

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

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN File No. BPH-851231MO

ELLWOOD BEACH File No. BPH-851231MS
BROADCASTING, LTD.

SPIRIT BROADCASTING File No. BPH-851231MZ

JAMES EVANS File No. BPH-851231MR

For Construction Permit for
New FM Broadcast Station at
Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1992; Released: January 23, 1992

By the Review Board: MARINO (Chairman) and
BLUMENTHAL.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 5714 (1989) (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ) in the above-captioned proceeding.¹ It also has before it the exceptions and replies of (1) Shawn Phalen (or Phalen), (2) Ellwood Beach Broadcasting, Ltd. (Ellwood Beach), (3) Spirit Broadcasting (Spirit), and James Evans (Evans).²

2. Originally a seven-party comparative case, we last encountered this proceeding to focus on the *I.D.*'s award of this frequency to one Claudia Bratton. Upon the exceptions and oral argument, we were compelled to agree with the exceptors that the case required remand on financial issues against that tentative winner. See *Memorandum Opinion and Order*, 5 FCC Rcd 53 (Rev. Bd. 1989). The case was then extensively delayed by an erroneous *Supplemental Summary Decision*, FCC 90-D, 14, released by the ALJ on April 4, 1990, and a barrage of interlocutory pleadings by Bratton that were not finally resolved until the Commission's action in *Shawn Phalen*, 6 FCC Rcd 990 (1991), after which Bratton dismissed her application and the ALJ issued a *Supplemental Initial Decision* on May 20, 1991. See *supra* note 1. However, after reviewing the *I.D.* and the pleadings, the Board regrets that it cannot make an award on the existing record, but must remand this case for further hearings on the new issues specified below.³

SHAWN PHALEN

3. *Real-Party-In-Interest*.⁴ As the *I.D.* recounts, Shawn Phalen was a 19-year-old freshman at the University of Arizona when this application was filed in her name. *I.D.*, para. 14. She was inspired to file this application, she claims, on the basis of a "cold call" to the campus from the communications counsel, David Tillotson, who has for many years represented her father Richard (Rick) Phalen, a man with extensive broadcast experience⁵ and currently the controlling principal of licensee of KQKS-FM, Longmont, Colorado. *Id.*, para. 6. The ALJ records (*id.*, para. 14):

Rick Phalen claims that Tillotson did not call him before he (Tillotson) called Shawn, but he couldn't explain how Tillotson obtained Shawn's phone number. At her deposition, Shawn Phalen couldn't remember whether she and her father discussed the fact that Tillotson would be calling her before the fact. But she assumes that Tillotson spoke with her father before calling her. In the initial call, Tillotson, told Shawn that her female status and local residence would be important advantages if she applied for the channel. See Tr. 332-333, 497 and 499; FM Montecito Ex. 22, pp. 31-34, 41; and FM Montecito Ex. 23, pp. 10 and 12.

4. Though Shawn Phalen claimed that Tillotson first called *her* about the application, counsel's billing records show that the first call went to Rick Phalen, with whom counsel discussed (among other things) a transmitter site. *I.D.*, para. 21. A second call included Rick Phalen's engineer, Benjamin Dawson. *Id.* Rick Phalen also contacted his Chicago attorneys to prepare a site lease, and the billing record of those attorneys reflects that their client was Rick Phalen. *I.D.*, para. 22.

5. While Shawn Phalen testified that the mailing of bills by communications counsel to her parents was a "mistake," there is no argument that her parents are financing this entire venture: that her parents keep the applicant's checkbook; that her mother had signed Shawn's name to checks when Shawn was away; that Rick Phalen has paid bills for the applicant on his own without any consultation with the applicant; that Shawn has no obligation to repay the "loans" (except if the station makes a profit); or that her parents had spent \$65 thousand at the time of the hearing (including, *e.g.*, Shawn's air fare to this hearing). *I.D.*, paras. 23-27.

6. Moreover, the ALJ writes that Rick Phalen has been deeply involved in many aspects of his daughter's application after the hearing was designated. Not only did he receive all copies of correspondence between counsel and his daughter, and spoke to counsel often about the case, *id.*, para. 28, Rick Phalen took a very active (if not dominant) role in later settlement negotiations. *Id.*, paras. 36-38.

7. In the end, the ALJ concluded (*id.*, Concls. at para. 5; footnote omitted):

Her father, Rick Phalen, is unquestionably a real-party-in-interest in Shawn's application. More than that. The record evidence points to the conclusion that BPH-851231MO is actually Rick Phalen's application, not Shawn's. This is a classic example of a white non-Hispanic, male applicant using his

daughter as a "front" in order to obtain a comparative female enhancement and avoid a comparative diversification demerit.

