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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

AUG 20 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re the matters of )  
 )  
CAPITOL RADIOTELEPHONE INC. ) PR Docket No. 93-231  
d/b/a Capitol Paging )

To: Honorable Joseph Chachkin  
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION  
TO CAPITOL RADIOTELEPHONE, INC.'S FIRST APPLICATION FOR  
REIMBURSEMENT UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Daniel B. Phythyon  
Acting Chief,  
Wireless Telecommunications Bureau

Gary P. Schonman  
Chief, Compliance and Litigation Branch  
Wireless Telecommunications Bureau

Susan A. Aaron  
John J. Schauble  
Attorneys  
Wireless Telecommunications Bureau

Federal Communications Commission  
2025 M Street, N.W., Suite 8308  
Washington, D.C. 20554  
(202) 418-0569

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## SUMMARY

On February 28, 1997, Capitol Radiotelephone, Inc., d/b/a Capitol Paging, ("Capitol"), filed an application for reimbursement of attorney's and expert witness' fees and costs under the Equal Access to Justice Act, 5 U.S.C. § 504, and Sections 1.1501, *et seq.*, of the Commission's Rules, 47 C.F.R. §§ 1.1501, *et. seq.* (1995) ("EAJA"). The Wireless Telecommunications Bureau ("Bureau") opposes Capitol's application on four grounds. First, Capitol's application for fees should be denied because Capitol did not prevail on two issues in this proceeding. Under both statutory and regulatory authority, an applicant must be designated the "prevailing party" to collect fees and costs under the EAJA. Here, the Private Radio Bureau successfully established that Capitol had violated two of the Commission's rules and obtained a \$2,000 forfeiture against Capitol. Under these facts, Capitol may not recover fees and expenses for defending those issues. Second, the Commission was "substantially justified" in designating the proceeding for hearing and in its positions taken in the adjudication. Under the plain language of the Act and the Commission's Rules, where the agency action is "substantially justified," no fees may be awarded under the EAJA. Third, Capitol attempts to rely on findings in the Initial Decision which had specifically been stricken on appeal. Such reliance is improper and should be rejected. Fourth, even assuming arguendo that fees may be awarded in this instance, the requested amount of \$49,636.28 includes charges which are not recoverable under the EAJA and should therefore be reduced in the amount of \$16,406.16 for the reasons stated below.

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1. On February 28, 1997, Capitol Radiotelephone, Inc., d/b/a Capitol Paging, ("Capitol"), filed an application for reimbursement of attorney's fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. § 504, and Sections 1.1501, *et seq.*, of the Commission's Rules, 47 C.F.R. §§ 1.1501, *et seq.* (1995) ("EAJA").<sup>1</sup> The Acting Chief, Wireless Telecommunications Bureau<sup>2</sup> ("Bureau"), by his attorneys, now opposes Capitol's application.

**PROCEDURAL HISTORY**

2. For approximately 30 years, Capitol has been involved in the mobile radio business, providing common carrier paging ("CCP") service under Part 22 of the Commission's rules. In 1990, Capitol augmented its paging services by operating private carrier paging ("PCP") facilities licensed under Part 90 of the Commission's Rules. Capitol's

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<sup>1</sup> Capitol and the Presiding Judge have consented to a filing date of August 20, 1997, for the Bureau's opposition brief in this matter.

<sup>2</sup> This matter was originally brought by the Private Radio Bureau, the predecessor to the Wireless Telecommunications Bureau.

PCP operations shared a channel on frequency 152.48 MHz with RAM Technologies, Inc. ("RAM"). Capitol Radiotelephone Inc. ("Commission Decision"), 11 FCC Rcd 8232, 8234 (¶ 2)(1996).

3. "This proceeding arose out of RAM's repeated complaints of harmful interference by Capitol and information developed by Commission field personnel raising a substantial and material question of whether Capitol willfully and repeatedly violated the Communications Act and the Commission's Rules in connection with its PCP operations." Id. at 8235 (¶ 3). Specifically, the Commission had received numerous letters on behalf of RAM complaining of Capitol's interference.<sup>3</sup> Additionally, inspection and monitoring of Capitol's station by Commission field personnel over a four day period indicated that Capitol was engaged in excessive and prolonged testing of its system, causing interference with RAM's operation. See e.g., HDO, 8 FCC Rcd at 6302-03 (¶ 9-13).

