

**ORIGINAL**

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**JUN 29 1992**

Federal Communications Commission  
Office of the Secretary

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

**ORIGINAL  
FILE**

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, Brockport, New York	)	

To: The Review Board

**APPEAL**

Donald J. Evans, Esquire  
Marianne H. LePera, Esquire

MCFADDEN, EVANS & SILL  
1627 Eye Street, N.W., #810  
Washington, D.C. 20006  
Its Attorneys

June 29, 1992

No. of Copies rec'd  
List A B C D E

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## APPEAL

Zenitram Communications, Inc. ("Zenitram"), by its counsel and pursuant to Section 1.301 of the Commission's rules, hereby files its appeal of the Memorandum Opinion and Order (the "Order"), FCC 92M-688, released June 12, 1992, in which the application of Zenitram was dismissed for failure to prosecute.

### I. The Facts of This Case Do Not Warrant Dismissal.

The Order dismissing the Zenitram application cites two reasons supporting the presiding Administrative Law Judge's ("ALJ") decision. First, it could not be established that Zenitram had paid its hearing fee; and second, Zenitram's Notice of Appearance ("NOA"), Standard Integration Statement ("SIS") and Standard Document Production ("SDP") were untimely filed.

It is unclear why Zenitram's payment in 1991 of the pre-designation hearing fee was an issue before the ALJ. That question (if there was one) should have been fully and finally resolved by the Bureau's inclusion of Zenitram's application among those designated for hearing. Indeed, had Zenitram not submitted its hearing fee, its application would not have been designated for hearing. Moreover, as evidenced by the FCC date stamp, Zenitram's hearing fee was, in fact, timely filed on July 15, 1991 and negotiated by the FCC. See Exhibit 1, attached hereto (date-stamped letter and cancelled check. Official notice requested). Despite the Bureau's clear resolution of this matter, the Order states that a review of the Commission's list of hearing fee payments "failed to reflect a payment of a hearing fee by Zenitram between July 8, 1991 and July 16, 1991." Order at 3. The ALJ's dismissal due to non-payment of the hearing fee was incontrovertibly based upon a false premise.

The second reason given by the ALJ for Zenitram's dismissal is that Zenitram filed required documents in an untimely manner. Zenitram's NOA, due to be filed on May 4, 1992, was dated and dispatched to the courier for delivery at the FCC before 5:30 on that date. As evidenced by the "Report" filed by Zenitram's previous counsel, a copy of which is attached hereto as Exhibit 2,

the package containing the NOA was not only not delivered by 5:30, but was also inexplicably held by the courier at Washington's National Airport for two weeks. Counsel did not become aware that the NOA had not been filed until May 18th, at which point it was promptly filed.

The ALJ also based his decision on Zenitram's failure to timely file its SDP and its SIS. However, the ALJ had separately stricken the Integration Statement on timeliness grounds. (MO&O, FCC 92M-654, released June 10, 1992). He further opined that if Zenitram were not dismissed, it would be foreclosed from making any comparative showings. Order, footnote 1. Therefore, to the extent that a sanction was appropriate with respect to that particular delict, the ALJ's June 10 MO&O imposed it, in spades.<sup>1/</sup> This Appeal will therefore focus on the late filing of the NOA.

Prior to the two delayed filings within a two week period in May of 1992, Zenitram's application had been diligently and timely prosecuted in all respects. No prior pattern of attorney inattention had placed Zenitram on notice that its application could be in jeopardy. Thus, Zenitram reasonably relied upon its attorney. Moreover, immediately upon receipt of the Order dismissing its application, Zenitram moved to secure new counsel and act to have its application reinstated. Given that Zenitram could not have foreseen a series of bizarre coincidences, or the sudden incapability of its attorney to effectively prosecute its application (whichever the case may be) the outright dismissal of the Zenitram application is inordinately harsh.<sup>2</sup>

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<sup>1</sup> This is not the appropriate time to address the propriety of that action, but the fact is that the rejection of the integration statement and denial of comparative credit had the effect of eliminating all possible prejudice to the other applicants. The need to engage in any comparative discovery against Zenitram was gone, and therefore the slight delay in the filing of Zenitram's NOA had no disruptive effect whatsoever on other applicants or in the proceeding itself.