8. *Exceptions.* The initial attack on the *I.D.* under this issue is directed toward the ALJ's comment that he considers the maturity and business background of the applicant in assaying license qualifications.⁶ Invoking the 1965 *Policy Statement*, 1 FCC 2d 393 (1965), Phalen contends that such factors are irrelevant, but jaundiced the ALJ's view on this issue.⁷ Next, citing the Federal Rules of Evidence, Section 408, Phalen contends that it was error to consider settlement negotiations and that "[i]t is obvious from both the transcript . . . and the *Initial Decision* that the ALJ was disturbed and angry that the settlement . . . had collapsed."⁸ Phalen submits that, once the ALJ's findings on the settlement negotiations are properly stricken, the "remaining findings under the party-in-interest rule are clearly insufficient to support a conclusion that Rick Phalen is a party-in-interest in Phalen's application."⁹

9. Notwithstanding the contention that, shorn of the settlement matter, the *I.D.* must fall, Phalen marshals numerous other arguments on this issue. She asserts that, though Rick Phalen did discuss the application with counsel and the engineer, these calls were surprisingly infrequent and "dealt with matters that Rick Phalen had a legitimate interest in as the person providing financial backing for Phalen's application (e.g., the effect of the Court ruling on female preferences on Phalen's comparative position) . . ."¹⁰ And she claims that Rick "Phalen never told her communications counsel to send [him] copies of letters that he sent to [Shawn]," that "at least one substantive pre-designation letter . . . was not sent to Rick Phalen," and that in any event¹¹:

[t]he fact that Rick Phalen was sent carbon copies of the letters referred to in [para.] 32 of the ALJ's findings is not probative of whether Rick Phalen is a party-in-interest in Phalen's application since all of the letters referred to in this finding pertained, in whole or in part, to the added issues which directly involved Rick Phalen.

10. As to the provision of finances, and relying heavily on cases such as *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984), *recon. denied*, 57 RR 2d 1483 (1985), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986); *KTRB Broadcasting Co.*, 46 FCC 2d 605 (1974), Phalen contends that the intrafamilial provision of financing is neither unusual nor controlling. She argues that in both cases the fact that parents provided the financing did not make out a real-party-in-interest case, and that in *KTRB* the Commission found that the fact that "although one of the sons was § 21 years old, unmarried, [and] a full-time student" did not negate the claim there that the son would "be 'his own man.'"¹² Phalen claims that the facts in *KTRB* were "virtually identical" to her case.¹³ and yet the father there was not found to be a real party.

11. Finally, Phalen pleads that "assuming, *arguendo*, that the evidence of record were deemed sufficient to support a conclusion that Rick Phalen is a party-in-interest," she should not be disqualified because "[t]here is not a scintilla of evidence in the record which even suggests that Phalen, or her father, concealed or attempted to

conceal from the Commission any aspect of their relationship, understandings or conduct concerning Phelan's application from the Commission."¹⁴ Interposing *Tequesia Television, Inc.*, 2 FCC Rcd 7324 (Rev. Bd. 1987) and *Virginia Beach Television Ltd.*, FCC 84D-87, released December 24, 1984, Phalen maintains that she may not be disqualified under this issue in the absence of a record evincing an intent to deceive, and she represents¹⁵:

After considering the findings and conclusions of the ALJ in the *Virginia Beach Television Ltd.* case pertaining to Bishop Willis' party-in-interest status in his daughter's application, the Commission held that "no adverse character considerations flow from this real party in interest finding." The Commission based this holding on the fact that the real party in interest holding did not derive from any findings of active wrongdoing on the part of Bishop Willis, in the sense of conduct, understandings or a relationship that was concealed from the Commission, but rather from a conclusion that an inevitable *future* course of conduct would result from his daughter's past total dependence upon him and the desire to protect an investment completely financed by him.

12. *Discussion.* "The Commission's real-party-in-interest inquiry typically focuses on whether a third person has an ownership interest, or will be in a position to actually or potentially control the operation of the station." *Astroline Communications, Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988)(quoting *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974)). Before applying that standard to the facts of this case, we will treat Phalen's two preliminary grievances. Initially, we concur with Phalen that the ALJ's *en passant* views on an applicant's maturity and lack of business experience are largely gratuitous. However, we note that (1) Phalen never sought the ALJ's removal under 47 CFR § 1.245; (2) the formal conclusions of the *I.D.* are derived of the ALJ's inferences from a plentitude of specific factual findings and are not based simply on a vague uneasiness with Shawn's tender years; and (3) in considering whether an applicant has maintained, or will maintain, control over a station, the Commission itself has considered probative, though certainly not dispositive, the relative broadcast experiences of the putative applicant and the dominant financier. See, e.g., *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5606 n.20 (1991); *accord, Evansville Skywave, Inc.*, 6 FCC Rcd 5373, 5375 (Rev. Bd. 1991)(and cases cited therein). As to the ALJ's discussion of the settlement negotiations, and while we agree that the law is generally disinterested in the specific terms and conditions of such negotiations, see *RKO General, Inc.*, 2 FCC Rcd 1626, 1627 (1987), it is not altogether irrelevant that a nominally "passive" financier took a very active role in settlement negotiations. See, e.g., *Evansville Skywave*, 6 FCC Rcd at 5377 n.10.

13. But on the subject of finances, and moving to the core substantive question of whether the record proves that Rick Phalen is a real-party-in-interest, we find ourselves partly in accord and partly in discord with Phalen's exposition of the law. True, particularly in a family situation, the law is clear that the mere provision of finances summons no grounds for inordinate suspicion, and Phalen's citation to *High Sierra* for this proposition is just on point. See also *Rayne Broadcasting Co., Inc.*, 5

FCC Rcd 3350 (Rev. Bd. 1990)(and cases cited therein). Indeed, even absent a family relationship, a mere "creditor" is not deemed ordinarily to possess control. *Morris, Pierce & Pierce*, 88 FCC 2d 713, 717 (Rev. Bd. 1981), *review denied*, FCC 83-31, released January 25, 1983. See generally also *KIST Corp.*, 102 FCC 2d 288, 290-93 (1985).

