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

MM Docket No. 88-342

In re Applications of

OCEAN PINES LPB BROADCAST CORP.	File No. BPH-870406KF
Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a OCEAN PINES BROADCASTING COMPANY	File No. BPH-870406KH

For Construction Permit for
New FM Station, Channel 246A,
Ocean Pines, Maryland

Appearances

Robert A. DePont, and *Robert E. Levine* on behalf of Ocean Pines LPB Broadcast Corp.; *Henry A. Solomon* on behalf of Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a Ocean Pines Broadcasting Company.

DECISION

Adopted: June 29, 1990; Released: October 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing Concurring Statement; Board Member ESBENSEN issuing Separate Statement.

Board Chairman MARINO:

1. The two remaining applicants in this case both propose to establish a new FM station in Ocean Pines, Maryland (which, notably, is in close proximity to Fenwick Island, Delaware). In his *Initial Decision* (I.D.), 4 FCC Rcd 7767 (1989), Administrative Law Judge (ALJ) Edward J. Kuhlmann dismissed the application of Ocean Pines LPB Broadcast Corp. (Ocean Pines) pursuant to the Commission's inconsistent or conflicting application rule, 47 CFR §73.3518, because Dr. Leonard P. Berger, Ocean Pines' sole stockholder, had been found in another proceeding, *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6589 (ALJ 1988), to be "the real-party-in-interest" and "in control" of an earlier-filed application to establish a new FM station at Fenwick Island, Delaware, and that the 1 mv/m contours of these two proposed facilities overlap each other. (*See* I.D., para. 45.) At oral argument in this proceeding held on April 25, 1990, Ocean Pines' new counsel urged that two issues are dispositive here: First, whether the findings in the *Key* case, if affirmed by the Board, justify the ALJ's action dismissing Berger's application; and second, whether Berger "has had a fair opportunity to litigate those issues." (Tr. 108-109). The Board will affirm the ALJ's dismissal of Ocean Pines' application for the reasons set out below.

BACKGROUND

2. On July 12, 1985, Fenwick Island Broadcast Corporation and Leonard P. Berger, collectively doing business as Fenwick Island Broadcast Limited Partnership I (Fenwick LP) filed an application for a new FM Station at Fenwick Island, Delaware. Berger held an 80% equity interest in Fenwick LP until April 2, 1987, shortly before he filed Ocean Pines' present application in this proceeding on April 6, 1987. *Key*, 3 FCC Rcd at 6592, paras. 60-62.

3. In *Key*, the Fenwick LP application was consolidated for hearing with several competing applications, and the presiding ALJ there designated the following special issues for hearing:

> (a) To determine whether Leonard Berger, M.D., is the real party in interest to the application of Fenwick L.P.;
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> (b) To determine whether, in light of Dr. Berger's interest in an application for a construction permit for a new FM broadcast station at Ocean Pines, Maryland, and the existence of an overlap of the 1 mv/m contours of the Ocean Pines and Fenwick L.P. proposals, the continued prosecution of the Fenwick L.P. application violates the provisions of Section 73.3518 of the Commission's Rules, prohibiting inconsistent applications.

Key, 3 FCC Rcd at 6587 para. 6. After a trial type hearing was held on these issues, the *Key* ALJ released his *Initial Decision*, there containing specific findings and conclusions concerning the "real-party-in-interest" and the inconsistent application issues. (*See Key* I.D., paras. 30-62; 138-148). The "real-party-in-interest" issue was resolved against Fenwick LP, but that applicant was *not* disqualified; instead, Fenwick LP was awarded "no decisive comparative credit for [its] flawed ownership proposals". *See* 3 FCC Rcd at 6599.

4. In this proceeding, Ocean Pines' application was consolidated for hearing with several other competing applications by *Hearing Designation Order* released August 3, 1988, 3 FCC Rcd 4641 (1988) (HDO). The HDO referred to the issue which had been designated in *Key*, and placed Berger on notice that if he received a construction permit here "its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of the outcome" of the *Key* case. *Id.*, 3 FCC Rcd at 4642. Thereafter, the ALJ in this proceeding specified the following issues (I.D., para. 1):

1. To determine whether the findings and conclusions about the conduct of Leonard P. Berger, as a real-party-in-interest in *Key Broadcasting Corporation*, 3 FCC Rcd 6587 (ALJ 1988), should disqualify Ocean Pines LPB Broadcast Corp.