<sup>2</sup>/Numerous cases exist which involve the dilatory conduct of applicant's attorneys. Cases in which a pattern of dilatory conduct existed, and in which the applicant failed to exercise due diligence in the wake of such conduct

## II. Precedent Supports the Reinstatement.

The ALJ properly recognized the two cases which set forth the legal standard to be applied here. In Communi-Centre Broadcasting, Inc. v. FCC, 856 F. 2d 1551, 1554 (D.C. Cir. 1988), the Court opined that, in evaluating just cause to dismiss an applicant for failure to prosecute, the Commission must consider (1) the justification for failure to comply, (2) the prejudice suffered by other parties, (3) the burden placed on the administrative system, and (4) the need to punish abuse of the system and deter further misconduct. None of these factors support dismissal here.

First, the justification for the late filing is unchallenged. While Zenitram's previous counsel obviously cut the filing quite close, the latest that anyone could reasonably have expected the NOA to be delivered was May 12th, a one day delay which would not realistically have had any effect whatsoever on the conduct of the proceeding. Indeed, since it is undisputed that Zenitram had earlier filed a NOA on July 15, 1991 (See Exhibit 1), it can reasonably be argued that Zenitram filed not too late but too early. At most, the failure to file again with another member of the agency was a relatively minor technicality. Second, as we have seen, not only was an NOA filed earlier than May 4th, but even the slight delay in the filing of the second NOA had no prejudicial effect. The only such effects articulated by the ALJ stemmed from possible delay in initiation of discovery. Order at 6. However, since Zenitram's Integration Statement has already been stricken, no further discovery against Zenitram was necessary or appropriate. Third, the chief "burden" on the administrative system cited by the ALJ was the burden of reviewing motions to dismiss Zenitram's

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have routinely led to dismissal. See, e.g., V.O.B. Inc., 4 FCC Rcd. 6753 (Rev. Bd. 1989). In sharp contrast, the nonfeasance of an attorney which was not part of a pattern of dilatory conduct, and the attendant diligence of the applicant to rectify the situation, justifies the reinstatement of an applicant. See Maricopa County Community College District ("Maricopa"), 4 FCC Rcd. 7754 (Rev. Bd 1989). Precedent clearly establishes that reasonable reliance upon one's attorney, and diligent action in the wake of attorney nonfeasance may excuse an applicant's violation of procedural rules.

application and writing the dismissal order. Zenitram can hardly be charged with having imposed on other applicants the burden of seeking the dismissal of its application, or with putting the ALJ to the trouble of dismissing it. Finally, the consequences of late-filing are so potentially severe that no one in his right mind would deliberately file late as a tactic to "delay the implementing of the early discovery procedures." Id. The ALJ's suggestion to that effect is not reasonable.

In Nancy Naleszkiewicz, 7 FCC Rcd. 1797 (1992) the full Commission applied these standards to exonerate the grossly late (45 days) filing of a notice of appearance. The Commission noted that stricter standards might apply in a comparative context (Naleszkiewicz was a singleton), but it nevertheless pardoned the late filing under circumstances far more egregious than those presented here.

Traditionally, the Review Board has carefully evaluated the individual circumstances surrounding requests for reinstatement by applicants dismissed for failure to prosecute. In this regard, the Board has tempered the harshness of absolute compliance with procedural rules by considering "unusual" or "very special circumstances" which may explain or excuse failures of an applicant for procedural rules "are not to be wielded with Draconian, mechanical, or insensitive finality." Pan American Broadcasting Co., 89 FCC 2d 167, 170 (Rev. Bd. 1982).

### III. Conclusion.

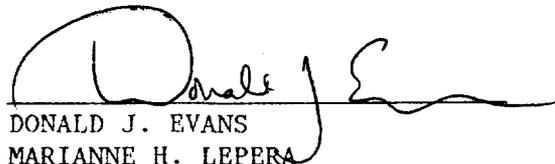
The dismissal of Zenitram's application for non-payment of its hearing fee was factually erroneous. Any prejudice to other parties which might have resulted from the late-filing of Zenitram's Integration Statement and discovery materials has been cured by the elimination of Zenitram's comparative credits. That leaves only the slightly late-filing of an NOA which (a) had already been filed with the agency, (b) occurred under totally unpredictable circumstances,

and (c) meets none of the criteria established by the Court for dismissal of an application. Zenitram's application should be reinstated.

Respectfully submitted,

ZENITRAM COMMUNICATIONS, INC.

By:

A handwritten signature in black ink, appearing to read "Donald J. Evans", written over a horizontal line.