14. At the same time, a financier can use that leverage as a bludgeon with which bend a licensee to its will, as the Commission continues to recognize. See *Benito B. Rish, M.D.*, 6 FCC Rcd 2628 (1991) (*inter alia*, "finances can demonstrate that control has been relinquished to another unauthorized person"). So did the court, over 50 years ago, in *Heimeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937), when it held:

It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances . . .

[T]he burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect . . .

See also *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, 715-16 (D.C. Cir. 1958)(financial leverage can effect control).¹⁶

15. In the case before us, Rick Phalen seems quite willing to wield that bludgeon on his daughter, for as the I.D. (at paras. 39-40) reflects:

Rick Phalen is pointedly aware of the total control he has exercised over his daughter's application, and why he has that control. At the June 27, 1989, hearing session, the following colloquy occurred. (Tr. 384, lines 3-8):

"JUDGE MILLER: So you have actively participated in --

"THE WITNESS: As my daughter's financial advisor; in terms of how much money we are willing to settle for, yes sir. Without me -- I'm the bank. You know, she's got a problem."

Moreover, Rick Phalen intends to continue to exercise control even after the station goes on the air. He testified (FM Montecito Ex. 23, pp. 20-26) that he ". . . would be watching it, and . . . would want to see monthly profit and loss statements and see how the operation is going." And he told his daughter: "you know, if the thing goes belly up -- we could have a loan agreement that says you have to meet certain levels, and if you don't the phones would be cut off . . . I can't tell you to sell the radio station; it's your radio station. But if push came to shove, I could cut off the funds."

16. Summing up the evidence thus far, the record supports the I.D. that (1) Rick Phalen was instrumental in the filing of this application; (2) he took an active role in the engineering and legal aspects, as well as in settlement

negotiations; while (3) Shawn, who claims she retained counsel, did not know her attorney's fee rates (I.D., para. 20), did not discuss costs with "her" engineer (id., para. 21), nor did she estimate the "specific cost estimate for her transmitter, antenna, transmission line, and studio equipment." Id., at para. 49. When conjoined with her father's financial dominance, the picture clarifies.

17. Moreover, it is clear that the Phalens were preoccupied with the Commission's gender preference. See *id.*, paras. 14, 41; Phalen Exceptions at 24-25 n.17. ¹⁷ In a variety of settings, the Commission has experienced many times in recent years the banal device of a white male, disadvantaged from a comparative perspective, lurking behind the petticoat, see, e.g., *Royce Int'l Broadcasting*, 5 FCC Rcd 7063 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991); *Progressive Communications, Inc.*, 5 FCC Rcd 7058 (1990) *recon. dismissed*, 6 FCC Rcd 1383 (1991). *Richard P. Bout II*, 4 FCC Rcd 4924, 4928-30 (Rev. Bd. 1989) *review denied*, 5 FCC Rcd 2508 (1990), *aff'd by judgment sub nom. Radio Representatives, Inc. v. FCC*, No. 90-1227 (D.C. Cir. 1991). *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd by judgment sub nom. Southeast Florida Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. October 28, 1991); *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986); *review denied*, 1 FCC Rcd 380 (1990). While financial support alone is not dispositive, perforce in a family setting, the case law is long, loud and clear that we will scrutinize even family relationships to assure the "independence" of the applicant from non-parties. *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 654-656 (Rev. Bd. 1983)(subsequent history omitted). ¹⁸ Upon the facts at bar, Shawn Phalen has been, and was intended as no more, than a fantocine in her sire's guignol. He is either *a*, or *the*, real party in this Monticeto application, beyond peradventure.

18. Undoubtedly sensing that the curtain is forever drawn on the real party facet, Phalen argues in the alternative that even if Rick Phalen is so deemed, no disqualification should ensue because the Phalens were candid throughout and certainly engaged in no outright misrepresentation. It is here that Phalen raises an interesting point. While we do not accept its reliance on *Tequesta Television, supra*, where we merely observed that, prior to disqualification, (either) a real party (or a misrepresentation) issue ought be added, see 2 Rcd at 7325,¹⁹ and the real party issue was here fully tried, the law beyond that is superficially clouded. In *Astroline, supra*, the court remarked that the Board had "on occasion suggested that an applicant who was not the real-party-in-interest would be disqualified from comparative licensing competitions." 857 F.2d at 1564 (emphasis added)(citing *KOWL, Inc., supra*; *Creek County Broadcasting Co.*, 31 FCC 2d 462, 467-68 (Rev. Bd. 1971)). When last faced with this precise question in *Ocean Pines LPB Broadcast Corp.*, 5 FCC Rcd 5821, 5822 (Rev. Bd. 1990), the "majority" decision avoided a resolution, but two members of the panel issued separate statements espousing their view that real party issues are disqualifying, because the element of deceit is implicit in an adverse determination. *Id.*, at 5826, 5827. See also *Tequesta Television, supra*.

