

FCC MAIL SECTION  
Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 92M-654  
03103

Jun 10 5 15 PM '92

In re Applications of	)	MM DOCKET NO. 92-61 ✓
LRB BROADCASTING	)	File No. BPH-901218MI
DAVID WOLFE	)	File No. BPH-901219MI
ZENITRAM COMMUNICATIONS, INC.	)	File No. BPH-901220MG
For Construction Permit for a New FM	)	
Station on Channel 288A	)	
in Brockport, New York	)	

MEMORANDUM OPINION AND ORDER

Issued: June 9, 1992;

Released: June 10, 1992

Background

1. This is a ruling on Joint Motion To Strike Integration and Diversification Statement of Zenitram Communications, Inc. ("Zenitram") that was filed by LRB Broadcasting ("LRB") and David Wolfe ("Wolfe") (the "Movants") on May 20, 1992. Zenitram filed its Opposition on June 4, 1992.

2. This case was initiated by Hearing Designation Order ["HDO"] DA 92-360, released April 13, 1992. Under the Commission's rules, Notices of Appearance ("NOA") must be filed within 20 days after mailing of the HDO. 47 C.F.R. §1.221(c). The date for filing NOAs in this case was May 4, 1992. The rules further require that standardized integration statements (SIS) must be filed five days later. 47 C.F.R. §1.325(c). The date for filing SISs in this case, allowing for an intervening weekend, was May 11, 1992.

Facts

3. The two Movants each filed their respective SIS on May 11, 1992. Zenitram filed its SIS one day late on May 12, 1992. Atop the first page of Zenitram's SIS document on which appears the Secretary's stamp, there also appears the following notation:

Law Office of Stanley G. Emert, Jr.  
(615) 681-4317  
Created Monday, May 11, 1992, 1:49 p.m.

The document is dated below Mr. Emert's name on May 11, 1992. Mr. Emert's office is located in Seattle Washington. The Certificate of Service reflects that a mailing was made on May 11, 1992.

4. It is officially noted that Seattle time is three hours behind Washington, D.C. time. Therefore, the SIS document was "created" by Mr. Emert at 4:49 p.m. Washington, D.C. time which is about forty minutes before

the scheduled close of the Commission Secretary's office. Mr. Emert is found to have known when he transmitted it that Zenitram's SIS probably would not be filed on the date that it was due to be filed, May 11, 1992. While the rules do not require that the applicant must attest to the accuracy of the SIS,<sup>1</sup> it is important that an applicant be shown the SIS for approval before it is filed. In view of these circumstances it would be almost impossible for Zenitram to file on time and that fact was known to Mr. Emert, the applicant's agent.

5. In its Opposition, Zenitram discloses the following:

Upon investigation, Zenitram has determined that the movants are correct that the pleading was filed on May 12.

Zenitram further represents that the SIS was faxed to an office in Washington, D.C. in the late afternoon of May 11, 1992, for filing on May 11, 1992. A copy of a document that is represented by Zenitram to be a "Fax Activity Log" reflects that the transmission of the document to the Washington, D.C. law firm of Miller & Miller, P.C., was completed on May 11, 1992 at 2:05 p.m. which would calculate to 5:05 p.m. Washington, D.C. time. That would leave 24 minutes to prepare six copies and to reach the Secretary's office with the copies for filing before 5:30 p.m. Notwithstanding that calculated time frame, Zenitram represents:

It was counsel's understanding that the document, indeed, had been filed on that day.

The pleading further states that the "apparent reason for the late filing was that there was a copying problem caused by a partial fax transmission difficulty." But there is no supporting affidavit from Miller & Miller, C.P. that would verify Mr. Emert's account or that would disclose instructions received for filing and related conversations. Thus, there is no statement from Miller & Miller to support counsel's "understanding" that the SIS had been filed on May 11, 1992. Nor was there a motion filed by Zenitram for leave to file its SIS one day late.