DONALD J. EVANS  
MARIANNE H. LEPERA  
McFadden, Evans & Sill  
1627 Eye Street, N.W., #810  
Washington, D.C. 20006  
(202) 293-0700

June 29, 1992

Its Attorneys

Exhibit 1

**BRYCE & EMERT**  
212 S. Peters Road  
KNOXVILLE, TENNESSEE 37923  
(An Association)

Philip J. Bryce  
Stanley G. Emert, Jr.  
-----  
David P. Klucken

FCC/MELLON JUL 15 1991

P.O. Box 52225  
Knoxville, Tennessee 37950-2225  
615/ 690-5566  
615/ 690-4967 (fax)

July 12, 1991

Federal Communications Commission  
Mass Media Services  
c/o Mellon Bank, Three Mellon Bank Center  
27th Floor  
Attn: Wholesale Lockbox Shift Supervisor  
525 William Penn Way, Room 153-001  
Pittsburgh, PA 15259-0001

Re: FM Application  
Brockport, New York  
Zenitram Communications, Inc.

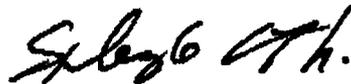
Dear Sir or Madam:

Enclosed please find a Notice of Appearance And Payment Of Hearing Fee in the above referenced matters. Also enclosed is the Form 155 and a check in the amount of \$6,670.00 for the filing fee.

Please file same accordingly and return to me a stamped copy in the enclosed self-addressed envelope.

Thank you for your assistance in this matter. Should there be any questions, please do not hesitate to contact me.

Sincerely,



Stanley G. Emert, Jr.

SGE:krd  
Enclosures

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

In re:  
Applications of

Zenitram Communications, Inc.

File No. BPH-901220MG

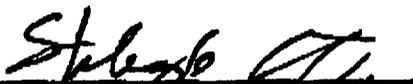
For Construction Permit  
for a new FM Station in  
Brockport, New York

To: The Commission

**NOTICE OF APPEARANCE AND PAYMENT OF HEARING FEE**

Zenitram Communications, Inc., by and through counsel, hereby states that said party will appear on the date fixed for the hearing and present evidence on the issues as required by new Commission rules. In accordance with Section 1.221 of the Commission's Rules, a hearing fee in the amount of \$ 6,760.00 is submitted herewith.

Zenitram Communications, Inc.

By:   
Stanley G. Emert, Jr.  
Its Attorney

Bryce & Emert  
212 S. Peters Road  
P.O. Box 52225  
Knoxville, Tennessee 37950  
(615) 690-5566

July 12, 1991

FEDERAL COMMUNICATIONS COMMISSION  
**FEE PROCESSING FORM**

Please read instructions on back of this form before completing it. Section I MUST be completed. If you are applying for concurrent actions which require you to list more than one Fee Type Code, you must also complete Section II. This form must accompany all payments. Only one Fee Processing Form may be submitted per application or filing. Please type or print legibly. All required blocks must be completed or application/filing will be returned without action.

**SECTION I**

APPLICANT NAME (Last, first, middle initial)

**Martinez, Jr., Domingo**

MAILING ADDRESS (Line 1) (Maximum 85 characters - refer to instruction (2) on reverse of form)

**88 Avenue D**

MAILING ADDRESS (Line 2) (if required) (Maximum 85 characters)

CITY

**Rochester**

STATE OR COUNTRY (if foreign address)

**New York**

ZIP CODE

**14621**

CALL SIGN OR OTHER FCC IDENTIFIER (if applicable)

**BPH90-1220MG**

Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in FCC Fee Filing Guides. Enter in Column (B) the Fee Multiple, if applicable. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number entered in Column (B), if any.

(A)	(B)	(C)	FOR FCC USE ONLY									
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**SECTION II** — To be used only when you are requesting concurrent actions which result in a requirement to list more than one Fee Type Code.

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STANLEY G. EMERT, JR., ATTORNEY

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PAY TO THE  
ORDER OF

FCC

15,676.00

*St. Thomas Roman Catholic Church*

DOLLARS

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FIRST  
TENNESSEE  
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KNOXVILLE, TENNESSEE 37905-0200

MEMO

ZENITH BANK (COMM. INC.)