19. We continue to hold to that reckoning. Our primary ground is simple deduction: in our cases, there are but two species of issues, *comparative* and *basic qualifying*. As nobody could suggest that real party issues are measured relatively under the 1965 *Policy Statement*, the issue must necessarily fall into the latter category, a point we

thought we had highlighted in *Tequesta Television*. See also *Massillon Broadcasting Co., Inc.*, 44 FCC 2540 (1961); *Barbara Kay Peel*, 6 FCC Rcd 2833, 2835 (1991)(HDO) (real-party-in-interest issue triggers basic character inquiry). Inasmuch as that is our conviction,²⁰ and as we uphold the ALJ's conclusion that Rick Phalen is inarguably a real-party-in-interest to this application, we find the applicant wholly disqualified.²¹

20. *Other Issues*. Because we find Phalen is solidly disqualified on the real-party-in-interest issue, we need not review her exceptions under the other issues (see *supra* note 4) to determine whether she is further disqualified. For whatever assistance, we do note that although the ALJ found adversely on the Section 1.65 issue (*I.D.*, paras. 5-12)(failure to report father's acquisition of KQKS-FM), the Board long ago held that when the acquisition of a broadcast interest is reported to (and on public file with) the Commission, it is difficult to infer an intent to deceive. *Superior Broadcasting of California*, 94 FCC 2d 904, 909-10 (Rev. Bd. 1983). As to the financial issues, we believe that while Shawn Phalen's parents appear to have had more than ample resources to fund her application. see *I.D.*, para. 60 (assets exceed liabilities by \$2.9 million), her own sworn certification seems vacuous since she never prepared a budget (see *id.*, para. 56); and even her written loan commitment left her short (see *id.*, paras. 58-59). Her certification seems therefore altogether glib. See *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989)(subsequent history omitted)("applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs"). Here, Phalen had no idea of (nor concern with) her application prosecution costs, let alone no clear construction or operating budget. Perhaps her father might have properly sworn; but his daughter (consistent with her jackstraw role) affixed her sworn signature to a federal application apparently *sans souci*.

ELLWOOD BEACH BROADCASTING

21. The *I.D.* awarded this applicant only a 20% integration credit, attributing for comparative purposes the 80% equity interest(s) of its two 40% limited partners, Ray Stanfield and E.L. Cartwright.²² The *I. D* reduced the integration credit chiefly because the limited partnership agreement did not contain the insulation provisions required by the Commission, *id.*, para. 109, and also because (*id.*, at para. 107 (footnote omitted)):

[t]he Ellwood Beach partnership agreement provides that the partnership can be dissolved at any time by "the affirmative vote of both the General Partners and Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership." Since the limited partners hold an aggregate of 80%, they have the right to dissolve the partnership at any time. This effectively gives them the right to seize control of the partnership assets at any time. At dissolution, the limited partners would have an 80% interest in the assets, including the license, and therefore would control those assets.

The ALJ also found that Ellwood Beach was "a creation of the two limited partners" whom he found held "ultimate control." *Id.*, at para. 111.

22. *Exceptions*. Relying on *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), *vacated as moot*, 6 FCC Rcd 1814' (1991), and *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988),²³ Ellwood Beach argues for 100% integration credit. Citing *Independent Masters, Ltd.*, 104 FCC 2d 178, 191 n.25 (Rev. Bd. 1986),²⁴ it also argues that the Commission's 1985 insulative provision requirements should not be applied to partnership agreements created prior to the effective date of the stricter requirements.²⁵ It also maintains that its partnership agreement, which provides for dissolution "upon the affirmative vote of both the General Partners and Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership," does not "give the limited partners [80% ownership interest] the unilateral right of dissolution."²⁶

23. *Discussion*. Even were we to agree with the exceptions of Ellwood Beach on all of these points,²⁷ subsequent developments make it impossible to immediately grant its application. In *Carta Corp.*, 5 FCC Rcd 3696, 3705 n.13 (Rev. Bd. 1990), we noted that one of the so-called "limited" partners to a sham had apparently developed the *modus operandi* of employing "false front applicants, and we held that no license should be granted to an applicant that includes that partner without further exploring its basic qualifications, in accordance with *Tequesta Television, supra*. See also *Marlin Broadcastinig of Central Florida*, 4 FCC Rcd 7945, 7957 n.18 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (1990), *review denied*, 5 FCC Rcd 5751 (1990) (*recon. dismissed*, FCC 90-409, released Dec. 12, 1990). Ray Stanfield, a 40% "limited" partner in the instant Ellwood Beach applicant, was also a (28.33%) "limited" partner in the sham *Carta Corp.* applicant, 5 FCC Rcd at 3696, and he was found to have participated in yet another sham application in Salinas, California. *Salinas Broadcasting Limited Partnership*, 4 FCC Rcd 2762, 68-69 (ALJ 1989).²⁸ The Board's decision in *Carta Corp.* was just affirmed on that point. See *Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991 (but modifying *Carta Corp.* on other grounds).²⁹

24. As the Commission recently indicated to the court, when a party has been a participant in an egregious sham, it may become necessary to additionally determine whether any such party possesses the basic qualifications for licenseeship. Brief For Appellee at 15-16 n.6; 44 n.22, *Southeast Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. filed June 11, 1991), a case in which the Commission was just *aff'd per judgment*, Slip Op. released October 28, 1991. See also *Royce Int'l, supra*, 5 FCC Rcd at 7065 n.6. Accord, *Evansville Skywave, supra*. In two cases, *Carta Corp.* and *Salinas Broadcasting*, Ray Stanfield was an active party to an egregious sham applicant, so an appropriate issue must be tried against Ellwood Beach before we could grant the license.³⁰ This is particularly true here, since Stanfield must be reckoned an "active" owner in Ellwood Beach (see *supra* note 27). See generally *Barbara Kay Peel, supra* (character issue added to examine conduct in prior comparative proceedings).

