

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

In the Matter of )
CAPITOL RADIOTELEPHONE )
COMPANY, INC. D/B/A ) File Nos. 26932-CD-P/ML-96
CAPITOL PAGING ) 26935-CD-P/ML-96
For Additional Facilities for Paging )
and Radiotelephone Service on the )
152.24 MHz Frequency )
RAM TECHNOLOGIES, INC. ) File No. 28384-CD-P/ML-96
For Additional Facilities for Paging )
and Radiotelephone Service on the )
152.24 MHz Frequency )

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2001

Released: March 29, 2001

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Capitol Radiophone Company, Inc. d/b/a Capitol Paging (Capitol) on November 24, 1999. Capitol seeks reversal of an order on reconsideration of the Wireless Telecommunications Bureau's Commercial Wireless Division (Division) on November 9, 1999, which affirmed the dismissal of Capitol's above-captioned applications to provide paging and radiotelephone service on 152.24 MHz in Point Pleasant and Ripley, West Virginia. For the reasons set forth below, we deny Capitol's Application for Review.

II. BACKGROUND

2. On May 28, 1996, Capitol filed applications to operate new sites on 152.24 MHz at Point Pleasant and Ripley, West Virginia, which were within 40 miles of an existing site operated by Capitol.

1 Capitol Paging Application for Review, filed November 24, 1999 (Application for Review).

2 Capitol Radiotelephone Company, Inc., 14 FCC Rcd 20080 (Comm. Wireless Div. 1999) (Reconsideration Order).

3 The applications were filed pursuant to interim licensing rules, adopted in WT Docket No. 96-18, that permitted incumbent licensees to file initial applications to add new sites that were located within 65 kilometers (continued....)

The applications appeared on a public notice released June 12, 1996, which established a thirty day filing window for the submission of competing applications through July 12, 1996.<sup>4</sup> On July 9, 1996, RAM Technologies, Inc. (RAM) filed a competing application for 152.24 MHz at Gallipolis, Ohio. In a public notice released on July 24, 1996, RAM's application was listed as having been found, upon initial review, to be acceptable for filing.<sup>5</sup> On November 4, 1997, Capitol submitted a late-filed petition to dismiss RAM's application.<sup>6</sup> On November 17, 1997, RAM filed an amendment to its application to submit corrected interference studies and a proposal to change its antenna at Gallipolis to a directional antenna.

3. On February 24, 1997, the Commission released its *Paging Second Report and Order*, in which it adopted rules governing geographic area licensing of common carrier paging and 929 MHz private carrier paging applications, and competitive bidding procedures for selecting among mutually exclusive applications for these licenses.<sup>7</sup> The Commission stated that in light of its decision to adopt geographic area licensing, it would dismiss all pending mutually exclusive paging applications, including those filed under the interim rules adopted in the *Paging First Report and Order*.<sup>8</sup> On December 14, 1998, pursuant to the *Paging Second Report and Order*, the Division dismissed all pending mutually exclusive paging applications,<sup>9</sup> including the applications of Capitol and RAM at issue here.<sup>10</sup>

4. On January 13, 1999, Capitol sought reconsideration of the dismissal of its applications, arguing that the Commission incorrectly dismissed its applications as mutually exclusive with RAM's application. In the *Reconsideration Order*, the Division determined that RAM's November 17, 1997 amendment was a minor amendment that cured any deficiencies in RAM's application alleged by Capitol.

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(40 miles) of an authorized site for which an application had been filed as of September 30, 1995. The authorized site must have been operational as of the date the applications for additional site(s) were filed. The applications would be placed on public notice and subjected to competing applications filed within 30 days. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *First Report and Order*, 11 FCC Rcd 16570, 16583-84, 16589, ¶¶ 26, 41 (1996) (*Paging First Report and Order*), modified, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Order on Reconsideration of First Report and Order*, 11 FCC Rcd 7409, 7411, ¶ 4 (1996).

<sup>4</sup> See *Public Notice*, Report No. NCS-96-32 (rel. June 12, 1996).

