers, Capehart, Blatt and Bobbitt, all RAM principals and employees. Their testimony, which is not corroborated by a single non-RAM affiliated witness, is entitled to no weight. As discussed, *supra*, 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 getting a license in the first instance, or to drive it off the frequency if ever licensed. All of the above named RAM affiliated witnesses played a role in this anti-competitive campaign. The campaign to keep Capitol off the channel did not end at the pre-hearing stage. The Presiding Judge had an opportunity to observe the testimony of these RAM affiliated witnesses and finds their testimony evasive, not forthcoming and prone to exaggeration, if not outright fabrication, concerning alleged interference caused by Capitol to RAM. RAM's obvious bias renders their testimony inherently unreliable and lacking of credibility.

67. HDO Issue (a) 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 Communications 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 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 Capehart, whose testimony is entitled to no weight. 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 raises a strong suspicion whether the complaint was *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.

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 Capehart to 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 findings that Capitol failed to monitor as required by Section 90.403(e), or that it willfully transmitted while RAM transmissions were in progress.

76. Finally, even assuming the testimony offered by the RAM witnesses concerning July 1991 were credited, 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.

77. HDO Issue (b) inquires as to the same substantive violations as HDO Issue a, 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 b: (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.<sup>24</sup> The inspectors admitted in their testimony that they were never able to determine the reason for Capitol "walking" on RAM's transmissions, nor could they identify any malfunction in Capitol's equipment. (Walker Tr. 197).

79. Peters, a paging expert, 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 Bogert's impression that he may have observed some noise in the inhibitor's receiver during the inspection. (Bogert Tr. 259-260). Raymond's testimony also is uncontradicted that during their inspection, 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".<sup>25</sup> Accordingly, no violation of Section 333 of the Act or 90.403(e) of the rules occurred by reason of such transmissions. The same conclusion is reached with respect to the tone transmissions by Capitol. The uncontradicted evidence establishes that the tone transmissions were bona fide test transmissions.

83. 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, Peters, who *is* an expert on paging, is of the view that the testing was *not* excessive. (Peters Tr. 1125, 1130, 1142-1143, 1179-1182). In the absence of rebuttal evidence challenging Peters' opinion, Peters viewpoint is accepted.

84. The issue of whether or not Capitol's testing was excessive is relevant to HDO Issue (b) 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 b RAM.

85. The evidence does not support any such findings in this case. Peters testified that Capitol's test transmissions neither "degraded" nor "obstructed" RAM's service as those terms are commonly understood. (Peters Tr. 1100-1103). 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.

86. PRB's assertion that "excessive" testing is a form of harmful interference, for purposes of Rule 90.403(e) and Section 333 of the Communications Act, violations even where such testing occurred during unoccupied channel time is wholly without support. As discussed, *supra*, *Armstrong* and *Kerr*, cited by PRB, hold that findings of harmful interference have been confined historically to instances of intentional and repeated "jamming" or "walking" on transmissions of other licensees. PRB has not cited a single case supporting its theory, which is rejected.

87. Further, as pointed out by Capitol in its findings, 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. 521-525). 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.<sup>26</sup>

88. Moreover, 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"

<sup>24</sup> 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).

<sup>25</sup> As reflected in the findings (par. 40) RAM "walked" on Capitol's transmissions (90% of the time); Capitol on RAM's transmissions (10% of the time). Also, unlike in the case of Capitol, RAM's "walking" on Capitol's transmissions was clearly deliberate since RAM employed a "two-minute time-out" device. See Finding 41. Notwithstanding, no sanction of any kind has been imposed on RAM.

<sup>26</sup> 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). 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.

is a violation of Commission rules, it should be dealt with as a direct violation of Section 90.405(a)(3) rather than indirectly as a form of "harmful interference".

89. Finally, in this regard, the evidence in this case 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. 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 WNL930 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.

90. This conclusion is underscored by the admissions of Bobbitt, a RAM affiliated witness. 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.*)

91. 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 rule 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.

92. Issue (c) 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.

93. 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: \* \* \* \* \*

(b) 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.

94. 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 (c). In this regard, PRB has conceded that "[N]o evidence was adduced concerning issue (c), which must be resolved in Capitol's favor." (PRB Findings, page 56).

95. HDO Issue (d) inquires as to the same rule violation as Issue (c), but again changes the relevant period to the time the Commission inspectors conducted their field visit. (HDO at ¶28.d). Again, the evidence fails to establish a violation by Capitol and, hence, this issue similarly must be resolved in Capitol's favor.

96. It is undisputed that, with the exceptions discussed above in paragraphs 78-79, 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).