4. The Hearing Designation Order was adopted at the Commission's agenda meeting held on August 3, 1993. At the meeting, the Private Radio Bureau expressed concern regarding a recent number of cases in which CCP licensees were becoming PCP licensees for apparently anticompetitive reasons. A Private Radio Bureau Attorney explained:

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<sup>3</sup> See e.g., Capitol Radiotelephone Inc. ("HDO"), 8 FCC Rcd 6300, 6301 (¶ 4), n. 6 (1993) (citing letter of November 27, 1990, from Frederick M. Joyce to Jerold Feldman (referencing, on behalf of RAM, oral complaint made to the FCC of harmful interference by Capitol); letter of November 28, 1990 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol's retransmission of common carrier pages on 152.490 MHz from November 15, 1990 through November 18, 1990); letter of February 19, 1991 from Hon. Carl C. Perkins, U.S. House of Representatives to Ralph A. Haller, Chief, Private Radio bureau (complaining, on behalf of RAM, of Capitol interference to RAM that occurred in October 1990, and further complaining that "Capitol has apparently refused to contact RAM to cooperate in engineering its system to avoid harmful co-channel interference"); letter of March 5, 1991 from Frederick M. Joyce to Carol Fox Foelak (complaining, on behalf of RAM, of harmful interference caused by Capitol on March 4, 1991); letter of March 19, 1991 from A. Dale Capehart to Mike Raymond (RAM complaint of interference on that date sent directly to Capitol)).

[The Private Radio Bureau has recently] encountered several instances where Common Carrier Paging licensees appeared to have become licensed on the same channel as their Private Carrier competitors for the purpose of causing harmful interference. Complaints about such interference have included empirical evidence which, on its face, tends to indicate that the Private Carrier business of the Common Carrier entity is nominal at best. In these circumstances, absent conflicting evidence, it can be concluded that the Common Carrier became licensed as a Private Carrier primarily to disrupt the business of its Private Carrier competitor.

See Videotape of FCC Open Meeting, August 3, 1993. According to the Private Radio Bureau, the evidence gathered at that time indicated that Capitol matched the projected profile of the anticompetitive CCP licensee. Id. The Private Radio Bureau outlined for the Commission the specific steps taken which led to this conclusion and the recommendation for the adoption of the HDO:

- the Commission received repeated complaints from RAM of harmful interference from Capitol;
- the interference and the complaints continued despite repeated efforts by the Field Operations Bureau and the Private Radio Bureau to resolve the matter;
- ultimately a field investigation was conducted to verify RAM's complaints; field personnel engaged in extensive monitoring and direction finding over a period of days, followed by a station inspection.

Id.

5. On August 31, 1993, the Commission released the Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 8 FCC Rcd 6300 (1993). The HDO specified various issues regarding the facts and circumstances surrounding the operation of PCP station WNSX-646 by Capitol, as well as lack of candor and misrepresentation issues.

6. The hearing was held during the period of February 1-4 and 7-9, 1994,

providing the Presiding Judge with the opportunity to make the necessary credibility determinations of all witnesses, consider all the evidence, and develop a full and complete record. See Capitol Radiotelephone, Inc. ("Initial Decision"), 9 FCC Rcd 6370, 6372 (¶ 3) (1994). On October 31, 1994, the Presiding Judge released the Initial Decision, holding that Capitol did not willfully or repeatedly violate the Commission's rules or make misrepresentations or lack candor before the Commission. Id. at 6377 (¶ 55). The Presiding Judge further found that the allegations against Capitol reflected an intent by RAM to avoid sharing the channel with Capitol. Id. at 6378-79 (¶ 63-65).

7. The Private Radio Bureau filed with the Review Board exceptions to the Initial Decision. The Review Board affirmed the Presiding Judge's ultimate conclusion that there was insufficient record evidence to support revocation of Capitol's licenses. Capitol RadioTelephone, Inc. ("Review Board Decision"), 11 FCC Rcd 2335 (¶ 1) (1996). The Review Board, however, concluded that "significant rule violations have been established on the record that warrant the imposition of a forfeiture against Capitol" in the amount of \$6,000. Id. at 2335 and 2342 (¶¶ 1, 34). It also described as a "close question" the issue of whether Capitol's conduct constituted malicious interference, although this was ultimately decided in Capitol's favor. Id. at 2341 (¶ 25). The Review Board further reversed the Presiding Judge's conclusion that the Private Radio Bureau demonstrated bias towards Capitol and, on its own motion, struck from the Initial Decision adverse findings and conclusions relating to RAM. Id. at 2335 and 2342 (¶¶ 1, 29-31).