<sup>5</sup> See *Public Notice*, Report No. NCS-96-38 (rel. July 24, 1996).

<sup>6</sup> Capitol Radiophone Petition to Dismiss as Blatantly Defective, filed November 4, 1997 (Petition to Dismiss).

<sup>7</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997) (*Paging Second Report and Order*).

<sup>8</sup> *Id.* at 2739, ¶ 6.

<sup>9</sup> See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Order*, 14 FCC Rcd 700, 701, ¶ 4, Attachment A at 773, 774 (Comm. Wireless Div. 1998) (*Division Dismissal Order*).

<sup>10</sup> On August 17, 1999, the Policy and Rules Branch, Commercial Wireless Division dismissed Capitol Paging's Petition to Dismiss as moot, because the *Division Dismissal Order* had dismissed RAM's underlying application. *Robert R. Rule d/b/a Rule Communications*, 14 FCC Rcd 13488, 13489, ¶ 4 (Comm. Wireless Div. 1999).

Accordingly, the Division affirmed the *Division Dismissal Order* and denied Capitol's petition for reconsideration.

### III. DISCUSSION

5. In its Application for Review, Capitol argues that the *Reconsideration Order* conflicts with Section 22.131(d)(1) of our rules, because RAM's original application was not received in a condition acceptable for filing.<sup>11</sup> Capitol has misconstrued the requirements of Section 22.131(d)(1). The determination that an application is "acceptable for filing" is different than a decision to grant the application after substantive review for compliance with Commission rules.<sup>12</sup> Section 22.131(d)(1) states, in pertinent part, that the filing date of an application is "the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later . . . ."<sup>13</sup> Former section 22.120 of the rules, in effect at the time of RAM's filing, provided for an initial review of each application for completeness in order to "identify applications that are defective in an obvious way (e.g. not signed, missing pages, improper or missing fee payment)."<sup>14</sup> Former section 22.120(c) expressly stated that "[a]pplications for which no obvious defects are discovered in the initial review are acceptable for filing."<sup>15</sup> RAM's amendments requested a change in the identification of co-channel transmitters and a change in the directional antenna. These amendments addressed matters that would not have been identifiable as obvious defects in the initial review of RAM's application. RAM's application was properly placed on public notice as acceptable for filing<sup>16</sup> and, accordingly, was entitled to be treated as mutually exclusive with Capitol's earlier-filed applications.<sup>17</sup>

6. Capitol also claims that RAM's amendment could not "relate back" to the date on which the application was originally filed with the Commission.<sup>18</sup> In the *Reconsideration Order*, the Division held that RAM's amendment was a minor amendment that did not alter the filing date of RAM's original

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<sup>11</sup> Application for Review at 1-3, 6.

<sup>12</sup> In this regard, former section 22.120(d) provided that "[t]he listing of an application on a Public Notice as acceptable for filing provides notices to the public that the application has been filed; it does not preclude dismissal of the application if it is subsequently found to be defective or otherwise subject to dismissal under § 22.128." 47 C.F.R. § 22.120(d) (1995).

<sup>13</sup> 47 C.F.R. § 22.131(d)(1) (1995). The Commission's stay of the effectiveness of Section 22.131 as it applies to 931 MHz paging applications, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Order*, 10 FCC Rcd 4146, 4151, ¶ 14 (1995), does not apply to the Capitol and RAM applications for frequency 152.24 MHz that are addressed in this order.

<sup>14</sup> 47 C.F.R. § 22.120(c) (1995).

<sup>15</sup> *Id.*

<sup>16</sup> *See Public Notice*, Report No. NCS-96-38 (rel. July 24, 1996).

<sup>17</sup> *See Paging First Report and Order*, 11 FCC Rcd at 16583-84, ¶ 26. *See also* 47 C.F.R. § 22.120(d) (1995).