2. To determine whether Ocean Pines LPB Broadcast Corp.'s application violates §73.3518 and should be dismissed.

An appeal of the ALJ's designation of these issues was denied by the Board wherein we agreed that Ocean Pines should not be permitted to collaterally attack the findings in the earlier *Key* case. *See Ocean Pines FM Partnership*, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989).

5. Later, in his I.D., the ALJ reported that at the hearing in the instant proceeding (I.D., para. 45; emphasis added):

> Leonard Berger was provided with an opportunity to show why his representations in the Key Broadcasting Corporation case should not disqualify him here. *He chose not to introduce any new evidence on the issue.* Instead, he urges that the decision in Key Broadcasting Corporation did not hold that the applicant Fenwick Island LP should be disqualified but that Leonard Berger should be considered an active partner in the applicant.

After summarizing the critical findings in the *Key* case (I.D., paras. 43-44), the ALJ concluded here that while the natural inference and implication of the *Key* case "is that Leonard Berger misrepresented his role in Fenwick Island LP from the outset, the presiding officer [in *Key*] did not disqualify Fenwick LP or consider whether the applicant should be disqualified." I.D. para. 46.

6. In *Key*, the Section 73.3518 issue had been resolved in favor of the Berger applicant because:

> The issue was added on the strength of Dr. Berger's application filed for a frequency in Ocean Pines, Maryland. However, the Ocean Pines application was filed after the application for Fenwick Island was filed. If either of these two applications are inconsistent, it would have to be the Ocean Pines application and not the Fenwick Island application. The Section 73.3518 issue has to be and IS RESOLVED in Fenwick L.P.'s favor.

In addressing this issue here, the ALJ held that the findings and conclusions in *Key* demonstrated that Berger's "proposal for Ocean Pines violates Section 73.3518." I.D. para. 46. The ALJ reasoned that (*id.*, at paras. 47-48; emphasis added):

> Section 73.3518 provides that "[w]hile an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor, or assignee." While Berger's Fenwick Island proposal has been pending, he applied for Ocean Pines. The 1 mV/m contours of the two proposals overlap. Although the names are different, *control is exercised by Leonard Berger over both the Fenwick Island and Ocean Pines applicants. Key Broadcasting Corporation*, 3 FCC Rcd 6587, 6598 (1988). LPB's claim that Berger deliberately sought to shed his ownership in Fenwick Island LP before he applied for Ocean Pines is beside the point since it has been found, after a hearing, that he did not.
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> A majority interest in two applicants held by the same persons or entity violates the inconsistent application rule. The Commission has held that under those circumstances the appropriate action to take is the dismissal of the latest filed application. *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3494 (1987), *citing See Agnes J. Reeves Greer*, 45 F.C.C. 2272 (1965). LPB was aware at the outset that Leonard Berger's application in this proceeding might be jeopardized by his actions in Fenwick Island. Because LPB's application violates §73.3518, it will be dismissed.

DISCUSSION

7. *Real-Party-In-Interest-Issue:* At the outset we are faced with a persistent contention that "the gravamen of the real-party-in-interest issue is intent to deceive" which Ocean Pines advanced in its exceptions, at oral argument (Tr. 118), and in a subsequent written Supplement filed May 18, 1990. It emphasizes the proposition that an intent to deceive, which lies at the core of all misrepresentation-like issues, must be proven before an applicant may be disqualified on a real-party-in-interest issue, citing *Tequesta Television, Inc.*, 64 RR 2d 497, 498 (Rev. Bd. 1987), and also submits that this issue does "raise a character matter." Tr. 145-146. In sum, Ocean Pines urges that "in order to find conduct of the alleged real-party-in-interest to be disqualifying, there must be findings of misrepresentation, intent to deceive, and/or lack of candor; and, absent such findings, disqualification of the applicant would be improper." Supplement p. 3. Ocean Pines also points out that even counsel for its opponent in this case conceded at oral argument that the ALJ in *Key* did not make such findings. Tr. 142-144.

