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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matters of)
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Application of)
)
CAPITOL RADIOTELEPHONE, INC.)
d/b/a CAPITOL PAGING)
)
For a Private Carrier Paging)
Facility on 152.480 MHZ in)
Huntington/Charleston, WV)
)
Imposition of Forfeiture re)
)
CAPITOL RADIOTELEPHONE, INC.)
d/b/a CAPITOL PAGING)
)
Former Licensee of Station)
WNSX646 in the PLMRS)
)
Revocation of Licenses of)
)
CAPITOL RADIO TELEPHONE, INC.)
d/b/a CAPITOL PAGING)
)
Licensee of Stations WNDA400)
and WNWW636 in the PLMRS)
)
Revocation of Licenses of)
)
CAPITOL RADIOTELEPHONE COMPANY,)
INC. d/b/a CAPITOL PAGING)
)
Licensee of Stations KWU373,)
KUS223, KQD614 and KWU204 in)
the PMRS)

PR Docket No. 93-231

To: The Commission, en banc

CAPITOL RADIOTELEPHONE COMPANY, INC. EXCEPTIONS TO THE
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Kenneth E. Hardman
MOIR & HARDMAN
2000 L Street, N.W., Suite 512
Washington, DC 20036-4907
Telephone: (202) 223-3772
Facsimile: (202) 833-2416

Attorney for Capitol Radiotelephone
Company, Inc.

December 5, 1997

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SUMMARY

In this phase of the proceeding Capitol Paging seeks partial reimbursement under the Equal Access to Justice Act (EAJA) of the litigation expenses it incurred in successfully defending against license revocation proceedings brought in 1993 by the Private Radio Bureau. The decision below correctly found that Capitol Paging was the "prevailing party" eligible for an award, but erroneously held that the Private Radio Bureau was "substantially justified" in bringing the license revocation proceedings.

EAJA expressly requires that the "substantial justification" issue be "determined on the basis of the administrative record, as a whole". 5 U.S.C. §504(a)(1). (Emphasis added). Erroneously contrary to this mandate, the decision below entirely excludes from its analysis Judge Chachkin's prior adverse findings and conclusions concerning RAM Technologies' "egregious misconduct" against Capitol. Refusing to use those findings as a sword against RAM in the prior phase of this proceeding does not justify shielding the Bureau from meaningfully scrutiny to determine whether its actions in bringing the revocation proceeding against Capitol were "substantially justified".

The case law also makes clear that the inquiry into the factual basis for the Bureau's actions is to be searching and careful, not perfunctory. See, e.g., *Smith v. NTSB*, 992 F.2d 849, 852 (8th Cir. 1993); *Frey v. CFTC*, 931 F.2d 1171, 1177-1178 (7th Cir. 1991); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148-1149 (D.C.Cir. 1988). However, the decision below erroneously truncates its analysis of the various pre-designation investigatory errors by the Bureau and, as stated above, erroneously excludes entirely the evidence that the charges against Capitol were trumped up by RAM to avoid sharing a channel with Capitol.

Judge Chachkin previously concluded that the "serious allegation[s] of misconduct ... [against Capitol] turn[ed] out to have no basis in fact," which should be dispositive that the Bureau was not "substantially justified" in bringing the revocation proceedings for purposes of EAJA. Therefore, the decision below should be reversed and remanded for an award as requested in Capitol's application.

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To: The Commission, en banc

CAPITOL RADIOTELEPHONE COMPANY, INC. EXCEPTIONS TO THE
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol" or "Capitol Paging"), by its attorney, respectfully files its exceptions in the captioned proceeding to the Initial Decision of Administrative Law Judge Joseph Chachkin, FCC 97D-10, adopted November 3, 1997 and released November 5, 1997 (hereinafter cited as the "Decision" or "Dec."), which denied Capitol's First Application For Reimbursement Under The Equal Access To Justice Act (the "Application"). For the reasons set forth below, Capitol respectfully requests the Commission to reverse the Decision and to remand the case to Judge Chachkin for the award of fees and costs as requested by Capitol in its Application. In support thereof, Capitol respectfully states:

Statement of the Case

In this phase of the proceeding, Capitol seeks an award of \$49,636.28 as partial reimbursement for the litigation costs it incurred during its successful defense against the license revocation proceedings brought against it in 1993 by the Commission's Private Radio Bureau (the "Bureau").¹ The award is authorized under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504, and §1.1501, et seq., of the Commission's rules, and

¹ *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing*, 8 FCC Rcd 6300 (FCC 1993) (hereinafter cited as the "HDO").

is sought on the basis of the statute and rules as they existed prior to the changes spawned by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

In the Decision below, Judge Chackin correctly found that Capitol was the "prevailing party" eligible for an award, within the meaning of EAJA (Dec. at ¶¶11-12), but nonetheless denied an award on the ground that the Bureau was "substantially justified" in bringing the revocation proceeding. *Id.* at ¶¶13-14. Capitol respectfully submits that this conclusion is in error and should be reversed.