*Shybe*

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OF ENDORSEMENT GUARANTEED  
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**Exhibit 2**

RECEIVED

MAY 20 1992

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

Federal Communications Commie  
Office of the Secretary  
RECEIVED

In re:  
Applications of ) MM Docket No. 92-61  
LRB BROADCASTING, INC. ) File no. BPH-901218MI  
DAVID WOLFE ) File No. BPH-901219MI  
ZENITRAM COMMUNICATIONS, INC. ) File No. BPH-901220MG

MAY 20 1992

FCC MAIL

For Construction Permit  
for a new FM Station in  
Brockport, New York

To: The Honorable Richard Sippel  
Administrative Law Judge

#### REPORT

Zenitram Communications, Inc. ("Zenitram") , by and through counsel, hereby provides the following report:

1. On Saturday, May 16, 1992, counsel for Zenitram received a document entitled "Non-Delivery Notice" ("the notice") from the courier which services had been retained for timely delivery of a package to the office of the Secretary of the Commission on May 4, 1992. The package contained, *inter alia*, Zenitram's post Hearing Designation Order "Notice of Appearance". The notice showed that the package was being held at the Washington National Airport near Washington D.C.

2. Counsel called the number listed on the notice for an explanation of the document, but could not get a response until Monday, May 18. From several phone conversations with courier personnel, it appears that the package was delivered to the Commission after 5:30 p.m., even though it was clearly marked to deliver before 5:30 p.m. Inexplicably at this point, the package has been held for two (2) weeks at the airport.

3. Zenitram's Notice of Appearance was served upon the Presiding Judge, other counsel, the Hearing Branch, and the Data Management Branch. Counsel requested that the package containing Zenitram's Notice of Appearance be delivered to the Commission immediately. Additional information is being sought by Zenitram as to this matter.

4. Zenitram further notes that prior to July 15, 1991, it properly paid its hearing fee, and filed a "Notice of Appearance and Payment of Hearing Fee" at that time. Moreover, it has filed a "Petition for Leave to Amend" and "Integration and Diversification Statement". Zenitram requests no relief in this pleading, but filed this Report to provide information.

Zenitram Communications, Inc.

By:   
Stanley G. Emert, Jr.  
Its Attorney

Law Office of Stanley G. Emert, Jr.  
2310 2d Avenue, Ste. 845  
Seattle, Washington 98121  
(206) 525-5459

May 18, 1992

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing "Report" has been sent by prepaid United States mail, first class, on the 18th day of May, 1992, to the following:

The Honorable Richard Sippel  
Federal Communications Commission  
2000 L Street N.W.  
Washington D.C. 20554

Charles Dziedzic, Esq.  
Chief, Hearing Branch  
Federal Communications Commission  
2025 M Street N.W.  
Room 7212  
Washington D.C. 20554

Chief, Data Management Staff  
Audio Services Division  
Mass Media Bureau  
Federal Communications Commission  
Room 350  
1919 M Street NW  
Washington, D.C. 20554

Richard J. Hayes, Jr., Esq.  
13809 Black Meadow Road  
Spotsylvania, Virginia 22553  
Attorney for David Wolfe

Arthur Belenduk, Esq.  
Smithwick & Belenduk, P.C.  
2033 m Street, N.W., Suite 207  
Washington D.C. 20036  
Attorney for LRB Broadcasting



---

Stanley G. Emert, Jr.

**CERTIFICATE OF SERVICE**

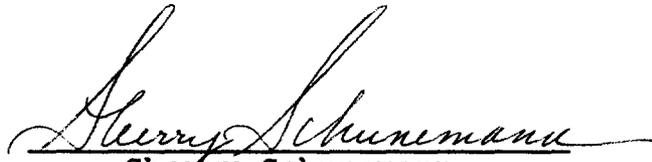
I, Sherry L. Schunemann, a secretary in the law firm of McFadden, Evans & Sill, do hereby certify that a copy of the foregoing "Appeal" was mailed by First Class U.S. Mail, postage prepaid, this 29th day of June, 1992 to the following:

\* Norman Goldstein, Esquire  
Hearing Branch, Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554

Richard J. Hayes, Jr., Esquire  
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Spotsylvania, Virginia 22553  
Counsel for David Wolfe

J. Richard Carr, Esquire  
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Chevy Chase, Maryland 20813-0725  
Counsel for David Wolfe

Arthur V. Belendiuk, Esquire  
Smithwick & Belendiuk  
1990 M Street, N.W., #510  
Washington, D.C. 20036  
Counsel for LRB Broadcasting

  
Sherry Schunemann

\*Denotes Hand Delivery