8. We do not have to reach these arguments because a review of the Initial Decisions in both *Key* and *Ocean Pines*, *see* paras. 5-6, *supra*, establishes that Berger was not disqualified on the real-party-in-interest issue. In his I.D. here, the ALJ did indicate that the implication of the *Key* conclusions "is that Leonard Berger misrepresented his role in the Fenwick LP application", but he also specifically recognized that the presiding ALJ in *Key* "did not disqualify" or even consider whether Fenwick LP "should be disqualified." I.D. at para. 46. Accordingly, the ALJ held that the Section 73.3518 issue was dispositive here. Thus, we do not have to reach the arguments concerning the nature of the real-party-in-interest issue which was of "no decisional significance." *See Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 3727 para. 9 (Rev. Bd. 1990).

9. *Inconsistent Application Issue* : Section 73.3518 is part of the Commission's processing rules and is designated to bar, at the threshold, an application which is inconsistent or in conflict with a previously filed application. Here, if the two applications are found to be under "common control" of Berger when his second (Ocean Pines) application was filed, that latter application would violate the Commission's multiple ownership rules because of prohibited 1 mv/m overlap. Indeed, it is undisputed that the 1 mv/m service areas of the two stations would result

in substantial prohibited overlap. Further, Ocean Pines disputes at great length the determination that Berger, in fact, controlled the Fenwick application at all times, and especially *after* he decided to file the Ocean Pines application.

10. We agree with Ocean Pines that the Board is obliged to first decide whether the findings and conclusions in *Key* are accurate (*i.e.,* supported by a preponderance of the evidence in that record). Exceptions were filed with the Board in *Key*, and that case was fully briefed and argued, but was not decided by the Board because the parties entered into a joint settlement agreement (which was approved and that proceeding terminated). *See Key Broadcasting Corp.*, 5 FCC Rcd 1986 (Rev. Bd. 1990)(application for review pending). However, our previous ruling in this case (*see Ocean Pines FM Partnership, supra,* 4 FCC Rcd at 3491), specifically indicated that the findings in *Key* would be binding here only if affirmed on appeal. Since the ALJ's action dismissing Ocean Pines rested squarely on the findings and conclusions in *Key*, the Board must conduct its own review of the record to insure that it supports the ALJ's pivotal conclusion that "control is exercised by Leonard Berger over both Fenwick Island and Ocean Pines applicants." I.D. at para. 47.

11. Until the most recent oral argument in this case, Ocean Pines' initial counsel, Robert E. Levine, represented both Fenwick Island LP and Ocean Pines at both hearings and filed exceptions before the Board. Ocean Pines' exceptions, which he prepared, incorporated (Br. 11, note 9) the more specific exceptions he had filed in the *Key* case. Since the Board had earlier heard oral arguments on those exceptions, and since consideration of those more specific exceptions will conduce to the proper dispatch of the Board's review of this case and fairness to an applicant whose application has been dismissed, we will review the record in the light of all exceptions. The following findings, which support the dismissal of the Ocean Pines application, are based largely upon the I.D. in *Key*, and have been slightly modified in the light of the exceptions and oral argument in both *Key* and *Ocean Pines*. The transcript citations contained in the following paragraphs (13-28) are to the *Key* proceeding.

12. The original principals of Fenwick L.P. were Leonard P. Berger, M.D., 80 percent limited partner, and Fenwick Island Broadcast Corporation, a Maryland corporation, 20 percent general partner. The corporation's original shareholders, officers, and directors (as of July 11, 1985) were: Sharon V. Lyon, President, Director and 49 percent shareholder; Lester L. Green, Vice President, Treasurer, Director and 20 percent shareholder; Alfred J. Stewart, Secretary, Director and 20 percent shareholder; and Elijah Saunders, M.D., Vice President, Director, and 11 percent shareholder. (Fenwick LP Exh. 1).

13. Prior to becoming involved with Fenwick L.P., Berger was active in the cable television business (Tr. 599, 601, 602), entering the cable television industry in 1971 as a founder, officer, director, and stockholder in Calvert, a Baltimore county cable system (Tr. 599). In 1978, he became President of Calvert (Tr. 601) and ran the company's day-to-day affairs (Tr. 619). Berger was also active in an unsuccessful applicant for a Baltimore city cable television franchise and ran that applicants' day-to-day affairs as well (Tr. 619). He met Green, one of the original principals in Fenwick L.P., at the public hearings in connnection with the city cable franchise (Tr. 616-17).