Questions Presented

1. Whether the Decision below misapplied the statutory standard of "substantially justified" by failing to fully analyze and make relevant findings concerning the complete factual basis on which the Bureau acted in bringing the revocation proceeding against Capitol.
2. Whether the Decision below erred in failing to make its determinations of "substantially justified" without considering "the administrative record, as a whole," as required by the EAJA.
3. Whether the Decision below erred in excluding from consideration the Judge's prior adverse findings concerning RAM Technologies, Inc., and in failing to fully

consider his prior findings concerning the Bureau's pre-designation handling of RAM's complaints against Capitol.

Argument

1. The Decision's Failure to Utilize the Prior Adverse Findings Concerning RAM Technologies, and its Truncated Analysis of the Bureau's Pre-Designation Investigatory Errors, Erroneously Conflicts with EAJA's Requirement that "Substantial Justification" Be "Determined on the Basis of the Administrative Record, as a Whole"

The Decision's error in failing to utilize the prior findings concerning RAM Technologies,² and in its truncated analysis of the Bureau's pre-designation investigatory errors,³ is readily apparent. EAJA explicitly provides that:

Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adjudication for which fees and other expenses are sought.

5 U.S.C. §504(a)(1). Emphasis added.

The Decision is palpably in conflict with this mandate, which it neither cited nor distinguished, and should be reversed on that basis. Indeed, had Judge Chachkin not already made his meticulous findings and conclusions in the original Initial

² Dec. at ¶14 & n. 8.

³ Compare Dec. at ¶14 & n. 7 with Section 2, *infra*.

Decision herein,⁴ he would have been obliged at this time to review the record as part of his consideration of Capitol's application and to make the necessary findings and conclusions on those issues. Having already done so, the task of determining whether the Bureau was "substantially justified" in bringing revocation proceedings against Capitol is vastly simplified.

In this regard, Capitol points out that the reason for striking the adverse findings concerning RAM simply are not implicated under EAJA. The Commission ruled that the adverse "findings are invalid as to their prejudicial effect on RAM".⁵ Such considerations, however, are not involved in EAJA determinations. It is one thing to rule that the findings cannot be used as a sword against RAM; but it is quite something else to hold, as the Decision essentially does, that the Bureau should be shielded from meaningful scrutiny concerning the factual basis for its bringing revocation proceedings against Capitol.

Accordingly, EAJA unambiguously requires that appropriate findings and conclusions on the basis of the entire administrative record be made in determining whether "substantial justifi-

⁴ *Initial Decision of Administrative Law Judge Joseph Chachkin*, 9 FCC Rcd 6370 (ALJ 1994) (hereinafter cited as the "ID").

⁵ *Memorandum Opinion and Order*, 11 FCC Rcd 8232, at ¶20 (FCC 1996) (hereinafter cited as the "MO&O").

cation" existed, and the Decision below therefore erroneously excluded portions of the record from consideration.

2. The Decision Below Erred in Failing to Make a Full Analysis of the Factual Basis Upon Which the Bureau Acted in Bringing the Revocation Proceeding Against Capitol.

The Decision below correctly cites the governing interpretation of the "substantial justification" standard of the EAJA,⁶ but then fails to make the full analysis of the record required in order to determine whether the Bureau's action had a "'reasonable basis both in law and fact'".⁷ The case law makes clear that the inquiry into the factual basis for the Bureau's action is to be searching and careful, not perfunctory.⁸

The Decision below concluded that "substantial justification" existed solely on the basis that (1) RAM had made repeated

⁶ Dec. at ¶13, citing *Pierce v. Underwood*, 487 U.S. 552 (1988).

⁷ *Id.* at 565. (Emphasis added). Echoing this standard, the Commission's rules also provide in relevant part that "[t]o avoid an award a Bureau must demonstrate that its position was substantially justified in law and fact" 47 C.F.R. §1.1505(a) (1995).