SPIRIT BROADCASTING

25. The ALJ denied Spirit all integration credit, finding its limited partnership to be a sham because (1) he found that it had no written limited partnership agreement on the "B" cut-off date (*I.D.*, para. 118), and (2) he found that, even assuming there was such an agreement, "all

[three] partners ignored the limited partnership agreement they finally did execute" on the matter of finances. *Id.*, at para. 124. Nonetheless, the ALJ did not disqualify Spirit, but merely awarded it no comparative integration credit. *Id.*, *Concls.* para. 16.

26. *Exceptions.* Spirit contends that it did have a written partnership agreement on the "B" cut-off date,³¹ claiming that a timely amendment to its original agreement merely changed the equity percentages of its "general partner, Michael Durden to 72% (down from 80%) and its two "limited" partners, Martin Moss and Jimmy Turner, to 14% each (up from 10% each). It argues that its partnership is *bona fide* and no sham, merely because of technical failures in complying with certain accounting aspects of the agreement.³² The exceptions of James Evans, however, maintain that the ALJ erred in failing to disqualify Spirit on finances.³³ Spirit replies that Evans' plaint is improper, since he never sought to enlarge the issues against Spirit.³⁴

27. *Discussion.* Even assuming Spirit had an operative limited partnership agreement,³⁵ we cannot grant its application without trying financial certification and basic financial qualifications issues. As we observed in *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6323 (Rev. Bd. 1990), where this same ALJ also made animadversions to an applicant's finances and then made adverse findings based thereon, but had not added a financial issue, the ALJ here pummeled Spirit, but did not disqualify it based on the record evidence. Because this instant *I.D.* was issued prior to *Mableton*, the ALJ was probably unaware of his error, and thought perhaps he could reach basic finances through a comparative integration analysis. Not so.

28. We staunchly agree with the ALJ and Evans, however, that significant and material questions of fact appear in this record as to whether Spirit had a legitimate basis for certifying as to a "reasonable assurance of finances, and whether it is, in fact, financially qualified. As we commented with respect to Phalen (*see supra* para. 20), it is not clear that Spirit ever prepared a serious budget.³⁶ Moreover, while the partnership agreement (§5.33) provides that the "limited" partners shall each provide \$15 thousand when its "general" partner made a request of each of them for a mere \$1,000 to help prosecute the application, they flatly refused.³⁷ Finally, whereas the "general" partner claims he felt that the "limited partners could meet their respective financial obligations, he really had no empirical basis.³⁸ Issues must be tried before Spirit could receive the grant.

JAMES EVANS

29. The ALJ declined to award Evans, a sole proprietor, any integration credit because Evans testified that:

[i]t would be just absolutely wonderful if the station was in the black and was just making all kinds of money and I was able to find people that could work there and I would just go in and be on the air every once in awhile or do what ever I liked to do, that would be a dream come true.

I.D. at para. 126 (quoting Tr. 1089-99).³⁹ Evans also (*id.* at para. 127, citing Tr. 1080):

presently owns a number of businesses. They include a site leasing company, and 50% of businesses involved in land mobile radio, paging, and specialized mobile radio (SMR). He spends less than 10 hours per week monitoring the affairs of these various businesses (Evans Ex. 1, p.2). Mr. Evans' typical work day consists of making some telephone calls at home, perhaps taking a tennis class, arriving at the office about 5:00 p.m. looking at messages and his mail, going to the post office and returning home He currently spends an average of 30 hours looking for new SMR investments.

Evans said he wouldn't devote more than 30 hours per week to these businesses, but did not indicate precisely how much time he *would* devote. *See* Tr. 1115.

30. *Exceptions.* Evans asserts that his quoted language was, in effect, precative, and that his full-time commitment to the station was "unequivocal."⁴⁰ Spirit replies that "Evan's [sic] arguments cannot obviate his clear testimony -- and intention -- that he will devote most of his time to other business endeavors (whatever those may be) once his station is up and running" ⁴¹

31. *Discussion.* We will affirm the *I.D.* Even if we were to overlook Evans' wishful testimony, *but cf. Victorson Group, Inc.*, 6 FCC Rcd 1697, 1697-99 (Rev. Bd. 1991), we would be compelled to deny integration credit. As we stated in *Naguabo Broadcasting Co.*:

The Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

6 FCC Rcd 912, 924 n.63 (Rev. Bd. 1991), *modified on another grounds*, 6 FCC Rcd 4879 (1991). The ALJ found that Evans had offered no specific and detailed plan to manage his other significant business interests, and neither Evans' exceptions nor his reply brief disputes that critical finding. Without such a specific, detailed and credible plan, integration credit will not be granted. *See generally Fresno FM, supra*, FCC 91-375 at paras. 11-13; *Ronald Sorenson, supra*, at paras. 8-9 & n.4. Under these circumstances, we shall affirm the *I.D.* and deny all integration credit to Evans. *Naguabo Broadcasting*.