14. Berger and Dr. Elijah Saunders are "life-long" friends (Tr. 643). They met at age 15, and were college roommates and later classmates in medical school (Tr. 643). Berger met Stewart, another original principal in Fenwick L.P., through Saunders (Tr. 617). Berger describes himself as a friend and advisor to Saunders and Green (Tr. 642). Berger "recommended" Saunders for the position of Vice President of the University of Maryland Hospital, a position which Saunders now holds (Tr. 643, 798), and Berger speaks with Saunders frequently (Tr. 643).

15. Robert Levine, who also represented Calvert in its cable television business, periodically contacted Berger with information about "window openings" (Tr. 637), to apply for new broadcast facilities. Some two months prior to the tendering of Fenwick L.P.'s application, Levine informed Berger of an opportunity to apply for a new radio station in Fenwick Island (Tr. 638-39). Levine also explained to Berger the nature of minority preferences in the comparative hearing process (Tr. 639). Berger then informed Lyon, and they contacted Saunders, Stewart and Green about the Fenwick Island opportunity (Tr. 639).

16. Berger testified that he brought together Lyon, Saunders, Stewart, Green, and himself as an applicant group for Fenwick L.P. because he wanted to "do something" for these people (Tr. 622-23). Prior to the filing of the application, Berger and the other principals agreed that Berger was to hold an 80% interest in Fenwick L.P. as a limited partner (Tr. 640). The remaining 20% was to be held by the other principals as shareholders in a corporate general partner (Tr. 640).

17. After they had agreed, Berger discussed with Lyons that they were going to have to retain an engineer for Fenwick L.P. (Tr. 674-75). He did not confer with the other principals about this decision, nor did he apprise them of the financial arrangement arrived at with the engineer (Tr. 676-79). Significantly, Berger retained the engineer after the time that the principals agreed that he was to be a limited partner (Tr. 673-74).

18. The engineer sent Berger a diagram of an appropriate site for the station (Tr. 672). Berger contacted a real estate agent to find a site, and then purchased an option on a transmitter site for Fenwick L.P. and agreed to make the site available to the partnership (Tr. 672). This is the same site specified in Berger's application in the instant proceeding (Tr. 671).

19. Berger testified that he would own the transmitter site in the event the application was granted; while he "hopes" the partnership will pay him something for the site, he would not "take away" the site in the event they are unable to reimburse him for the cost (Tr. 686-87). The costs required to purchase the site option and the anticipated cost of exercising that option were above and beyond Berger's 80% contribution to the partnership (Tr. 686). According to the minutes of the organizational meeting of the Board of Directors of Fenwick L.P.'s corporate general partner, Saunders was obligated to contribute $110 as payment for 110 shares of stock (FIC Exh. 6, pgs. 5, 6). Lyon was obligated to contribute $490 for 490 shares of stock (*id.*, p. 3). Green was obligated to contribute $200 for 200 shares of stock (*id.*, p. 4), and Stewart was obligated to contribute $200 for 200 shares of stock (*id.*, p. 5).

20. Berger purportedly "resigned" from the Fenwick partnership on April 2, 1987, after deciding to apply for the FM station at issue here (Tr. 626, 688-89). He did so

after being advised by Levine that, because of the Commission's rules, he could not continue in Fenwick L.P. and prosecute an application for Ocean Pines, Maryland (Tr. 626).

21. When Dr. Berger "withdrew" from Fenwick L.P., he sold his interest to Lyon for $10.00 and other considerations" (Tr. 694). Berger described the "other considerations" as his "right to apply for another license" (Tr. 694), and believed this was fair because he was leaving "the partnership on its own" (Tr. 691). It is undisputed that Berger and Lyons have had a close personal relationship since 1981. (Tr. 605-609, 710). Dr. Berger was divorced in 1976 or 1977 (Tr. 598), and he first met Lyon on a trip to Florida in 1980 or 1981, when he went out with her on a blind date (Tr. 602). They shared a residence in Florida for six to twelve months in 1980 or 1981 (Tr. 608-09).

22. Lyon was later hired by Calvert, Berger's cable television company, in 1980 or 1981 as Director of Advertising Sales (Tr. 610). Berger sold his interests in Calvert in September 1983; the sale was finalized in February, 1984 (Tr. 610), and he thereafter established a permanent residence in Ocean City, Maryland in 1984 (Tr. 611).