8. On March 25, 1996, Capitol filed an Application for Review with the Commission, contending that the Presiding Judge's initial decision should be reinstated.

Commission Decision, 11 FCC Rcd at 8236 (¶ 7). On July 11, 1996, the Commission released its Memorandum Opinion and Order ("Order"), affirming the Review Board's decision in part and modifying the \$6,000 forfeiture imposed by the Review Board to \$2,000. In the Order, the Commission found that Capitol violated Sections 90.405(a)(3) and 90.425(b)(2) of the Commission's Rules, 47 C.F.R. §§ 90.405(a)(3) and 90.425(b)(2), thereby justifying the Review Board's imposition of a \$1,000 fine for each violation. The Commission, however, rejected the Review Board's finding of a violation of Section 90.403(e), 47 C.F.R. § 90.403(e), which requires reasonable precautions to avoid causing harmful interference. Id. at 8238-40 (¶ 14-17). The Commission therefore deleted the \$4,000 forfeiture imposed by the Review Board on that ground. Id. at 8239-40 (¶ 17).

9. The Commission found support in the record for a violation of Section 90.405(a)(3) of the Commission's Rules, pertaining to testing for station and system maintenance. The Rule requires licensees to keep testing "to a minimum" and to "employ every measure to avoid harmful interference." 47 C.F.R. §§ 90.405(a)(3). In upholding the Review Board's finding of a violation of Section 90.405(a)(3), the Commission reasoned that "the lack of a credible justification for the prolonged testing [by Capitol] and the suspicious circumstances disclosed during the inspection [by Commission field personnel] amply support[ed]" the Review Board's holding that the rule was violated. Commission Decision, 11 FCC Rcd at 8237-38 (¶ 12,13). The Commission further upheld the Review Board's finding of a violation of Section 90.425(b)(2) of the Commission's Rules, which pertains to the required Morse code transmission rate, noting that "Capitol's application for review does not specifically contest the finding that it [violated the rule]." Id. at 8238 (¶ 13). The

Commission additionally affirmed the Review Board's deletion of the adverse findings made by the Presiding Judge concerning RAM, reasoning that no issues had been designated against RAM in this proceeding. *Id.* at 8240 (¶ 20).

10. In April, 1997, the United States Court of Appeals, District of Columbia Circuit affirmed the order of the Commission "for substantially the reasons set forth in the Commission's Memorandum Opinion and Order, 11 FCC Rcd 8232 (1996)." Capitol Radiotelephone Company, Inc. v. Federal Communications Commission, 111 F.3d 962 (D.C. Cir. 1997). Capitol did not appeal the matter further and paid the \$2,000 forfeiture issued against it.

11. On February 28, 1997, while the appeal was pending before the District of Columbia Circuit, Capitol filed its First Application for Reimbursement Under the Equal Access to Justice Act. The Bureau now opposes that application.

## ARGUMENT

### A. Prevailing Party

12. The EAJA, 5 U.S.C. § 504, provides that "an agency that conducts an adversary adjudication shall award, to a **prevailing party** other than the United States, fees and other expenses incurred by that party in connection with that proceeding, **unless the adjudicative officer of the agency finds that the position of the agency was substantially justified** or that special circumstances make an award unjust." (Emphasis added.)

13. Section 1.1501 of the Commission's Rules, 47 U.S.C. § 1.1501, which implements the EAJA, provides for the award of attorney's fees and other expenses to an eligible party "when it **prevails** over the Commission, **unless the Commission's position in**

**the proceeding was substantially justified** or special circumstances make an award unjust."

(Emphasis added.) Similarly, Section 1.1505(a) of the Rules, entitled "Standards for awards,"

states, in pertinent part:

**A prevailing applicant** may receive an award for fees and expenses incurred in connection either with a proceeding, or with a significant and discrete substantive portion of a proceeding, **unless the Administrative Law Judge determines that the position of the Commission over which the applicant has prevailed was substantially justified.** The position of the Commission includes ... the action ... by the agency upon which the adversary adjudication is based. (Emphasis added.)

