

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

In the Matters of	)	PR DOCKET NO. 93-231
	)	
Imposition of a 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 RADIOTELEPHONE, INC.	)	
d/b/a Capitol Paging	)	
1420 Kanawha Blvd. E	)	
Charleston, West Virginia 25301	)	
	)	
License of Station WNDA-400 in the	)	
Private Land Mobile Radio Service	)	
	)	
and	)	
	)	
Revocation of License of	)	
	)	
CAPITOL RADIO TELEPHONE, INC.	)	
d/b/a Capitol Paging	)	
1420 Kanawha Blvd. E	)	
Charleston, West Virginia 25301	)	
	)	
License of Station WNWW-636 in the	)	
Private Land Mobile Radio Services	)	
	)	
and	)	
	)	

Revocation of License of )  
)  
CAPITOL RADIOTELEPHONE COMPANY, )  
INC. )  
1420 Kanawha Blvd. East )  
Charleston, West Virginia 25301 )  
)  
Licensee of Station KWU-373 in the )  
Public Mobile Radio Service )  
)  
and )  
)  
Revocation of License of )  
)  
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 Blvd. 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 Blvd. 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. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a Capitol Paging; and Susan A. Aaron, John J. Schauble, Gary P. Schonman, and Daniel B. Phythyon, on behalf of Wireless Telecommunications Bureau.

### INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 3, 1997

Released: November 5, 1997

### Preliminary Statement

1. Capitol Radiotelephone Inc. d/b/a Capitol Paging (Capitol), by its counsel, applies for an award of 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. The Acting Chief, Wireless Telecommunications Bureau (Bureau), by his attorneys, opposes Capitol's application.<sup>1 2</sup>

### FINDINGS OF FACT

2. Capitol provides mobile radio services in the area around Charleston, West Virginia, and paging services throughout West Virginia and parts of Ohio. For some 30 years, Capitol has provided common carrier paging 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.<sup>3</sup> Capitol's PCP operations shared a channel on 152.48 MHz with RAM Technologies, Inc. (RAM).

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

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<sup>1</sup> Pending before the Presiding judge are "First Application For Reimbursement Under the Equal Access To Justice Act" filed February 28, 1997 by Capitol; "Wireless Telecommunications Bureau's Opposition To Capitol Radiotelephone Inc.'s First Application For Reimbursement Under The Equal Access To Justice Act" filed August 20, 1997 by the Bureau and "Reply To Opposition" filed September 4, 1997 by Capitol. In this connection, Capitol consented to a filing date of August 20, 1997 for the Bureau's Opposition.

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

<sup>3</sup> Capitol's authorization for those PCP facilities was set aside when this proceeding was designated for hearing and its application for the PCP facilities was returned to pending status. Before the hearings began, Capitol dismissed its application for the PCP facilities. Since Capitol was liable for a forfeiture as its former licensee, these facilities remained in the caption of this proceeding.

material question of whether Capitol willfully and repeatedly violated the Communications Act and the Commission's Rules in connection with its PCP operations. Capitol Paging, 8 FCC Rcd 6300 (1993). After a hearing, the Presiding Judge concluded that Capitol did not willfully or repeatedly violate the Commission's Rules or make misrepresentations or lack candor before the Commission. Capitol Paging, 9 FCC Rcd 6370, 6377 ¶¶ 55 (ALJ 1994). Rather, the ALJ found that the allegations against Capitol reflected an intent by RAM to avoid sharing the channel with Capitol. Id. at 6378-6379 ¶¶ 63-65.

4. The Review Board affirmed the initial decision in most respects. However, the Review Board found that the ALJ had "glossed over" evidence concerning certain alleged violations and therefore made its own findings as to these matters. 11 FCC Rcd at 2338 ¶8. The Review Board found that Capitol violated 47 C.F.R. § 90.403(e), which requires licensees to take reasonable precautions to avoid causing harmful interference. The Review Board also found that Capitol violated 47 C.F.R. § 90.405(a)(3), which requires licensees, when conducting tests for proper station and system maintenance, to keep testing to a minimum and to employ every measure to avoid harmful interference. The Review Board also found that Capitol violated 47 C.F.R. § 90.425(b)(2), which requires licensees to transmit station identification information by Morse code at a rate of 20-25 words per minute. Id. at 2341 ¶ 26.

5. However, the Review Board held that, while a close question, the record did not establish that the transmissions indicated a malicious intent to interfere with RAM's operation. Id. In the absence of such malicious intent, the Review Board found that the violations did not implicate Capitol's basic qualifications. Id. at 2341 ¶ 27. The Review Board imposed a \$4,000 (\$1,000 per day for four days) forfeiture for violation of 47 C.F.R. § 90.403(e), and forfeitures of \$1,000 (\$250 per day for four days) each for violation of 47 C.F.R. § 90.405(a)(3) and 47 C.F.R. § 90.425(b)(2). Id. at 2341-2342 ¶ 28. As an additional matter, the Review Board deleted findings by the ALJ that RAM had engaged in a deliberate campaign to drive Capitol from the Channel. Id. at 2342 ¶ 32.

6. The Commission, in its Memorandum Opinion and Order, 11 FCC Rcd 8234 (1996)<sup>4</sup> 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 8238-8240 (¶ 15-17). The Commission therefore deleted the \$4,000 forfeiture imposed by the Review Board on that ground. Id. at 8239-8240 (¶ 17).

7. 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

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<sup>4</sup> On March 25, 1996, Capitol filed an Application for Review, contending that the initial decision should be reinstated.

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 filed personnel] amply support[ed]" the review Board's holding that the rule was violated. Commission Decision, 11 FCC Rcd at 8237-8238 (¶ 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 ALJ concerning RAM. Id. at 8240 (¶ 20).