6. Zenitram further states that at the time Zenitram filed its application it had included an integration and diversification statement that was later amended. Zenitram argues that there is little difference in the facts disclosed in the earlier statement and the late-filed SIS. Zenitram further argues that there has been no unlawful upgrade and that there will be no surprise or unfair comparative advantage by accepting the SIS. Finally, Zenitram argues that it would not be in the public interest to reduce the number of comparative proposals from three to two.

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<sup>1</sup> Also, since an SIS is in the nature of a pleading, a facsimile signature is permitted. 47 C.F.R. §1.52. See also Mary Ann Salvatoriello, 6 F.C.C. Rcd 4705, 4707 (Comm'n 1991).

Discussion

7. Since the issue here is whether to accept a significant document that was filed one day late, it is first necessary to find a showing of good cause for the delay. See Silver Springs Communications, 3 F.C.C. Rcd 5049 (Review Bd 1988), rev. den., 4 F.C.C. Rcd 4917 (Comm'n 1989). It appears that Mr. Emert did not prepare Zenitram's SIS until the afternoon on the day that it was due to be filed with the Commission. And none of the attendant circumstances of speculative copying problems or a failure of the corresponding law firm to reach the Secretary's office before 5:30 p.m. constitute cause. In Silver Springs Communications, supra, good cause was held to be not shown where the applicant asserted a failure to receive an HDO in the mails. This case presents no similar question of fact about timely notice. Zenitram's counsel, for no stated reason, simply waited until the last minute to file. There has not been a showing of good cause for the acceptance of Zenitram's late-filed SIS.

8. And even though Zenitram was late by only one day, it would be an unfair advantage for one party to receive an opponent's SIS before filing its own SIS. But there is no evidence to show that Zenitram had actually received an opponent's SIS before its filing on May 12. Thus, this record does not support a conclusion that the opposing applicants have been prejudiced. Also, the late filing by Zenitram would not alter a proposal that had formerly been set. Therefore, the analogous unfair upgrade doctrine does not apply here. Cf. Alexander S. Klein, Jr., 86 F.C.C. 2d 423, 434 (Comm'n 1981). However, Zenitram's argument that public policy requires three rather than two competing applicants is rejected. See Capitol City Broadcasting Company, 7 F.C.C. Rcd 2629 (Comm'n 1992). And each applicant is entitled to the SIS that is prescribed by the Commission's hearing rules notwithstanding what was filed earlier. Therefore, there is no policy reason for accepting the late-filed SIS.

9. The Commission has delegated broad discretion to Presiding Judges to regulate the course of its multiparty comparative proceedings. Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (Comm'n 1986). Discretion to accept Zenitram's SIS that was filed one day late will not be exercised here in Zenitram's favor. It appears that the duty to file timely was treated in a cavalier fashion since it was not even transmitted for filing from the west coast until late in the afternoon of the due date. Then, counsel did not immediately follow-up to determine if it could be filed on time. Apparently, it was left to see if anyone noticed that it was one day late. No contemporaneous motion for an extension of time was filed. The certificate of service reflected May 11, 1992, and Mr. Emert states that his "understanding" was that it was filed on the due date. That is an unreasonable understanding because he had a corresponding law firm in Washington, D.C. that could readily inform him on May 11th as to whether or not it had been filed on that date. It would be inappropriate to exercise discretion to accept Zenitram's SIS under circumstances of such an inexcusable disregard for the duty to follow the Commission's rules for filing deadlines and for failing to follow-up with a corresponding local D.C. counsel to determine whether the filing deadline had in fact been met.

Ruling

Accordingly, IT IS ORDERED that the Joint Motion To Strike Integration And Diversification Statement Of Zenitram Communications, Inc. filed by LRB Broadcasting and David Wolfe on May 20, 1992, IS GRANTED.

IT IS FURTHER ORDERED that the Integration And Diversification Statement Of Zenitram Communications, Inc. filed on May 12, 1992, IS REJECTED as a late-filed pleading.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Richard L. Sippel".

Richard L. Sippel  
Administrative Law Judge