97. 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 paragraph 83. Walker, who does not claim to be an expert on paging, opined that the testing was excessive; while Peters, who *is* an expert on paging, opined that it was *not* excessive. The opinion of Peters warrants greater weight due to his expertise in the paging industry. In this connection, as noted, *supra*, PRB did not call an expert to rebut Peters.<sup>27</sup> Additionally, the issue must be resolved in Capitol's favor even without resolving the conflict in the testimony of Walker and Peters. The Private Radio Bureau has the burden of proof with respect to HDO Issue (d) (HDO at ¶30). The most that can be fairly said is that the evidence on this issue is equally divided and the Bureau thus failed to carry its burden of proof.<sup>28 29</sup> Therefore, whether the conflict in testimony is resolved or not, HDO Issue (d) must be resolved in favor of Capitol.

<sup>27</sup> 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". In this connection, there is no factual basis for PRB's claim that the tone transmissions occurred "around the clock without being turned off" while the inspectors were in Charleston. (See PRB Conclusions, p. 36). Thus, imposition of a forfeiture for this incident is not warranted.

<sup>28</sup> Even if the evidence proffered by Walker is 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 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 requires that no forfeiture should be imposed on Capitol.

<sup>29</sup> PRB argues in its Reply that even if RAM's witnesses are disregarded entirely, "the interference observed by FCC engineers warrants the revocation of all Capitol's licenses and imposition of a forfeiture..." (par. 7). The Bureau's position can not be reconciled with the light sanction imposed in *Texidor Security Equipment, Inc.*, 4 FCC Rcd 8694 (1989) involving far

98. HDO Issue (e) 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, PRB failed to prove it did so "willfully" during this period of time. Therefore, this issue likewise will be resolved in favor of Capitol.

99. 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 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, 271-273). 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 e. 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.

100. No such finding may 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 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 Raymond believed the inspectors had been satisfied and thus did not pursue the issue further at that time. (CAP-01 at p. 19). It is not necessary to resolve this conflict because the inspectors corroborate Raymond's testimony that the reason for the slow speed was Capitol's good faith reliance on the correctness of the factory settings for the dip switches and not some plot to interfere with RAM by deliberately slowing down the identification transmissions. Under these circumstances, again, there is no warrant for finding that Capitol "willfully" identified its PCP station too slowly, even on August 15, 1991.<sup>30</sup>

101. HDO Issue (f) 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. 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.

102. Similarly to Issue (f), HDO Issue (g) 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). This issue is also resolved in favor of Capitol.

103. The evidence on this issue centered around 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).

104. 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).

105. It is unnecessary to analyze those rule requirements in detail, because the evidence persuasively establishes that Capitol did not engage in the conduct charged. Capitol has denied causing the duplication transmissions (Raymond Tr. 814-815). The Presiding Judge finds such testimony credible. In fact, having had an opportunity to observe Capitol's witnesses including Raymond, the Presiding Judge finds their testimony overall to be forthcoming and entirely believable. Peters is also of the view that Capitol was not responsible.

106. Wholly apart from the fact that testimony of the RAM-affiliated witnesses will not be credited, a fatal flaw in RAM's investigatory methodology is that they never competently identified a Capitol transmitter as the source of the "dummy" pages on 152.48 MHz. (Peters Tr. 1096, 1116-1117, 1253-1254).

107. It is also entirely implausible that Capitol would have engaged in the conduct alleged by the RAM-affiliated witnesses. By the time this type of retransmission started, Capitol had just been hit with a \$20,000 NALF alleging "egregious misconduct" for "malicious[] interfere[n]ce" to RAM. (PRB-12). Capitol has been an FCC licensee for 30 years; it has "a very healthy respect for the FCC, if not an outright fear;" and it knew it was being closely watched by RAM. (CAP-01 at pp. 1-2; Peters Tr. 1116; Raymond Tr. 1019-20).

108. Furthermore, the nature of the transmissions themselves belie any inference that Capitol was at their root. They did not occur while RAM was transmitting, i.e., they did not "walk" on RAM's pages. Instead, they were held until air time was available. Moreover, to the extent PRB-16 is fairly representative of the character of the transmissions, they were all digital pages and never had more than half a dozen or so pages batched together in the same transmission. Thus, the "dummy" transmissions were never more than a few seconds long before relinquishing the channel -- a period of time that Bobbitt admitted would not have a significant adverse impact on RAM's service.

more serious violations. In *Texidor*, a licensee operating in the Business Radio Service on a secondary non-interference basis caused harmful interference to co-channel users in violation of Sections 90.403(e)(f) and (g). In addition, he did not reply to the Notice of Violation issued by the EIC and ignored repeated calls made by field personnel after the issuance of the Notice. Notwithstanding *Texidor's* willful violation of the Rules, *Texidor*

was issued a forfeiture in the amount of \$1,000. Here, in addition to revocation of all of Capitol's licenses, PRB seeks a forfeiture of \$95,000.

<sup>30</sup> The issue speaks to violations on particular dates. Any alleged violations on dates other than those specified in the *HDO* are, therefore, irrelevant.