8. 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.

### CONCLUSIONS

9. Section 1.1501 of the Rules 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." <sup>5</sup> The EAJA is applicable because the captioned proceeding sought to revoke licenses held by Capitol. In addition, Capitol meets the eligibility requirements denoted in Section 1.1504 of the Rules. <sup>6</sup>

10. Parties may be considered prevailing parties for purposes of the EAJA "if they succeed on any significant issue in litigation which achieves some of the benefits sought in bringing suit." Hensley v. Eckhart, 461 U.S. 424, 433 (1983). See also Continental Web Press, Inc. v. NLRB, 767 F.2d 321 (7th Cir. 1985). This test was reaffirmed in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, \_\_\_\_\_, 109 S.Ct. 1486, 1492-1493 (1989). In Garland, the Supreme Court held that "the touchstone of the prevailing

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<sup>5</sup> It should be noted that Section 1.1505(b) of the Rules 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 after March 29, 1996." See Section 1.1502. The instant matter was commenced on August 3, 1993; consequently Section 1.1505 does not apply here.

<sup>6</sup> Capitol's February 28, 1997 "Motion For Confidential Treatment" of Exhibits B and C to its Application for Reimbursement which is unopposed, will be granted and the financial information contained in such exhibits will be withheld from public disclosure.

party inquiry must be the alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Id. at \_\_\_\_\_, 109 S.Ct. at 1493.

11. Capitol has met the burden of demonstrating it is the prevailing party. The hearing sought revocation of Capitol's licenses on basic qualification grounds. Capitol prevailed on all issues with the exception of two rule violations. The Commission affirmed the Review Board's finding that Capitol violated the testing and Morse code provisions of the Commission's Rules. 47 C.F.R. Section 90.405(a)(3) and 90.425(b)(2) and assessed a forfeiture of \$2,000. The Bureau urges that since Capitol did not prevail on these issues, it may not recover fees and expenses incurred in defending them. However, Hensley makes clear that the mathematical approach suggested by the Bureau is not appropriate, where, as here, the litigation involves a common core of facts. Under the circumstances, an award should not be reduced because Capitol failed to prevail on every issue.

12. The Bureau also appears to make the further argument that Capitol's failure to prevail on the two code violation issues also precludes any recovery, notwithstanding that Capitol has prevailed on the significant issues in litigation. It is true, as urged by the Bureau, "that 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." (Bureau Opposition, paragraph 15). However, Capitol's entitlement does not rest on that ground. Capitol is deemed to be a "prevailing party" because, consistent with Hensley, it has succeeded on all the significant issues in litigation and the Bureau has failed to achieve any of its objectives in bringing this proceeding.

13. However, while Capitol is the "prevailing party," it can not recover fees and expenses if the Commission was "substantially justified" in designating this matter for hearing. 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 1 215 (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). See also United States v. Modes, Inc. 18 C.I.T. 153 (CIT 1994).

14. The record in this proceeding demonstrates that there was a reasonable basis in law and fact for designating this matter for hearing and prosecuting the case to its conclusion. This proceeding arose out of RAM's repeated complaints of harmful interference by Capitol, accompanied by supporting affidavits, and information developed by Commission personnel

during field inspections. Such evidence properly raised 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. Under the circumstances, there was ample reason for designating this matter for hearing. The fact that the Presiding Judge, in his initial decision, determined that the testimony of RAM's witnesses lacked credibility and credited the testimony of Capitol's witnesses does not undercut the justification for the hearing. On the contrary, as noted by the Bureau, the Presiding Judge's significant reliance on credibility findings in resolving the factual questions supports the view that there was "substantial justification" for the Commission's decision to designate the matter for hearing.<sup>7</sup> Similarly, the Commission's ultimate resolution, on the basis of the record, of the issues in favor of Capitol, with the exception of two rules violations (Sections 90.405(a)(3) and 90.425(b)(2)), does not undermine or diminish the justification that existed in 1993 upon which the Commission relied in designating this case for hearing.<sup>8</sup> In sum, since the Commission's action in designating this matter for hearing and the Bureau's prosecution of the case against Capitol was "substantially justified" as that term is defined in Pierce, Capitol's request for an award of fees and costs pursuant to the EAJA is denied.<sup>9</sup>

Accordingly, IT IS ORDERED, That the "Motion For Confidential Treatment" filed February 28, 1997 IS GRANTED.

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<sup>7</sup> In its Reply to Opposition, Capitol cites the Judge's finding that the allegations in the HDO relating to Capitol's "inhibitor" was a result of an investigatory error by the Commission's inspectors. Also, the allegations in the HDO concerning Capitol's computerized record was mistaken. See Capitol Paging, 9 FCC Rcd 6370, 6383 ¶¶ 114 (ALJ 1994). However, while the allegations were in error, there is no evidence that the Bureau acted in bad faith or for oppressive reasons in deciding to bring revocation proceedings against Capitol. Consequently, the existence of these errors does not preclude a determination that the Commission was "substantially justified" in designating this matter for hearing. See Modes, supra and cases cited therein.

<sup>8</sup> Capitol improperly relies on the Presiding Judge's adverse findings concerning RAM as a basis for its application for fees under the EAJA. Since these findings were stricken from the administrative record, they do not provide a basis for ruling on Capitol's EAJA request.

<sup>9</sup> In light of this determination, it is unnecessary to reach the question of whether the amount of reimbursement sought by Capitol (\$49,636.28) is fully recoverable.

IT IS FURTHER ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,<sup>10</sup> the "First Application For Reimbursement Under The Equal Access To Justice Act" filed February 28, 1997 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin  
Administrative Law Judge

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<sup>10</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).