⁸ See, e.g., *Smith v. NTSB*, 992 F.2d 849, 852 (8th Cir. 1993) (critical examination by Court of underlying facts that undercut statements of government employees); *Frey v. CFTC*, 931 F.2d 1171, 1177-1178 (7th Cir. 1991) (comprehensive analysis of the elements of price fixing to determine if bringing the charge was warranted); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148-1149 (D.C.Cir. 1988) (critical analysis of alleged credibility issues to determine if underlying facts warranted agency action).

complaints to the Bureau about Capitol, and that (2) the Bureau conducted a field inspection before bringing the revocation proceedings. (Dec. at ¶14).⁹ In actuality, however, at its core the HDO cited four reasons for the Bureau's targeting Capitol for license revocation: (1) the allegation that Capitol's motive for licensing its PCP station was primarily to interfere with RAM and not for a legitimate business purpose; (2) the allegation that Capitol used its PCP station to maliciously interfere with RAM's transmissions at various times; (3) the allegation that Capitol lied about or lacked candor concerning the *bona fides* of its PCP operation, including its channel monitoring equipment and its testing for the Greenup County Rescue Squad; and (4) the allegation that Capitol lied about or lacked candor concerning its business records and its PCP subscribers.

The *facts* concerning these allegations, as demonstrated at the hearing, are that:

1. *The Bureau had it precisely backwards and targeted the wrong party for license revocation.* In fact, the repeated complaints by RAM were actually part of an anticompetitive campaign

⁹ The Decision appears to suggest at one point that the Bureau was "substantially justified" in bringing the revocation proceeding unless "the Bureau acted in bad faith or for oppressive reasons". Dec. at ¶14 & n. 7. However, that is not the standard prescribed by EAJA, as the Decision otherwise correctly acknowledges, and it is further evidence that the Decision in fact misapplied the statutory standard.

by RAM to avoid sharing the channel with Capitol, notwithstanding that it was required by law to share the channel. ID at ¶61. In fact, Capitol was the *victim* of what Judge Chachkin characterized as "egregious misconduct" by RAM; Capitol was not the perpetrator of misconduct against RAM. *Id.* at ¶115 & n. 33.

From the very inception of RAM's complaints, Capitol vehemently denied RAM's charges and consistently argued to the Bureau what Capitol ultimately proved at the hearing, *i.e.*, that it was a victim of RAM's anticompetitive ploy. In reviewing the Bureau's pre-hearing handling of the case, Judge Chachkin criticized the Bureau's "inexplicabl[e]" decision not to investigate the corroborative evidence proffered by Capitol before bringing the revocation proceeding (ID at ¶13 & n. 7); and he further pointed out that the Bureau "accepted RAM's versions of the facts without question" while turning a "deaf ear" to "corroborated" complaints by Capitol about RAM's conduct and otherwise according "uneven treatment" to RAM's and Capitol's complaints. *Id.* at ¶62.

Nor are Judge Chachkin's credibility determinations concerning the RAM witnesses supportive of substantial justification in this case.¹⁰ Credibility determinations, "[b]y virtue of their very ease of invocation," must, in order to defeat EAJA

¹⁰ Dec. at ¶14.

liability, "be based upon an actual, material conflict which the trier of fact would be obliged to resolve in adjudicating the case."¹¹ In this case, Judge Chachkin concluded that the "obvious bias" of the RAM witnesses "renders their testimony inherently unreliable and lacking of credibility" (ID at ¶66), matters which should have been obvious to the Bureau prior to the hearing and did not require a trial to ventilate. Moreover, Judge Chachkin relied on the *demeanor* of the RAM witnesses to support his credibility findings, *i.e.*, that the RAM witnesses were "evasive, not forthcoming and prone to exaggeration, if not outright fabrication" (ID at ¶66), rather than the material conflicts in testimony required under *Leeward Auto Wreckers*.

2. *Not one of the multiple alleged instances of malicious interference by Capitol could be sustained by the Bureau; while, at the same time, the Bureau entirely glossed over or ignored entirely RAM's deliberate interference to Capitol. Not one shred of evidence other than RAM's self-serving complaints was ever adduced to support RAM's pre-inspection complaints (ID at ¶66); and in one instance Capitol had not even started operating its PCP station and plainly could not have been at fault. Id. at ¶65. Moreover, the Capitol transmissions alleged by the Bureau as a result of its inspection to be malicious interference were,*

¹¹ *Leeward Auto Wreckers, supra*, 841 F.2d at 1148.

in fact, no more than excessive testing, a "miscellaneous" violation of the Commission's technical operating rules carrying a civil forfeiture of \$250.00 per day for four days. Additionally, the slow Morse code station identification which the Bureau alleged to be part of a sinister plot by Capitol to interfere with RAM turned out in fact to be the product of "an erroneous setting of the terminal card at the factory". ID at ¶99. (Emphasis added).