CONCLUSION

32. In the end, we have one applicant (Phalen) disqualified, two applicants that must address qualifying issues (Ellwood Beach and Spirit), and one basically qualified applicant (Evans) that would receive no strong comparative advantage, should the former two survive the following issues.

33. As to Ellwood Beach:

(1) To determine whether Ray Stanfield intentionally participated in the submission of sham applications in Salinas and Fresno, California, thereby abusing the Commission's processes, or made misrepresentations or lacked candor in those proceedings, and the effect on the qualifications of Ellwood Beach to be a licensee.

34. As to Spirit Broadcasting:

- (2) To determine whether it falsely certified reasonable assurance of finances in its application; and
- (3) To determine whether it is financially qualified to be a licensee.

35. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for a further hearing on the issues specified herein, and for the preparation of a Further Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

¹ The ALJ has also issued a *Supplemental Initial Decision*, 6 FCC Rcd 2789 (1989)(*S. I. D.*), against which the four remaining applicants have filed exceptions and replies. The *S. I. D.* is *in haec verba* with the *I. D.*, save that it (1) omits all reference to two subsequently dismissed applicants, Patricia J. Jacobsen and Claudia Bratton; (2) denies all integration credit to Ellwood Beach, *see S. I. D.*, para. 107 (and note 22 *infra*); and (3) awards Evans a 100% quantitative integration credit, *see S. I. D.*, para. 126 (and note 39 *infra*). For our purposes, we will review the *I. D.* and the originally filed exceptions and replies, since these are more complete and since we remanded this case solely on financial issues against now dismissed Claudia Bratton (*see infra* para. 2). To the extent the Board granted a Joint Petition For Extension of Time, filed on June 26, 1991, to extend the date for lodging exceptions to the *S. I. D.*, that grant was improvident since we shall review only the *I. D.* The Ellwood Beach Motion To Dismiss, filed June 25, 1991, and the pleadings responsive thereto are therefore dismissed as moot. Finally, we accept for reporting purposes only, under 47 CFR § 1.65, the several amendment petitions filed herein.

² The Board also has before it the Motion to Intervene and a companion Brief Amicus Curiae, filed June 20, 1991, by Amador S. Bustos, an applicant who is challenging the renewal application of KOKS-FM, Longmont, Colorado. Bustos meets none of the criteria for late intervention set forth in 47 CFR § 1.223, *see also infra* note 20, and the Bustos motion is denied.

³ The Board sincerely regrets the need for this additional remand, but did not reasonably foresee at our last review of the *I. D.* (1) that none of the (former) six applicants would emerge a comparative winner, or (2) that subsequent case law would change the complexion of this case. Although the Board Chairman did not fully concur in some past Board decisions, *see Carta Corporation*, 5 FCC Rcd 3696, 3705 n.16 (Rev. Bd. 1990),

he now agrees that subsequent Commission actions require the addition of a basic qualification issue. The Board has not previously had the unfortunate experience of surveying a case in this posture.

⁴ The ALJ also added, and resolved adversely against Phalen, the following issues:

II-1: To determine whether Shawn Phalen has violated 47 CFR 1.65 by failing to amend her application to reflect that her father, Rick Phalen, had acquired a radio station, and if so, what effect that violation has on Phalen's basic qualifications to be a Commission licensee.

II-2: To determine whether Shawn Phalen deliberately concealed from or lacked candor with the Commission by failing to report her father's media interest, and if so, what effect that concealment or lack of candor, has on her basic qualifications to be a Commission licensee.

* * *

II-4: To determine whether Shawn Phalen misrepresented or lacked candor when she affirmatively certified her financial qualifications in BPH-851231MO, and if so, what effect those misrepresentations and/or lack-of-candor has on her basic qualifications to be a Commission licensee.

II-5: To determine whether Shawn Phalen is financially qualified to construct and operate it for three months without revenue.

⁵ The *I.D.* (at paras. 17-19) reports:

On the other hand, Rick Phalen was and is a broadcaster. He began his career with the radio sales representative firm of Grant Webb in Chicago; then he moved to the John Pearson Company; and then he joined the Mutual Broadcasting System. FM Montecito ex. 23, p.6.

In 1969, Mr. Phalen left the "sales-rep" business to become part-owner of station KIKI, Honolulu, and the following year, he and three people founded Western Cities Broadcasting, Inc. (Western). He was President of Western, and came to own 21.3% of the company. Between 1970 and 1985, Western acquired 8 AM and FM stations in the following markets: Las Vegas, Nevada; Tucson, Arizona; Phoenix, Arizona; Sacramento, California; and Gilroy/San Jose, California.

On March 15, 1985 (less than a month before Tillotson placed his initial call to Shawn Phalen) Rick Phalen and his Western group consummated the sale of their eight station communications network, and he began look around for other broadcast opportunities. Tr. 366-374; and FM Montecito Ex. 23, pp. 6-9.

Rick Phalen found such an opportunity in Longmont, Colorado. *Id.*, para. 6.

⁶ During the admissions session, the ALJ had opined (Tr. 239):

And I look at the facts and I say to myself somewhere along the line, is this person capable of running a broadcast station? She or he? Do they have the necessary business background to make the transition and run a radio station?

