

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

In the Matter of )

CAPITOL RADIO RADIOTELEPHONE )  
COMPANY, INC. )

File No. 24190-CD-P/ML-01-92

Application For Authority to Modify Public )  
Land Mobile Service Station KQD614 to )  
Establish 152.51 MHz Facilities at Athens, )  
Ohio )

**ORDER**

**Adopted: March 24, 1998**

**Released: March 24, 1998**

By the Acting Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. On May 1, 1992 Athens Business Communications, Inc. (Athens)<sup>1</sup> filed a Petition to Dismiss or Deny (Petition) Capitol Radio Radiotelephone Company, Inc's. (Capitol Radio) Application for Modification of its Public Land Mobile Service Station KQD614 to establish an additional base station to operate on frequency 152.51 MHz at Athens, Ohio (Application).<sup>2</sup> Athens alleges that Capitol Radio's Application violates section 22.115(a)(1)<sup>3</sup> of the Commission's rules because Capitol Radio failed to obtain reasonable assurance of availability for its proposed tower site prior to filing its Application.<sup>4</sup> For the reasons set forth below, we deny Athens' Petition.

2. Capitol Radio's Application states that it had obtained reasonable assurance from Ohio

<sup>1</sup> Athens is the licensee of Public Land Mobile Service Stations KUC997 and KUS228 in the Athens, Ohio, area. Athens states that the grant of Capitol Radio's Application will allow Capitol Radio to compete with its services, thereby causing Athens economic injury of a direct, tangible, substantial and immediate nature. See Petition at 1-2.

<sup>2</sup> Capitol Radio's Application was filed March 18, 1992. It was accepted for filing by *Public Notice*, Report No. PMS-92-27, released April 1, 1992.

<sup>3</sup> Athens' Petition references 47 C.F.R. § 22.15(a)(1) (1994), which was replaced by 47 C.F.R. § 22.115(a)(1). See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd. 6513 (1994). Pursuant to our rules, we apply the current rules to Athens' Petition. Nonetheless, our conclusion would be the same whether we applied the former or the current rules.

<sup>4</sup> Capitol Radio filed an Opposition to the Petition (Opposition) and Athens filed a Reply to the Opposition (Reply).

University that Ohio University's tower in Athens was available for Capitol Radio's use.<sup>5</sup> Athens alleges that at the time Capitol Radio filed its Application, Capitol Radio did not have reasonable assurance of the availability of the tower site indicated in its Application.<sup>6</sup> Athens argues that upon contacting Jerry Carmean (Carmean), Ohio University's Chief Engineer and the individual responsible for the tower site, Athens was informed that: (1) Carmean had no knowledge of a contract with Capitol Radio concerning the leasing of tower space; (2) before Ohio University would consent to the use of the site, an engineering analysis had to be performed to determine if the proposal would interfere with others presently operating on the tower; and (3) to Carmean's knowledge, no analysis was requested or performed by Capitol Radio.<sup>7</sup> In light of the above, Athens argues that Capitol Radio's certification in its Application that it had obtained reasonable assurance of the availability of the proposed tower site is a direct misrepresentation to the Commission and, thus, Capitol Radio's Application should be dismissed or denied.<sup>8</sup>

3. Capitol Radio disputes Athens' allegations arguing that on November 27, 1991, Capitol Radio contacted Carmean by telephone and discussed the availability and leasing price of the tower.<sup>9</sup> Capitol Radio states that Carmean provided it with a book of tower profiles to use in conducting an analysis to determine if the 152 MHz frequency would be technically compatible with existing users.<sup>10</sup> Capitol Radio contends that based on its analysis, it understood that: (1) Ohio University would lease the space to Capitol Radio; (2) obtaining final permission would be a formality, and (3) final permission should not be sought until the Commission approved Capitol Radio's Application.<sup>11</sup> Furthermore, Capitol Radio states that on May 12, 1992, it formally requested final approval from Ohio University for its proposed use of Ohio University's tower.<sup>12</sup> On May 28, 1992, Capitol Radio filed an amendment to its Application to include a letter from Ohio University to Capitol Radio stating that: (1) Ohio University had reviewed Capitol Radio's proposal; (2) the tower appears to have space available; and (3) when Capitol Radio's Application is granted, Ohio University could enter into formal lease negotiations.<sup>13</sup> In light of these events, Capitol Radio asserts that, at most, there was a good-faith misunderstanding of the manner in which Ohio University expected final approval of the site to be requested. Capitol Radio argues that this misunderstanding does not rise to the level of a direct misrepresentation to the Commission.

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<sup>5</sup> Capitol Radio's Application, FCC Form 401, at Schedule B, Item 27, indicates that the WOUB-TV site is at Golf Course Road, North Lat. 39-18-50, West Long. 82-08-54, Athens, Ohio. Capitol Radio placed an "X" in the "Yes" box for Item 34, which asked: "Has the applicant obtained reasonable assurance that it can use the proposed site?"

<sup>6</sup> Petition at 3-4.

<sup>7</sup> *Id.* at 4. See Declaration of Robert Watkins, officer of Athens, attached to Petition.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> See Declaration of J. Michael Raymond, Vice President for Capital Radio, attached to Opposition.

<sup>10</sup> Opposition at 3.

<sup>11</sup> *Id.*

<sup>12</sup> See Declaration of J. Michael Raymond, attached to Opposition.