14. As each of the above statutory and regulatory provisions plainly demonstrates, the threshold requirement for recovery of attorney's fees and expenses under the EAJA is that the applicant be a "prevailing party." A "prevailing party" is defined as one that "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 and n.6 (1982)(citation omitted)(decided under Civil Rights fee award statute but holding that standard set forth in opinion is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'"). Here, Capitol did not prevail on two issues designated for hearing. Specifically, this matter was designated for hearing to determine whether it had violated the Commission's rules, made misrepresentations or lacked candor in connection with the operation of its PCP station. The Review Board found that Capitol violated the testing and Morse code provisions of the Commission's Rules, 47 C.F.R. §§ 90.405(a)(3) and 90.425(b)(2). Review Board Decision, 11 FCC Rcd at 2343 (¶ 34). This ruling was upheld on appeal by the Commission, 11 FCC Rcd at 8237-38 (¶ 12, 13), and the District of Columbia Circuit, 111 F.3d 962 (D.C. Cir. 1997) and a \$2,000 forfeiture was imposed against

Capitol for the violations. Id. Thus, Capitol did not prevail on these issues and may not recover fees and expenses incurred in defending against them. See e.g., Sandra V. Crane, 8 FCC Rcd 861 (1993)(ALJ Chachkin)(rejecting application of fees claimed under EAJA where the Bureau achieved by settlement benefits it sought in bringing the proceeding).

15. Moreover, Capitol does not become a "prevailing party" simply because the forfeiture of \$2,000 was a substantially less severe remedy than was contemplated in the HDO. The size of the penalty ultimately awarded, either in relation to the maximum amount allowable under the rules or the amount sought by the Commission, is not determinative of "prevailing party" status under the EAJA. For example, in United States v. Hitachi America, Ltd., 964 F.Supp. 344, 391 (CIT 1997), a petitioner's argument that it was a "prevailing party" because it was assessed a penalty that was a little more than 1% of the amount sought by the Government, was rejected. In Unites States v. Modes, Inc., 18 C.I.T. 153, 1994 WL 88927 (CIT 1994), a movant was held not to be a "prevailing party" under the EAJA notwithstanding that the penalty judgment of \$50,000 was insignificant compared to the maximum potential recovery of \$2.3 million.<sup>4</sup> The Modes case, in turn, relies upon Beall Construction Co. v. OSHA Rev. Commission, 507 F.2d 1041 (8th Cir. 1974). In Beall,

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<sup>4</sup> It should be noted that Section 1.1505(b) of the Commissions Rules, 47 C.F.R. § 1.1505(b), permits a party to recover fees and expenses incurred in connection with an adversary adjudication where "the demand of the Commission is substantially in excess of the decision in the adversary adjudication and is unreasonable when compared with that decision, under the facts and circumstances of the case." That rule, however, applies only to "adversary adjudications commenced on or after March 29, 1996." See Section 1.1502, 47 C.F.R. § 1.1502. As the instant matter was commenced on August 3, 1993 (prior to the March 29, 1996 commencement date), Section 1.1505 clearly does not apply here. Even assuming it was applicable, however, Capitol would not be able to recover fees under that rule. Section 1.1505(b) expressly precludes such an award to any party which "has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust." Here, Capitol was found to have committed a "willful and repeated violation of Section 90.405(a)(3) and 90.425(b)(2) of the Commission's Rules." Commission Decision, 11 FCC Rcd at 8241 (¶ 23). Accordingly, Capitol does not satisfy the standards for an award under Section 1.1505(b) of the Commission's Rules.

OSHA compliance officers assessed a proposed penalty against a contracting firm in the amount of approximately \$35,000 for various violations found on a construction site. The ALJ vacated the proposed penalty in part, finding that the evidence did not support all the alleged violations, and reduced the penalty down to approximately \$3,600. On appeal, the OSHA Review Commission affirmed the ALJ's decision as to the existence of the violations but reduced the penalties further to \$620. On appeal to the Eighth Circuit, the company argued that because it had succeeded in obtaining dismissal of one penalty and substantial reduction of the remaining ones, it was a prevailing party. The Eighth Circuit rejected the argument holding that the petitioner was not a "prevailing party" and was thus not entitled to recover costs or attorneys' fees. Beall, 507 F.2d at 1047. In the instant matter, Capitol did not prevail on the testing and Morse code violations and, as a result, must bear its own costs.