On the other hand, the evidence is uncontradicted that in March 1991, RAM disabled its monitor receiver and deliberately "walked" on Capitol's transmissions when it was trying to initiate service on its PCP station (ID at ¶24); and the evidence is likewise uncontradicted that RAM knowingly installed an unlawful time-out device which enabled it to deliberately "walk" on co-channel transmissions in August 1991. *Id.* at ¶41. The Bureau did nothing whatsoever concerning the former conduct, and only sent a warning letter to RAM concerning the latter. The Commission later acknowledged that RAM's conduct in this regard was in "serious violation of the rules" and that the Bureau's handling of it was "lenient" and "unwarranted". MO&O at ¶19.

3. *The Bureau jumped to erroneous conclusions concerning Capitol's monitoring equipment, its testing for Greenup County Rescue Squad and its business records. As Judge Chachkin acknow-*

ledged, the allegations concerning Capitol's monitoring equipment "in fact turn out to have been the result of investigatory error by the Commission's inspectors". ID at ¶114. Not only did the Bureau fail to adduce any evidence on the Greenup County issue, but also, as Judge Chachkin observed, "[i]ncredibly, the Bureau did not call anyone from the Greenup County Rescue Squad to testify on its behalf". ID at ¶39 & n. 16.

Similarly, with respect to Capitol's business records, it turns out that in fact the Bureau had jumped to an erroneous conclusion about Capitol's computer capabilities on the basis of a document that was manually produced at the request of the inspectors (ID at ¶114), and that the Bureau had made no effort prior to hearing designation to determine who produced the document or how. *Id.* at ¶46 & n. 21. Judge Chachkin thus concluded that "this very serious allegation of misconduct [by Capitol], like the others in this case, turns out to have no basis in fact". ID at ¶114. (Emphasis added).

Capitol respectfully submits that Judge Chachkin's finding is dispositive on the "substantial justification" issue, i.e, the "serious allegation[s] of misconduct ... in this case turn[] out to have no basis in fact". Moreover, as Judge Chachkin's findings further make clear, the Bureau should have realized that there was no substance to the allegations had it conducted its

pre-designation investigations with reasonable care and diligence.

It is additionally pertinent to note that the Bureau explicitly has the burden of establishing that its actions were "substantially justified in ... fact". 47 C.F.R. §1.1505(a) (1995). Under these circumstances, Capitol respectfully submits that the Bureau's conduct in bringing the revocation proceedings against Capitol cannot even plausibly be said to have been "substantially justified" under any standard, much less that it was "justified to a degree that could satisfy a reasonable person," as required under EAJA.¹²

Conclusion

WHEREFORE, Capitol Radiotelephone Company, Inc. respectfully requests that the Commission find and declare that the Bureau was not "substantially justified" in bringing the revocation proceedings against Capitol, and accordingly prays that the Decision below be reversed and the proceedings remanded to Judge Chackin

¹² *Pierce v. Underwood, supra*, 487 U.S. at 565.

for an award of litigation expenses as requested in Capitol's
Application.

Respectfully submitted,

CAPITOL RADIOTELEPHONE COMPANY,
INC. d/b/a CAPITOL PAGING

By: 
Kenneth E. Hardman

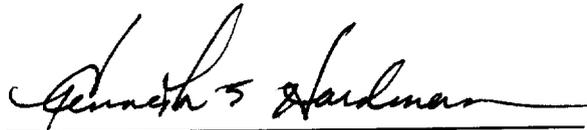
Its Attorney

MOIR & HARDMAN
2000 L Street, N.W.
Suite 512
Washington, D.C. 20036
Telephone: 202-223-3772
Facsimile: 202-833-2416

December 5, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of December, 1997, served the foregoing Exceptions upon the Wireless Telecommunications Bureau by mailing a true copy to Gary P. Schonman, Esquire, Susan A. Aaron, Esquire and John J. Schauble, Esquire, 2025 M Street, N.W., Room 8303, Washington, D.C. 20554, and upon RAM Technologies, Inc. by mailing a true copy thereof to Frederick M. Joyce, Esquire, Joyce & Jacobs, 1019 - 19th Street, N.W., 14th Floor, Washington, D.C. 20036.



Kenneth E. Hardman