Now, some of the judges don't do that, but I do. I take into account a person's business background. I think the people that don't are sticking their heads in the sand. Now Barbara Marmet did not have that much experience up in Middletown, Maryland. But I looked over her background. She participated in things, she was active in civic activities. She actually went out and did work, volunteer work, and held some jobs down. I said, hey, this is a mature woman who can run a radio station.

⁷ Phalen Exceptions at 12-14.

⁸ *Id.*, at 21-22.

⁹ *Id.*, at 24.

¹⁰ *Id.*, at 25-26 n.17.

¹¹ *Id.*, at 26 n. 18 (original emphasis).

¹² *Id.*, at 31.

¹³ *Id.*

¹⁴ *Id.*, at 32.

¹⁵ *Id.*, at 34 (original emphasis).

¹⁶ We recognize that, in *Doylan Forney*, 5 FCC Rcd 5423, 5427 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. October 7, 1991), the Commission stated:

There is no mention of any question about control of the applicant in the cited opinion in *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937). In *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), the court predicated the pertinent holding on extensive evidence of *de facto* control by someone other than the putative controlling principal. In *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958), the court decided that a lender was a principal for purposes of integration analysis because the terms of the credit arrangement empowered him to manage the applicant's business and virtually ensured that he would acquire a majority of the shares of voting stock within two years.

However, to the extent that Phalen's exceptions imply that the Commission has completely taken leave of its senses and now makes absolutely no connection between finances and control, *see also*, e.g., Tillotson, *FCC's Comparative Process As A Sham And A Shamble*, *BROADCASTING*, October 5, 1987 at 22, we believe she has overstated her case. *See Benito Rish, M.D., infra*.

¹⁷ In asserting here that, as the financier of "his daughter's" application, Rick Phalen had a legitimate interest in the critical engineering and, for instance, the female preference, Phalen proves far too much, for by that broad standard Rick Phalen could be involved in any and every aspect of the application and station operation, and he himself has insisted as much. *See infra* para. 15. The facts here distinguish this case glaringly from, e.g., *KTRB Broadcasting, supra*, in which Phalen also invests heavily.

¹⁸ The *Cannon's Point* case led to a direct challenge to the Commission's female preference. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated en banc*, *Order of Oct. 9, 1986*. The preference is again under attack in the D.C. Circuit, *Lamprecht v. FCC*, No. 88-1395, but it turns out that the preference is of far less weight than the Board had loosely assumed, *see Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991 paras. 9-10 (female preference of very slight comparative significance)(by implication), though it had long wondered. *See Horne Industries, Inc.*, 94 FCC 2d 815, 822-825 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601 (1984).

¹⁹ Whereas Shawn Phalen was a freshman when filing, we find sophomoric her postulate that she must prevail on this issue because the ALJ used the term "undisclosed" party-in-

interest, though her father's role was always "disclosed." Phalen Exceptions at 20-21. One, the question is who is the *real-party-in-interest*, *see Astroline*; and, two, Rick Phalen was not "disclosed" as a "party," the very issue on the table. Apart from that, we do not greatly disagree that a general candor, nay a clumsy transparency, suffused Rick Phalen's *actual* role. While the daughter appears to have engaged in some futile puffery in an attempt to solidify her position (e.g., sending law firm bills to her parents was a "mistake," *I. D.*, para. 23; her claim that she negotiated the engineer's contract, but didn't discuss his fees, *id.*, para. 21), a limited amount of which hyperbole the Commission has always tolerated, *see Grenco, Inc.*, 39 FCC 2d 732, 737 (1973); *John C. Roach*, 43 FCC 2d 685, 689 (Rev. Bd. 1973), we find that the Commission has permitted even much more serious misrepresentations without finding grounds for total disqualification. *See Broadcast Associates of Colorado*, 104 FCC 2d 16 (1986).

²⁰ We do not here address the question of the impact of this conclusion on the ongoing comparative renewal proceeding involving Rick Phalen's KOKS-FM, Longmont, Colorado, though we have recognized the potential impact of this case. *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 2325, 2326 n.3 (Rev. Bd. 1991); *see also Barbara Kay Peel, supra*. We will address the matter there, if and when the question reaches us in that proceeding.

²¹ We do not attempt to distinguish an (apparently) unreported letter to an attorney, relied upon greatly, *see* Phalen Exceptions at 32-34, in which the Commission purportedly found that the adverse real-party-in-interest conclusion of an initial decision in *Virginia Beach Television* (father/daughter applicant disqualified) had no impact on the character of that applicant. Even if Phalen had appended the letter so that we might have surveyed its characteristics, it is salient that Phalen does not say that the letter criticized the ALJ's absolute *disqualification* of the subject *Virginia Beach* applicant in that comparative proceeding. *Compare also Barbara Kay Peel, supra*.

²² In his *S.I.D.*, and relying on *Royce Int'l Broadcasting, supra*, the ALJ modified his *I.D.* and awarded Elwood Beach no integration credit whatever. 6 FCC Rcd at 2797. For the reasons explained in the text, we need not decide at this juncture whether the reduction was justified on that particular ground.