<sup>13</sup> See Letter to J. Michael Raymond from J. Welling, Director, Ohio University Telecommunications Center dated May 22, 1992.

## II. DISCUSSION

4. We find Athens' arguments unpersuasive. Section 22.115(a)(1) of the Commission's rules requires that "at the time of filing, applicants must have obtained reasonable assurance that all antenna sites specified in their applications are available for the proposed use."<sup>14</sup> Failure to obtain reasonable assurance of site availability results in dismissal of the application.<sup>15</sup> In order to establish reasonable assurance of site availability, the applicant does not need a binding agreement or absolute assurance, it needs only to obtain assurance from the property owner or his agent as to the existence and future availability of the site.<sup>16</sup> The designation of a specific site on the application is an implied representation that the applicant has obtained reasonable assurance that the site will be available for its intended use. Failure to inquire as to the availability of the site until after the application is filed is inconsistent with such a representation and raises a character qualification issue.<sup>17</sup>

5. We find that Capitol Radio obtained reasonable assurance that the tower site specified in its Application would be available as required under section 22.115(a)(1) of the Commission's rules. Although Athens maintains that Carmean did not have knowledge of a contract with Capitol Radio for the site, it is undisputed that Capitol Radio contacted Ohio University prior to filing its Application.<sup>18</sup> Section 22.115(a)(1) of the Commission's rules does not require an applicant to have a firm agreement, it only requires that prior to filing an application the applicant have a reasonable belief as to the site's availability for the intended use and the property owner's willingness to agree to the proposed use.<sup>19</sup> We believe that by supplying Capitol Radio with a book of tower profiles and discussing the cost of leasing space on its tower, Ohio University's representative, Carmean, demonstrated a willingness to enter into an agreement with Capitol Radio for the proposed tower site.<sup>20</sup> Thus, Capitol Radio has met its burden of demonstrating that it obtained reasonable assurance of site availability.

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<sup>14</sup> See 47 C.F.R. § 22.115(a)(1); see also *Charles Mitchell Dant*, 2 FCC Rcd. 5584 (1987) (*Dant*) (at the time of filing, the applicant must determine that there is space available on the tower, that the space is available for such use, and that it is reasonable to anticipate that the applicant may use this space).

<sup>15</sup> See, e.g., *CPS Telecom, Inc.*, 2 FCC Rcd. 4060 (Mob. Serv. Div. 1987).

<sup>16</sup> See *Dant*, 2 FCC Rcd. at 5584.

<sup>17</sup> See, e.g., *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (1974) (*Wallace*).

<sup>18</sup> Compare *CPS Telecom, Inc.* 2 FCC Rcd. 4060 (Mob. Serv. Div. 1987). Therein, the site owner submitted an affidavit stating that the applicant contacted him "some time ago" and that he "could not say" what date he had been contacted. The Mobile Services Division was persuaded by "the noncommittal words found in [the site owner's] affidavit" that the applicant did not contact the site owner before it filed its application. In Capitol Radio's case, while Athens alleges that Carmean did not recall Raymond's November 27, 1991, telephone call, Athens does not dispute that the contact occurred. Moreover, we find no affidavit or declaration from Carmean himself concerning his failure to recall any contact.

<sup>19</sup> See *Dant*, 2 FCC Rcd. at 5584 (1987) citing *Advanced Mobile Phone Service*, 52 Rad. Reg. 2d (P&F) 1593, 1598 (1983) (applicant's burden only involves obtaining permission from site owner or his agent as to the existence and possible future availability of the site).

<sup>20</sup> See *Wallace*, 49 FCC 2d at 1427 (applicant needs some indication by the property owner that he is favorably disposed toward making an arrangement).

6. Moreover, we find that Raymond's statement concerning Ohio University's expectation that Capitol Radio would request antenna space in writing before filing with the Commission reflects a good-faith misunderstanding of the timing of Capitol Radio's request for tower space and does not support Athens' contention that Capitol Radio made a direct misrepresentation to the Commission. It is undisputed that Capitol Radio inquired as to the availability of space on Ohio University's tower before filing its Application, and that Ohio University's representative responded in a manner that demonstrated its willingness to enter into an agreement. Based on the evidence of contact between Capitol Radio and Ohio University, we believe Capitol Radio's representation of availability was made in good faith.<sup>21</sup>

### III. CONCLUSION AND ORDERING CLAUSES

7. For the reasons stated above, we find that prior to filing Capitol Radio obtained reasonable assurance of the availability of the tower site specified in its Application, in accordance with section 22.115(a)(1) of the Commission's Rules. We also find that Capitol Radio did not make any misrepresentations to the Commission when certifying its Application that it had obtained reasonable assurance of site availability.

8. Accordingly, IT IS ORDERED, that, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and section 22.130 of the Commission's rules, 47 C.F.R. § 22.130, the Petition to Dismiss or Deny filed on May 1, 1992, by Athens Business Communications, Inc. IS DENIED.

9. IT IS FURTHER ORDERED, that, pursuant to section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, this action is taken pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Steven E. Weingarten  
Acting Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>21</sup> See, e.g., *Robert and Patricia Gardner*, 2 FCC Rcd. 4686 (CCB 1987) (if an applicant accepts the representation of an individual apparently in a position to know the availability of a tower, then the applicant did not act unreasonably, and its assertion of reasonable assurance of site availability is made in good faith).