**B. Substantially Justified**

16. Capitol's application must also be denied because the Commission was "substantially justified" in designating this matter for hearing. When an agency is "substantially justified" under the EAJA and the Commission's Rules, there can be no imposition of attorney's fees and other expenses. EAJA, 5 U.S.C. § 504; Section 1.1501 of the Commission's Rules, 47 U.S.C. 1.1501. The Supreme Court has defined the phrase "substantially justified" in the context of the EAJA to mean "justified in substance or in the main -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Supreme Court has further recognized that both a prevailing party as well as a losing party may be found to have taken a "substantially justified" position. Pierce, 487 U.S. at 569. The Pierce Court stated, "[A] position can be

justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Pierce, 487 U.S. at 566, n. 2. Thus when the agency's action is found to be "substantially justified," the application for an award of fees pursuant to the EAJA must be denied. See e.g., Trahan v. Brady, 907 F.2d 1215 (D.C. Cir. 1990) (position taken by government concerning confidential tax information of Supplemental Security Income recipients was supported by a reasonable, albeit ultimately incorrect, interpretation of the law, requiring denial of the application for fees under the EAJA on "substantial justification" grounds); Richard Bott II, 9 FCC Rcd 3663 (1994)(ALJ Steinberg) (although all designated issues in proceeding were ultimately resolved in licensee's favor, ample grounds existed for initially setting case for hearing thus requiring denial of licensee's application for fees and other expenses under EAJA). In deciding whether or not the position of the agency was "substantially justified", the Commission's Rules require that the administrative record as a whole be considered in making such a finding. In the matter of Equal Access to Justice Act Rules, 2 FCC Rcd 1394 (1987)("Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, adduced during the course of the adjudication.")

17. A review of the record in the instant matter, demonstrates that the Commission's position in this proceeding was "substantially justified". There existed ample reasons for designating the matter for hearing and ample support for the Commission's position in the adjudication. Prior to issuing the HDO, the Commission had received numerous letters on behalf of RAM complaining of Capitol's interference. (See Procedural

History Section, supra, at ¶ 3 and n. 3.) The Field Operations Bureau and the Private Radio Bureau made repeated attempts to resolve the matter between RAM and Capitol but the interference and the complaints nevertheless continued. Thereafter, Commission field personnel conducted an investigation to verify RAM's complaints, which involved extensive monitoring over a period of days, followed by a station inspection. (Id. at ¶ 3.) The investigation confirmed wrongdoing on the part of Capitol. (Id.) Additionally, Capitol appeared to match the profile of CCP licensees which were believed to be engaging in anticompetitive conduct. (Id. at ¶ 4 .)

18. A reasonable person undertaking an independent analysis of this matter, could have concluded that substantial and material questions of fact were also raised regarding Capitol's misrepresentation of facts or lack of candor in dealing with the Commission. As indicated in the HDO and at the August 3, 1993 meeting of the Commission, it appeared that the information provided by Capitol concerning the existence and number of paging subscribers of its station were both internally inconsistent and inconsistent with information developed during the Commission field personnel's inspection, raising the question of misrepresentation. See, HDO, 8 FCC Rcd at 6304 (¶ 19). The pre-hearing record further appeared to raise questions as to whether Capitol had been less than forthcoming regarding its testing of its station. Accordingly, the pre-hearing record amply supported the Commission's initial position.

19. The Presiding Judge's significant reliance on credibility findings further demonstrates the "substantial justification" of designating this proceeding for hearing and resolving the issues through the adjudicatory process. When questions of intent and

credibility are at issue, the Commission places considerable weight on the credibility determinations of the ALJ, who is the only decision maker with the opportunity "to observe and evaluate a witness, 'including the expression of his countenance, how he sits or stands, [and] whether he is inordinately nervous.'" TeleSTAR, Inc., 2 FCC Rcd 7352, 7353 (¶ 11) (Rev. Bd. 1987) Here, in rendering the Initial Decision, the Presiding Judge relied significantly on his personal assessment and determination of the credibility of the various witnesses. See e.g., Initial Decision, 9 FCC Rcd at 6379 (¶¶ 66, 76). The Review Board placed considerable weight on the ALJ's credibility findings. See, Review Board Decision, 11 FCC Rcd at 2340 (¶ 21). If credibility findings are necessary to the resolution of a factual question, a hearing must be held in order for those determinations to be made. Accordingly, the Presiding Judge's reliance on credibility findings establishes "substantial justification" for the Commission's decision to designate this matter for hearing.