23. In February, 1985, Lyon moved to Ocean City and was hired by the Sheraton Fontainebleau Inn & Spa (Tr. 611; Fenwick L.P. Exh. 2, p. 2), which is controlled and owned by Berger (Tr. 612, 743). When Lyon moved to Ocean City to work for the Sheraton, she resided temporarily with Berger (Tr. 612). She currently resides in a condominium owned by Berger (Tr. 610, 742).

24. Berger considers himself to be a wealthy man (Tr. 684), while Lyon is from a family of average means (Tr. 711). During their relationship, he has given Lyon monetary gifts when she was in need of money (Tr. 683, 730-31). Berger has also given her non-monetary gifts on many occasions (Tr. 731, 733-34, 736). Lyon testified that, on at least several occasions, these non-monetary gifts have been worth more than $6,000 (Tr. 731).

25. The hearing fee assessed by the Commission in the Fenwick case was due on July 22, 1987. *See Hearing Designation Order*, DA 87-746, released July 1, 1987 at para. 19. Lyon testified that she "hinted" to Berger that she deserved a $6,000 bonus (Tr. 745-46) and she was aware that the Commission's hearing fee was $6,000 (Tr. 746).

26. Berger gave Ms. Lyon $6,000, in July of 1987. (Tr. 682-3), and it was conceeded that he was aware of the Commission's $6,000 hearing fee requirement since he had been informed of the requirements by Levine in connection with his application for the Ocean Pines station (Tr. 685).

27. Berger is uncertain whether he has made other gifts to Lyon during the time in which the Fenwick L.P. application was pending before the Commission (Tr. 684), but Berger further testified that, if Lyon approached him today for money he would probably give her the money again (Tr. 688), and that he had in the past, and would in the future, give her advice about the Fenwick application. (Tr. 695).

28. In sum, the crucial determinations in *Key* established that Berger, after assembling the principals in the Fenwick Island application and agreeing to be a limited partner, maintained firm control over the venture. Levine, who Berger described a "my lawyer" and "a very good friend" (Tr. 648), was retained to represent *both* Berger's Fenwick Island and Ocean Pines applicants. Berger selected Fenwick Island's engineer, and purchased an option on a transmitter site which was to be used by both the Fenwick Island and the Ocean Pines applicants. Since 1981, Berger had maintained a close personal and business relationship with Lyon, his "protegee," providing her with jobs, housing, as well as substantial gifts of money and jewelry, and, later in 1987, transferred his 80% interest in the Fenwick Island application to her for insignificant consideration. Perhaps most significant was the fact that after Berger withdrew from the Fenwick application, Lyon obtained the $6,000 hearing fee directly from Berger as well as the fact that he had not in the past, and would not in the future, insulate himself from her management of the Fenwick application. These objective indicators of control (and the ALJ's opportunity to observe the witnesses who testified in the Fenwick Island case) support the ALJ's *Key* conclusion that (I.D. at para. 147):

> . . . it was Dr. Berger alone who has been the life blood of Fenwick L.P.'s entire proposal. In April of 1987, Dr. Berger decided to apply for a frequency in Ocean Pines, Maryland, and upon counsel's advice, withdrew from Fenwick L.P. But there is no evidence indicating that Dr. Berger has extricated himself from his position of control in relation to this application nor that his interest will not continue through Ms. Lyon in the future. On the contrary, the record indicates that even after his withdrawal from Fenwick L.P., Dr. Berger has continued to be involved with the activities and decisions made by the partnership. He has provided Ms. Lyon with the $6,000 hearing fee in order that Fenwick L.P. could continue in this proceeding. He has stated his willingness to continue to provide funds to Ms. Lyon for use in this proceeding. He owns the option to purchase Fenwick L.P. transmitter site . . . . There can be no doubt that Dr. Berger potentially and even now controls the operation of Fenwick L.P. There is ample proof that Ms. Lyon and Dr. Saunders are too beholden to Dr. Berger to be considered independent of his control. It must be concluded that Dr. Berger is the real party in interest.