<sup>18</sup> Application for Review at 2, 5-6.

application pursuant to rule section 22.131(d)(i).<sup>19</sup> We agree. Former Section 22.123 of the rules specified the filings that would be considered major amendments and provided that filings were minor if they were not classified as major.<sup>20</sup> RAM's amendments to include corrected interference studies and a change in the directional antenna did not fall under any of the listed categories of major amendments to applications specified in section 22.123(e)(6)-(11) and thus were correctly determined to be minor.<sup>21</sup> Accordingly, the original filing date of RAM's application, July 9, 1996, was not altered by the filing of RAM's November 17, 1997 minor amendments.<sup>22</sup>

7. Finally, Capitol argues that RAM's amendment did not cure the alleged defects in RAM's application regardless of the filing date assigned to the application.<sup>23</sup> We find it unnecessary to reach this argument in affirming the *Reconsideration Order*. In the *Paging First Report and Order*, we provided for the filing of initial applications and stated that "[i]f a competing application is accepted for filing, we will treat both applications as mutually exclusive and will hold them in abeyance until the conclusion of the proceeding, and will be resolved in a manner consistent with the rules."<sup>24</sup> Thus, once RAM's application was reviewed as required under former section 22.120 and found to be acceptable for filing, it was properly treated as mutually exclusive with Capitol's application. Further, RAM's application was entitled to mutually exclusive treatment regardless of whether its subsequently filed minor amendment cured an alleged defect, provided the minor amendment was submitted prior to any Commission action dismissing the application after substantive review. We note that the initial review applied to RAM's application was the same initial review applied to Capitol's own application when it was found to be acceptable for filing and was afforded mutually exclusive status, even though Capitol's application had not been subject to substantive review for compliance with Commission rules. Ultimately, the applications of both Capitol and RAM were later dismissed as directed by the *Second Report and Order*.<sup>25</sup> We find that the Division's

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<sup>19</sup> See *Reconsideration Order*, 14 FCC Rcd at 20081, ¶ 3.

<sup>20</sup> 47 C.F.R. § 22.123(e)(6)-(11) (1997). In general, this rule provides that filings in the paging and radiotelephone service are major if they amend pending applications in any of the following ways: changing a requested channel; extending the service area of a station on a requested channel to include area that would not have been served by that station as previously proposed in the application and is not already served by the station on the requested channel; extending the interfering contours of a station on a requested channel beyond the composite interfering contours of that station as previously proposed in the application and the composite interfering contours of any other stations authorized to the filer on a requested channel; increasing the proposed effective radiated power or antenna height above average terrain in any azimuth of a fixed transmitter; changing the location of a fixed transmitter from that previously proposed in the application; or amending a pending application for which pre-filing coordination was required to change the technical proposal substantially from that which was coordinated with other users.

<sup>21</sup> See *id.*

<sup>22</sup> See 47 C.F.R. § 22.131(d)(1).

<sup>23</sup> Application for Review at 3-5.

<sup>24</sup> *Paging First Report and Order*, 11 FCC Rcd at 16583-84, ¶ 26.

<sup>25</sup> *Division Dismissal Order*, 14 FCC Rcd at 701, ¶ 4. RAM filed an opposition to the Application for Review and Capitol filed a reply thereto. RAM Opposition to Application for Review (filed December 9, 1999) (Opposition); Capitol Reply to Opposition to Application for Review, filed December 17, 1999 (Reply). We do not address Capitol's argument that RAM lacks standing to file its Opposition because we have not relied upon RAM's Opposition and therefore we need not address the standing argument. Capitol also claims that the order (continued....)

denial of Capitol's Petition for Reconsideration was proper.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Capitol Radiotelephone Company, Inc. d/b/a Capitol Paging on November 24, 1999 IS DENIED.

## FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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conflicts with Section 309(j)(6)(E) of the Communications Act, 47 U.S.C. § 309(j)(6)(E), which obligates the Commission to attempt to avoid mutual exclusivity in application and licensing proceedings. Application for Review at 3. Capitol did not make this argument before the Division, and we accordingly do not address it. *See* 47 C.F.R. § 1.115(c) (no application for review will be granted if it relies on questions upon which the designated authority was afforded no opportunity to pass).