20. "Substantial justification" is further established through the Review Board's decision, which held that "significant rule violations have been established on the record that warrant the imposition of a forfeiture against Capitol." Review Board Decision, 11 FCC Rcd at 2338, 2341-42 (¶ 8-10,26-28). The Review Board's resolution of the malicious interference issue, which was not disturbed by the Commission on appeal, is further evidence that there was "substantial justification" for designating Capitol's licenses for hearing and adjudicating the issue. In addressing this issue, the Review Board stated, "Whether or not the tone transmissions provide clear evidence of malicious interference for purposes of Section 333 of the Communications Act is a close question ...." Review Board Decision, 9 FCC Rcd at 2341 (¶ 25). The Review Board's finding that the matter of malicious interference by Capitol was

a "close question" constitutes an affirmative acknowledgement that the commencement of the proceeding against Capitol was indeed substantially justified. A finding of malicious interference by Capitol could have justified revocation of its licenses. The fact that the ultimate sanction imposed was a \$2,000 forfeiture does not undermine or diminish the substantial justification that existed in 1993 upon which the Commission relied in designating this case for hearing and asserting its position during the proceeding. A prima facie case of significant violations substantially justified commencing the action against Capitol and the Review Board's finding of a "close question" on the serious matter of malicious interference confirms that fact.

21. In addition, Capitol's reliance on the Presiding Judge's adverse findings concerning RAM as a basis for its application for fees under the EAJA is improper and should be stricken. (See Capitol's First Application for Reimbursement Under the Equal Access to Justice Act ("Capitol's Application"), at ¶¶ 5 and 6.) The Commission specifically affirmed the "Board's deletion of the adverse findings made by the ALJ concerning RAM", reasoning that no issues were designated against RAM in this proceeding. Commission Decision, 11 FCC Rcd at 8240 (¶ 20). The District of Columbia Circuit further affirmed the Commission's decision to strike these unrelated findings. Capitol Radiotelephone Company, Inc. v. Federal Communications Commission, 111 F.3d 962 (D.C. Cir. 1997). Since the findings were stricken from the administrative record, they do not provide a basis for ruling on Capitol's EAJA request. Accordingly, Capitol cannot rely on the stricken findings for support of its application.

**B. Reduction of Any Award of Fees and Expenses**

22. Even assuming arguendo that fees may be awarded in this instance -- which would be improper here -- Capitol's reimbursement request in the amount of \$49,636.28 should be reduced by an amount of \$16,406.16, on the following grounds.

**Expert Witness Fees and Costs**

23. Capitol's request for \$13,036.41 to compensate its expert witness, Arthur K. Peters should be rejected on the following grounds. First, Capitol has failed to submit adequate documentation of the fees claimed by its expert, as required under Section 1.1513 of the Commission's rules, 47 C.F.R. § 1.1513, entitled "Documentation of fees and expenses." That rule requires "full documentation of the fees and expenses" for which an award is sought. The rule provides in relevant part:

A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount paid or payable by the applicant or by any other person or entity for the services provided.

47 C.F.R. § 1.1513. In merely providing a one page summary letter from its expert -- which fails to document with specificity the individual tasks for which reimbursement is sought and the number of hours devoted to each task -- Capitol fails to satisfy the requirements of the rule. (See Capitol's Application, at Exhibit F.) Accordingly, Capitol has failed to show its entitlement to such an award and its claim should be denied. See, Hensley, supra, 461 U.S. at 437 (1983)(where fee applicant's documentation is inadequate, award may be reduced accordingly).

24. Capitol seeks reimbursement at the rate of \$960 per day for its expert witness fees. Capitol offered no evidence that the rate charged by its expert does not exceed the prevailing rate for such services in this market area. See 5 U.S.C. § 504(b)(1)(A); Section 1.1506(c)(2) and (d) of the Commission's Rules, 47 CFR § 1.1506(c)(2)(in determining the reasonableness of the fee sought for an expert witness, the ALJ shall consider the prevailing rate for similar services in the community in which the witness ordinarily performs services). The EAJA further permits recovery of "the reasonable expenses of expert witnesses ... except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved." 5 U.S.C. § 504(b)(1)(A); Section 1.1506(b) of the Commission's Rules, 47 CFR § 1.1506(b)("No award to compensate an expert witness may exceed the highest rate at which the Commission pays expert witnesses."); see also, Olympic Marine Services, Inc. v. United States, 792 F.Supp. 461, 471 (E.D.Va 1992)(rejecting reimbursement request calculated at rate of \$150 and \$187.50 per hour for applicant's expert witness fee; recovery was limited to \$6.25 per hour (\$50 per day), the highest rate the government paid its experts). The Commission generally does not retain outside expert witnesses in connection with adjudicatory matters. Rather, experts from within the Commission or other governmental agencies are generally used by the Commission in adjudicatory proceedings. The standard rate at which the Commission pays witnesses is \$40 per day. See, 18 U.S.C. § 1821(b)(setting attendance fee for witness at \$40 per day). Additionally, the one day billed by Mr. Peters for travel time may be compensated at only half the hourly rate. See, Cooper v. United States Railroad Retirement Board, 24 F.3d 1414, 1417 (D.C. Cir. 1994)(under EAJA, travel time of attorney will be compensated at half the

allowable base hourly rate).