29. Thus, the record before us fully supports the conclusion that the limited partnership in Fenwick was a "sham" when measured by any of the legal standards which have been utilized in the past. *See Metroplex Communications, Inc.*, 4 FCC Rcd 8149 (Rev. Bd. 1989), *rev. denied*, FCC 90-294, released September 19, 1990. More importantly, all of the objective indicators require us to affirm the ALJ's findings that Berger was "the real-party-in-interest" and "in control" of the Fenwick application from the beginning, and was still in control of that application when he filed the instant Ocean Pines application. It is undisputed that the proposed service areas of these two applications substantially overlap in violation of the Commission's multiple ownership rules, and the inconsistent applications rule. Controlling Commission precedent establishes, as the Administrative Law Judge correctly concluded, that the inconsistent application rule was violated when the Ocean Pines application was filed, *see Margaret Escriva*, 4 FCC Rcd 5294 (1989), and that the

appropriate remedy is the dismissal of the later-filed Ocean Pines application. *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3494 (1987).

30. *Collateral Estoppel*: At oral argument, new counsel for Berger argued that, if the Board affirms the findings in the Fenwick Island case, those findings cannot be applied against Berger here because Levine did not formally represent Berger in the Fenwick Island hearing. However, the record establishes that Berger was given specific notice of the issues to be tried in both cases (*supra*, paras. 3-4); Levine was counsel of record in both cases; and Berger considered Levine "my" lawyer, and was satisfied with Levine's joint representation of his common interests. Accordingly, as a factual matter, there is no reason why the Board should modify its previous ruling that Berger should not have been permitted to relitigate the facts established in the Fenwick Island case "where the parties and issues are similar or interrelated." *See Ocean Pines*, *supra* 4 FCC Rcd at 3491.

31. Departing significantly from the exceptions filed by Ocean Pines' erstwhile counsel, its current counsel at oral argument contended that the adverse real-party-in-interest findings of *Key* cannot be held against Berger in the instant case, because Berger was not a "party" to the *Key* case and had no opportunity to fully litigate that issue. *See* Tr. 109, 120-132, 150-154. In other words, while this precise legal argument was not made specifically in Ocean Pines' original exceptions (and might therefore be ignored, *see* 47 CFR § 1.277(a)), current counsel essentially argues that the doctrine of collateral estoppel cannot be used to hold the *Key* findings and conclusions against it, because Berger was not a "party" in *Key*, merely a witness.

32. We made clear in our interlocutory *Ocean Pines* order that, inasmuch as a full evidentiary hearing had been held in *Key* to determine whether Berger was a real-party-in-interest there, the ALJ here need not relitigate those findings in this proceeding, because we would rule on the exceptions in *Key* going toward those findings. *See* 4 FCC 2d at 3491. However, as indicated, *Key* was settled before we ruled on those exceptions. Consequently, our review of Ocean Pines' instant exceptions has necessarily required that we give a *de novo* review to the record in *Key*, and to all of the exceptions filed in that case. We have done so and are in accord with the *Key* ALJ that Berger was not only a real-party-in-interest in that case, but actually controlled the applicant fronted by Lyon.

33. Notwithstanding, new counsel maintained at oral argument that collateral estoppel was unavailable, and, as a result, Berger was, by virtue of our prior *Ocean Pines* order, denied an opportunity to adequately challenge the adverse findings in *Key*. Just prior to our 1989 *Ocean Pines* order, we had reviewed the leading authorities at length in *Montgomery County Media Network*, 4 FCC Rcd 3749 (Rev. Bd. 1989), and set out the following prequisites to the application of collateral estoppel:

> (1) an issue identical to one that was previously litigated and that was essential to the previous decision;
>
> (2) the prior adjudication must have reached the stage of being a final judgment on the merits;
>
> (3) the party to be estopped must have been a party to the prior litigation, or in privity with such a party;
>
> (4) the estopped party must have had a full and fair opportunity to litigate the issue in the prior proceeding.

In *Montgomery County*, we held that because the subject applicant had merely been a discredited witness in a different case, collateral estoppel was unavailable and that the applicant's conduct would have to be relitigated in a second proceeding.