109. Even assuming arguendo that Capitol desired to disrupt the operations of its competitor RAM (which it did *not*), it is absolutely impossible to believe that it would have elected to do so by engaging in this type of retransmission. The retransmissions were so subtle and so limited that they were totally ineffective as any form of competitive disruption to RAM. Accordingly, it is simply impossible to believe that Capitol could have been the cause of them. For all of these reasons, HDO issue (g) is resolved in favor of Capitol.

110. The final substantive issue is the HDO inquiry as to whether, in its dealings with the Commission, Capitol misrepresented facts to the Commission or was lacking in candor. Again, the evidence overwhelming requires resolution of this issue in favor of Capitol.<sup>31</sup>

111. Insofar as misrepresentation are concerned, the HDO identifies two matters in which misrepresentations allegedly may have occurred: (1) representations about the existence and number of Capitol's PCP paging subscribers, and (2) representations about the Greenup County Rescue Squad. With respect to the Greenup County Rescue Squad, Capitol's testimony affirming the existence and nature of that relationship is uncontradicted. (CAP-01 at pp. 27-28; CAP-22). As noted, *supra*, PRB called no witnesses to rebut Capitol's testimony.

112. With respect to Capitol's PCP paging subscribers, the most that the evidence shows is that there may have been some minor inconsistency in the precise identification of Capitol's PCP subscribers at the various times and places in responding to the Commission's different questions. (CAP-01 at pp. 24-27). If so, the record reflects they were simply honest mistakes resulting from the difficulty in determining precise answers from Capitol's records. (*Id.*). In fact, the thrust of Capitol's response in each case was that its PCP station was attempting to serve subscribers, but that it had no more than a relative handful at the times inquired about by the Commission, due to the various difficulties it had been experiencing. Such response was truthful and could not have misled the Commission in any respect.<sup>32</sup> Accordingly, in the absence of evidence of intentional deception, there is no basis for finding any misrepresentation by Capitol in this proceeding.

113. There is similarly no basis for finding lack of candor. Again, the Bureau did not introduce any evidence of lack of candor in this case, and ¶20 of the HDO is the only source for including the issue in the proceeding. As discussed above, the evidence is overwhelming that Capitol's PCP operations were bona fide at all times, including the times it was engaged in testing, and that the representations Capitol made to the Commission in re-

sponse to RAM's complaints were entirely truthful and accurate. Therefore, there is no basis for finding lack of candor by Capitol with respect to any of these matters.

114. The allegations in the HDO relating to Capitol's "inhibitor" in fact turn out to have been the result of investigatory error by the Commission's inspectors. Similarly mistaken are the allegations in the HDO concerning Capitol's computerized record capability. It appears that PRB erroneously concluded that Exhibit PRB-05, pp. 2-3, was the product of a routine report generated by Capitol's business computer. In fact, the record establishes that it was manually compiled and produced on a word processor or typewriter. (Raymond Tr. 983). Again, this very serious allegation of misconduct, like the others in this case, turns out to have no basis in fact.

115. In sum, the evidence adduced at the hearing conclusively establishes that Capitol's application for and operation of its PCP station was in all respects a *bona fide* business venture. Capitol has not "willfully" or "repeatedly" violated the Commission's rules governing PCP operations and has at all time dealt honestly and forthrightly with the Commission. It is therefore concluded that there is no justification for revoking any of Capitol's licenses or for imposing a forfeiture.<sup>33</sup>

Accordingly, IT IS ORDERED, that the "Order To Show Cause" and "Order Of Forfeiture" ARE VACATED and this proceeding IS TERMINATED.<sup>34</sup>

#### FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin  
Administrative Law Judge

<sup>31</sup> HDO Issues (i) through (m) are derivative issues which depend upon the resolution of the preceding issues. Since all of the preceding issues are resolved in Capitol's favor, as shown above, there is no need to separately discuss Issues (i) through (m) herein.

<sup>32</sup> The Commission has repeatedly affirmed that the core of misrepresentation and lack of candor is "deceit". E.g., *Character Qualifications, supra*, 102 FCC 2d at 1196. Whether Capitol had two or five customers at any given time, or whether a customer were REMC or Pioneer Home Improvement, is wholly irrelevant to the issues in this case and could not possibly have had any adverse impact on the Commission's exercise of its statutory responsibilities. There is thus no reason to equate a mis-

take in compiling Capitol's customer lists with a "misrepresentation" to the Commission.

<sup>33</sup> While the evidence clears Capitol of charges of misconduct the same cannot be said of RAM. The record reflects that RAM has been guilty of "egregious" misconduct in pursuing its anti-competitive objective. RAM's PCP license was not set for hearing and is, therefore, outside the jurisdiction of the Presiding Judge.

<sup>34</sup> In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).