25. Second, Mr. Peters' expenses for "food & lodging," "Federal Express," and "telephone," in the amount of \$2,068.77, must also be denied. Such expenses are not allowable under the EAJA. See, Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1069 (D.C. Cir. 1985)(expenses such as taxi fares, messenger services, travel expenses, telephone bills and postage not eligible for reimbursement as "costs" under EAJA), cited in Cooper, supra, 24 F.3d at 1417. Based on controlling legal authority as set forth above, Capitol's claim for expert fees and costs should be denied in its entirety, thereby reducing any award to Capitol by \$13,036.41.

#### Attorney Fees and Costs

26. The Bureau also objects to Capitol's request for \$36,527.51 to cover the fees and costs of its attorney, Kenneth E. Hardman, Esquire, in this matter. (See, Capitol's Application, at Exhibit E.) Any award of attorney's fees should be reduced on several grounds. First, Capitol's claim for reimbursement of \$5,027.51 in expenses should be reduced as it consists in part of several categories of expenses not allowable under the EAJA. The unpermitted categories of expenses sought by Capitol include charges for "postage", "local messenger service", "telephone tolls", "air fare" and "Federal Express"<sup>5</sup>, all of which are not recoverable under the EAJA. See, Massachusetts Fair Share, supra. Only Mr. Hardman's costs for photocopying and hearing transcripts are properly claimed under the EAJA. Id. at 1069 (of the expenses claimed, only those for duplication were recoverable under the EAJA).

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<sup>5</sup> These charges are set forth in the "Disbursement" section of the attorney invoices submitted by Capitol in its Application. See Capitol's Application, at Exhibit E (Invoices dated 9/10/93 (p.2), 10/11/93 (p.3), 11/10/93 (p.3), 12/10/93 (p.3), 1/12/94 (p.4), 2/12/94 (p.3-4), 3/11/94 (p.2), 5/11/94 (p.2)).

It should be noted that in several instances, Mr. Hardman's invoices reflect a combined charge for "photocopying" (an allowable cost) "postage" and "messenger service" (ineligible charges). (See Capitol's Application, at Exhibit E (invoices dated 9/10/93, 10/11/93, 11/10/93, 12/10/93, 1/12/94, 2/12/94)). Since Capitol is required to adequately document its allowable costs, failure to adequately identify the allowable portion requires denial of its claim. Section 1.1513 of the Commission's Rules, 47 C.F.R. § 1.1513 (detailed documentation of fees and expenses required). Thus, the charges recoverable by Capitol for its attorney costs should be reduced by \$2,132.25, as follows:

\$ 530.42	1/18/94 --Reproduction and binding of Capitol's direct case (listed on 2/12/94 invoice)
\$2,186.60	2/18/94 and 2/25/94 --Hearing transcripts (listed on 3/11/94 invoice)
<u>\$ 178.24</u>	<u>4/11/94 --Photocopying (listed on 5/11/94 invoice)</u>
\$2,895.26	Total amount allowable
<u>(-\$5,027.51)</u>	<u>less: total amount claimed for attorney's costs</u>
(-\$2,132.25)	Total amount deducted from Capitol's request for attorney's costs

27. Second, Capitol's reimbursement for attorney's fees includes charges for services not recoverable under the EAJA. Several of Mr. Hardman's entries relate to public relations efforts, such as writing press releases and speaking with reporters. (See Capitol's Application, at Exhibit E (entries dated 8/3/93 ("telephone conference with NY Times reporter"); 9/9/93 ("telephone conference with reporter from Bulletin re FCC HDO"); 11/3/94 ("draft and send press releases to trade publications"; 11/10/94 ("telephone conference re: press contacts on Initial Decision"); 11/17/94 ("telephone conference re press matters"))).