34. At the oral argument, counsel urged, in essence, that Berger's posture in *Key* was identical to that of the witness in *Montgomery County*, and that he was not "*a party to the prior litigation, or in privity with such a party* . . . ." We find this eleventh-hour argument to be hollow, at best. Unlike *Montgomery County*, *the* issue in *Key* was whether, in fact, Berger yet remained a real-party-in-interest, despite his alleged withdrawal. The ALJ there found, and we here affirm, that Berger was and remained *the* real-party to, and in control of, the *Key* application. There, as here, Berger's applicant was represented at hearing by "my attorney" (*see supra* para. 28); Berger was given an opportunity in *Key* to give full evidence in defense of the real-party-in-interest issue; he does not claim that any pertinent evidence was omitted; he was given an opportunity by the ALJ in the instant proceeding to present additional explanatory evidence on the issue (but declined, *see supra* para. 5); [1] and his instant exceptions challenge fully and vigorously the adverse conclusions against him in *Key*. And, from the outset of the instant proceeding, Berger was acutely aware of the adverse *Key* conclusions, as well the potentially fatal impact on the basic qualifications of Ocean Pines.

35. We hold that Berger was, at a minimum, "in privity" with the discredited *Key* applicant, and that collateral estoppel applies. Berger had every opportunity to present his evidence in support of his version of his relationship to Lyon and the *Key* applicant to the FCC, and convinced neither the *Key* ALJ nor this Board that Berger was not the *de facto* party in control of the *Key* applicant. We therefore affirm the dismissal of Ocean Pines' application and the grant of the application of Ocean Pines Broadcasting Company. [2]

36. ACCORDINGLY, IT IS ORDERED, That the application of Ocean Pines LPB Broadcast Corp. (BPH-870406KF) IS DISMISSED with prejudice, that the application of John Hopkins Broadcasting IS DISMISSED, pursuant to 47 CFR 1.276(c) and that the application of Ocean Pines Broadcasting Company (BPH-870406KH) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] At hearing, Ocean Pines did offer revised Exhibit 4A, a letter from Dr. Berger to Ms. Lyons dated April 2, 1987, announcing his resignation from the Fenwick Island application, but this cumulative evidence was properly rejected by the ALJ because it did not materially add to the factual record in *Key*.

[2] The release of our *Decision* in this case was held in abeyance pending final settlement of *Key*. Had *Key* not settled, we would have addressed the exceptions directly therein.

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

I reach the same destination as the majority *Decision*, but would do so via a slightly different route.

Ex necessitate (*Key Broadcasting Corp*, 3 FCC Rcd 6587 (ALJ 1988), settled before we addressed the exceptions), we have here reviewed the *Key* record and exceptions to determine whether the ALJ there erred in finding Dr. Leonard P. Berger to be a real-party-in-interest to the applicant Fenwick Island Broadcast Limited Partnership I, and not merely the (80%) "passive limited partner" he claimed initially to be. The majority *Decision* here finds that the *Key* ALJ was manifestly correct in his adverse ruling under that critical issue.

Having found -- after a thoroughgoing review of the *Key* record, the *Key* initial decision, the exceptions thereto, and the Ocean Pines LPB exceptions to the instant initial decision that rehash at length the *Key* real-party-in-interest evidence -- that Dr. Berger was not merely *a* party to his *Key* application but the *controlling* party, I would disqualify his instant applicant, Ocean Pines LPB, on that basis alone. The law has long held that real-party-in-interest issues are *basic* qualifying issues, not *comparative* ones, *see Massilon Broadcasting Co., Inc.*, 22 RR 218, 220-221 (1968); *see also Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350, 3353 (Rev. Bd. 1990); *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987), [1] and Dr. Berger is therefore ineligible to receive this Ocean Pines construction permit. [2]

In short, the record in *Key* corroborates this: Dr. Berger, deploying his inamorata as a distaff front, applied for an FM permit in Fenwick Island. He shortly thereafter filed for this permit in Ocean Pines. If he were deemed a cognizable party to both applications, a cross-ownership rule conflict stood squarely in his path. While he putatively "withdrew" from his 80% equity interest in his Fenwick Island applicant, he maintained his *de facto* interest by and through Lyons, who needed, *inter alia*, his funding to pay even the hearing fee. His is not the first applicant to lurk behind his woman's petticoat, *see, e.g., N. E.O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986); *see generally Richard E. Bott, II*, 4 FCC Rcd 4924, 4329-4330 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2508 (1990), but the precedent does not make more palatable the practice.