²³ Ellwood Beach Exceptions at 7. *Susan S. Mulkey* was vacated. 6 FCC Rcd 1814 (1991). We recognize that certain subsequent opinions continue to distinguish *Mulkey*, *see, e.g., Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498 (1991); *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5606 n.22 (1991), but the Board will not rely on a vacated opinion. *Victory Media*, while not vacated, has been substantially disavowed. *See Poughkeepsie*, 6 FCC Rcd at 2498 n.2; *Royce Int'l Broadcasting, supra*, 5 FCC Rcd at 7065 n.13; *Coast TV*, 5 FCC Rcd 2751, 2752 (1990). It is now known in the trade as "Phyrric Victory."

²⁴ In its recent *Evergreen Broadcasting, supra*, the Commission limited the Board's non-retroactivity approach in *Independent Masters*. *See* 6 FCC Rcd at 5600, 5606 n.11.

²⁵ Ellwood Beach Exceptions at 4-5.

²⁶ *Id.*, at 4.

²⁷ We do not. Purely in light of its contract language, which plainly gives the "limited" partners the equity power to dissolve the partnership, the 80% equity share of the "limited" partners must (at a minimum) be attributed for integration purposes. *Evergreen Broadcasting, supra*, 6 FCC Rcd at 5600.

²⁸ *Salinas Broadcasting* was not appealed and is thus binding on those parties. 5 U.S.C. § 557(b). While that decision may not be "binding precedent," thereby allowing for the doctrine of *res*

adjudicata, see *WFG Inc.*, 24 RR 419, 425 (1963), the issue we have here added shall permit full exploration of Stanfield's role in Salinas and in Fresno.

²⁹ The Commission's affirmation of the need to test the basic qualifications of the *Carta Corp.* principals involved in that wicked sham could hardly have been more clear, since Stanfield's applicant had specifically complained about this very point to the Commission, see *Fresno FM Limited Partnership*, 5 FCC Rcd 7261 (1990), and it is impossible that the Commission simply overlooked this matter. Indeed, pursuant to the Board's footnote language in *Carta Corp.*, the ALJ presiding over a Carmel, California proceeding did add a qualifying issue against a *Carta Corp.* principal, see *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991), but the Commission there again declined to intervene. An epilogue: when the *Carta Corp.* "limited" partner categorically refused to even appear in the Carmel proceeding, the ALJ dismissed the applicant for failure to prosecute. See *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 4633 (Rev. Bd. 1991).

³⁰ We recognize that, citing *Carta Corp.* and *Salinas Broadcasting*, the ALJ's *S.I.D.* denied all integration credit to Ellwood Beach; but unlike *Evansville Skywave*, no disqualifying issues were tried to examine Stanfield's intent in those two previous California proceedings. A separate issue must be tried prior to a basic disqualification. *Tequesta Television*, *supra*.

³¹ Spirit Exceptions at 4 & n.2.

³² See *id.*, at 5-9.

³³ Evans Exceptions at 19-20.

³⁴ Spirit Reply at 3. n.2.

³⁵ It appears that any failure to have a written limited partnership agreement at the "B" cut-off date may be here immaterial. See, e.g., *Evergreen Broadcasting*, *supra*, 6 FCC Rcd at 5599.

³⁶ When its "general" partner, Durden, was queried at hearing, he testified:

Q. Thank you. Did you ever ascertain how much money it would take to construct and operate a radio station for three months without revenues?

A. I cannot remember.

Tr. 866. He also conceded (Tr. 901):

Q. Did you give any consideration to the non-personnel operating expenses of the station?

A. I don't remember.

As to his salary as station General Manager, Durden confessed (Tr. 869):

Q. Are you going to get a salary?

A. Yes.

Q. Who determined that you'd get a salary?

A. I did.

Q. And when did you determine that?

A. I don't recall what certain date I determined that.

Q. Was it prior to the time you filed the application?

A. I believe so. I think Jimmy and I spoke about it. I mean Jimmy, Martin, and I spoke about it.

Q. And you arrived at a sum?

A. No.

Q. So you don't know what salary you will be getting.

A. No.

Q. And what will determine what your salary will be?

A. I don't know.

³⁷ Durden testified (Tr. 859-60):

Q. When is the last time you asked the limited partners for money?

A. I would say a month ago.

Q. And how much did you ask each of them for?

A. \$1000.

Q. And have they paid you each \$1000?

A. No.

Q. Have each paid you \$1000?

A. No.

³⁸ Durden testified (Tr. 903-04):

Q. You have personal knowledge of their financial obligations?

A. Oh, no. No.

Q. Do you know the assets and liabilities of each limited partner?

A. No, I don't.

Q. Did you know the salaries of Messrs. Turner and Moss at the time you executed the application?

A. Not exactly, no.

³⁹ In his *S.I.D.*, and citing the recent *Ronald Sorenson*, 6 FCC Rcd 1952 (1991) (*recon. denied*, FCC 91-371, released November 21, 1991), the ALJ *sua sponte* raised Evans' integration credit from zero % to 100%, stating that since "the Commission has indicated that they are not overly concerned" with applicants who view their broadcast operation as merely one of several businesses they are engaged in . . . neither will the ALJ be overly concerned. 6 FCC Rcd at 2798. We believe that the ALJ

has overreacted to *Sorenson*, but see *Kevin Potter*, FCC 91R-113, released December 13, 1991 (concurring statement) (integration proposals treated unevenly), and we are confident that the Commission remains deeply concerned. *Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991).

⁴⁰ Evans Exceptions at 15.

⁴¹ Spirit Reply at 3.