Other entries appear to concern lobbying efforts or services unrelated to the instant proceeding. (See Capitol's Application, at Exhibit E (entries dated 3/2/94 ("telephone conference re meeting on Capitol Hill"); 3/14/94 (telephone conference re: "local Senate office"); 3/15/94 ("telephone conference re: meeting on appointment"); 3/25/94 ("telephone conference re preparation of letter for appointment"); 4/13/94 ("draft proposed letter to Senator Byrd")). Fees for such services are not permitted under the EAJA and should be excluded. See e.g., Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 221 (9th Cir. 1987)(fees for lobbying, publicity and unrelated claims disallowed under Rehabilitation Act and Equal Access to Justice Act ); see also, Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994)(rejecting a § 1988 claim for fees for public relations efforts and noting that "legitimate goals of litigation are almost always attained in a courtroom, not in the media").

28. Third, Capitol's claim for Mr. Hardman's travel time may not be compensated at the full rate. (See Capitol's Application, at Exhibit E (entry dated 9/13/93 ("travel to Charleston))). Rather, any recovery must be limited to half the allowable base hourly rate or \$37.50 per hour. See, Cooper, supra, 24 F.3d at 1417 (D.C. Cir. 1994)(under EAJA, travel time of attorney will be compensated at half the allowable base hourly rate). It should also be noted that Mr. Hardman's invoices frequently combine the hours logged for ineligible charges (i.e., publicity, lobbying, travel) with those that are allowable (i.e., legal work connected with the case). As indicated above, failure to adequately identify the allowable portion requires denial of its claim. Section 1.1513 of the Commission's Rules, 47 C.F.R. § 1.1513. Based on the above grounds, Capitol's request for the attorney's fees portion of its application

should be reduced by \$ 1,237.50, calculated as follows:

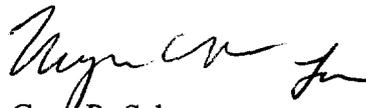
\$ 862.50	Fees for services relating to publicity and lobbying efforts or matters unrelated to the instant proceeding (See Capitol's Application, Exhibit E (entries dated 8/3/93, 9/9/93, 11/3/94, 11/10/94, 11/17/94, 3/2/94, 3/14/94, 3/15/94, 3/25/94, 4/13/94).
<u>\$ 375.00</u>	Fees for attorney travel time; 10 hours @ \$37.50 per hour, <u>i.e.</u> , half the allowable base hourly rate.
\$1,237.50	Total amount of reduction from attorneys fees portion.

29. Based on the reasons stated above, Capitol's application for reimbursement of fees and costs, if allowed, should be reduced in the amount of \$16,406.16, calculated as follows:

\$13,036.41	Amount deducted from request for expert witness fees/costs
\$ 2,132.25	Amount deducted from request for attorney's costs
<u>\$1,237.50</u>	<u>Amount deducted from request for attorney's fees</u>
<b>\$16,406.16</b>	<b>Total amount of reduction</b>

30. Accordingly, the Bureau requests the Presiding Judge to either deny the application for reimbursement under the Equal Access to Justice Act or, in the alternative, reduce the fee award as reflected above.

Respectfully submitted,  
Daniel B. Phythyon  
Acting Chief, Wireless Telecommunications Bureau



Gary P. Schonman  
Chief, Compliance and Litigation Branch



Susan A. Aaron  
John J. Schauble  
Attorneys  
Wireless Telecommunications Bureau

Federal Communications Commission  
2025 M Street, N.W., Suite 8308  
Washington, D.C. 20554  
(202) 418-0569

August 20, 1997

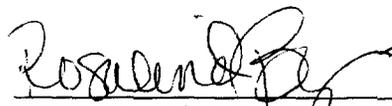
**CERTIFICATE OF SERVICE**

I, Rosalind Bailey, a secretary in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, by first class U.S. mail, this 20th day of August 1997, sent copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Capitol Radiotelephone, Inc.'s First Application for Reimbursement Under the Equal Access to Justice Act", to:

Kenneth E. Hardman, Esquire  
Moir & Hardman  
2000 L Street, N.W.  
Suite 512  
Washington, D.C. 20036  
Counsel for Capitol Radiotelephone, Inc.

Frederick M. Joyce, Esquire  
Joyce & Jacobs  
1019 19th Street, N.W.  
14th Floor  
Washington, D.C. 20036  
Counsel for RAM Technologies, Inc.

Administrative Law Judge Joseph Chachkin  
Federal Communications Commission  
2000 L Street, N.W.  
Second Floor  
Washington, D.C. 20554

  
\_\_\_\_\_  
Rosalind Bailey