FOOTNOTES TO CONCURRING STATEMENT

[1] Ocean Pines LPB's exceptions rely on *Tequesta* for the proposition (in its view) that, since the *Key* ALJ did not find misrepresentation or lack of candor on the part of Dr. Berger, Berger cannot be considered unqualified to control a license, despite the adverse real-party-in-interest conclusions in *Key*. I read *Tequesta* differently: There, in approving a settlement, the Board (of which I was *definitely* not a panel member) noted that although the ALJ had below rejected the "integration" credit of one of the settling applicants, he had not added a real-party-in-interest issue against, and therefore did not formally disqualify, that applicant. The *Tequesta* Board, decrying a tendency in some contemporary cases to reach *de facto* control solely through the *comparative* issue of "integration," enjoined our ALJ's to add, where appropriate, discrete real-party-in-interest issues so that the culpable applicant was not simply deprived of "integration" credit, but subject to basic disqualification. The *Key* ALJ effectively comported with the *Tequesta* ideal. He added a specific real-party-in-interst issue and resolved it adversely to what was plainly, in fact, Dr. Berger's applicant. *Tequesta*, as I read it, provides little succor for Ocean Pines LPB.

In a supplement to its exceptions, Ocean Pines LPB argues further that, despite his adverse conclusions, the *Key* ALJ did not disqualify Dr. Berger's applicant, and that its opponent here concedes that Dr. Berger was not found to have been untruthful. However, we have the public interest to protect and I agree with the initial decision in the instant case that a necessary implication of *Key* "is that Leonard Berger misrepresented his role in the Fenwick LP application" (*see ante*, para. 8). That is also the legal implication of *Tequesta*. But above and beyond the "implications" of the adverse *Key* conclusions, are facts that reveal glaringly Dr. Berger's several attempts at deception in the Fenwick Island case: first, when he claimed to be merely a "passive" investor, with Lyons an independent agent in full control; and, second, when he alleged to have "withdrawn" (for $10) as a principal, so as not to conflict impermissibly with this Ocean Pines application. In suggesting that Lyons would unilaterally control the Fenwick Island facility, while he controlled a competing station just down the beach, Dr. Berger plainly intended to deceive, and the record underlying the real-party-in-interest issue proves conclusively that Dr. Berger's was one and the same as the Lyons' share. I see neither innocence nor candor in his conduct in these companion cases.

[2] As the majority *Decision* explains, with my endorsement, Ocean Pines LPB's new counsel (with "the brimming vitality of a fresh paladin," *San Joaquin Television Improvement Corp.*, 96 FCC 2d 617, 618 (Rev. Bd. 1984)) raised for the first time at oral argument the claim that collateral estoppel does not lie because Dr. Berger was not a "party" in the *Key* case. Procedural estoppel aside, this argument is not without seductive qualities, but is beneath the surface specious to the point of hubris. In *Key*, Dr. Berger was on clear notice that if he was found to be a party there, his instant application was subject to summary dismissal under the cross-ownership rules. He was thus more than a mere witness; he was defended by "his" lawyer (in that case and this) to whom he paid good money; and he lost the vital issue by overwhelming evidence. To now claim that Dr. Berger was not a "party" or "in privity" with Lyons in *Key*, or that the defense of that issue was somehow handicapped, is perhaps a colorable "lawyers argument," but nothing more. Substantively and procedurally, Dr. Berger had every reasonable opportunity to prove to the FCC that he did not control his *Key* applicant; he does not here claim any additional evidence or testimony; he has had his say in two sets of exceptions; he has had a *de novo* review of the record; and he now has a unanimous Board agreeing with the *Key* ALJ on the pivotal issue. We need not hold another hearing to "make the rubble bounce."

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

Hair-splitting technicalities aside, the Board has affirmed the real-party-in-interest conclusions of the *Initial Decision* in *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (1986), and determined that Berger's instant application for Ocean Pines, Maryland to be inconsistent with 47 CFR §73.3518.

I respectfully submit that, irrespective of the theory of the disqualification of Berger's Ocean Pines LPB Broadcast Corporation, such disqualification is the mandatory result. Thus, I specifically agree with the Concurring Statement that a real-party-in-interest issue, by its very nature, is a basic qualifying issue in which the element of deception is necessarily subsumed. *Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350, 3353 (Rev. Bd. 1990) (Board declares "could not grant" application in the face of "real-party-in-interest" issue "without determining whether [applicant] is basically qualified").