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FEDERAL COMMUNICATIONS COMMISSION

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Applications of:)	WT Docket No. 97-199
)	
WESTEL SAMOA, INC.)	File No. 00560-CW-L-96
)	
For Broadband C Block Personal)	
Communications Services Facilities)	
)	
and)	
)	
WESTEL, L.P.)	File Nos. 00129-CW-L-97
)	00862-CW-L-97
For Broadband C Block Personal)	00863-CW-L-97
Communications Services Facilities)	00864-CW-L-97
)	00865-CW-L-97
)	00866-CW-L-97

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1998 ; Released: March 10, 1998

By the Commission:

1. This memorandum opinion and order grants in part a Petition for Reconsideration, filed October 6, 1997, by Anthony T. Easton,¹ and modifies the hearing designation order in this proceeding. Westel Samoa, Inc., 12 FCC Rcd 14057 (1997) (HDO).

I. BACKGROUND

2. This proceeding arose from facts and circumstances surrounding a bid placed by

¹ Also before the Commission are: (1) the Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration, filed October 16, 1997, and (2) the Reply to Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration, filed October 24, 1997, by Easton.

PCS 2000 L.P. (PCS 2000)² in the Commission's broadband Personal Communications Services (PCS) C Block auction. Two individuals involved in the instant proceeding, Anthony T. Easton and Quentin L. Breen, were, respectively, the Chief Executive Officer, and a director, of Unicom Corporation, PCS 2000's general partner.

3. The background of this proceeding is set forth in the HDO and a separate Notice of Apparent Liability Issued against PCS 2000. PCS 2000, L.P., 12 FCC Rcd 1703 (1997) (NAL). In the NAL, the Commission found that the evidence before it indicated that Easton had made misrepresentations and lacked candor before the Commission. 12 FCC Rcd at 1714-16 ¶¶ 40-42, 44-46. The Commission stated that Breen's conduct was less clear but that it appeared that Breen was aware of Easton's misconduct and did not disclose it. 12 FCC Rcd at 1717-18 ¶ 50.

4. The Commission's NAL proposed a \$1 million forfeiture against PCS 2000, which PCS 2000 paid. 12 FCC Rcd at 1717-18 ¶¶ 48, 52-53; 12 FCC Rcd at 14059 n.10. Nevertheless, the Commission granted PCS 2000's 15 C Block PCS applications, because PCS 2000 had taken measures to remove Easton and Breen from the ownership and control of PCS 2000. PCS 2000, L.P., 12 FCC Rcd 1681, 1688-89 ¶¶ 16-17 (1997).

5. The Commission subsequently initiated the instant proceeding because Breen is the controlling principal of Westel Samoa, Inc. and Westel, L.P. (collectively Westel), which are the high bidders for seven PCS C Block and F block licenses in American Samoa. The Commission designated issues to determine whether Breen made misrepresentations or lacked candor before the Commission in connection with Easton's conduct concerning the January 23, 1996 overbid.

6. The Commission also designated an issue against Easton. The Commission stated (12 FCC Rcd at 14073 ¶ 45) that:

Although Mr. Easton has no applications currently pending before the Commission, we believe that it is both more efficient and more fair to consider his fitness to be a Commission licensee at this time since we must decide whether we can grant the Westel applications for C and F block authorizations controlled

² PCS 2000, now called ClearComm, L.P., has petitioned to intervene in this proceeding, and has filed comments, on November 24, 1997, with respect to Easton's Petition for Reconsideration. The Presiding Judge denied intervention. Westel Samoa, Inc., FCC 98M-3 (Jan. 16, 1998), app. for rev. pending. We have considered the comments as an amicus filing. Accordingly, we have also considered Easton's Response to Comments of Clearcomm. L.P., filed December 4, 1997.

by Mr. Breen, and for all practical purposes, we cannot examine Mr. Breen's role in the controversy without examining Mr. Easton's. Consequently, we are ordering Mr. Easton to show cause why he should not be banned from future Commission proceedings.

Accordingly, the Commission designated an issue (12 FCC Rcd at 14076 ¶53):

To determine, based on Anthony T. Easton's misrepresentations before and lack of candor exhibited towards the Commission, whether Mr. Easton should be barred from holding Commission authorizations and participating in future Commission auctions.

7. Easton contends that the Commission should vacate the hearing designation order with respect to him and acknowledge that there has been no adjudicative determination that he engaged in intentional misconduct. He asserts that the Commission does not have subject matter jurisdiction to issue a hearing designation order concerning him because he is not an applicant before the Commission and he is not currently engaged in any conduct regulated by the Communications Act. Easton further contends that the hearing designation order violates the procedural requirements of the Communications Act and deprives him of due process because it contains findings (based on the NAL against PCS 2000) that he committed misrepresentations, even though he has never been party to an evidentiary hearing regarding the allegations against him.

8. The Bureau opposes vacating the HDO. It argues that the Commission has jurisdiction to conduct this proceeding because Easton committed misrepresentations, which constitutes misconduct relevant to the Commission's regulatory responsibilities, while he was engaging in a PCS auction, an activity regulated by the Commission. It also argues that Easton has not been deprived of hearing rights under the Communications Act or the Constitution because Easton participated in the proceeding leading up to the issuance of the NAL by submitting sworn declarations, participating in interviews with the Commission's staff, and by submitting a report by his counsel. The Bureau contends that Easton is not entitled to a hearing because no substantial and material question exists as to whether he committed misrepresentations. In any event, the Bureau believes that the issue designated is broad enough to encompass an inquiry into the facts and circumstances surrounding the misrepresentations.

II. DISCUSSION

9. We conclude that Easton is properly the subject of the hearing but that the scope of the issue against Easton should be modified to make clear that no findings have been made against him and that whether he engaged in misrepresentation or lack of candor is itself a

subject of the hearing, with no weight being given to the Commission's findings in the NAL against PCS 2000.

A. Jurisdiction

10. Section 1.2109(d) of the rules provides:

Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process . . . may be prohibited from participating in future auctions.

We believe that holding a hearing about Easton under this rule is within the Commission's jurisdiction. While we agree with Easton that Section 309 of the Communications Act is not a basis for jurisdiction here because no application is pending and that section 312 is also inapplicable to this proceeding,³ the Act gives us the flexibility to adopt special or additional forms of relief where the public interest so requires. See United States v. Southwestern Cable Co., 392 U.S. 157, 180-81 (1968) (The Commission may issue "such orders not inconsistent with [the Communications Act], as may be necessary in the execution of its functions.") Id. at 181, quoting 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r) (The Commission shall "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act); 47 U.S.C. § 403 (The Commission shall have the authority to "institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which . . . any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act"⁴). Thus, we make clear here

³ Section 309(a) provides that the Commission shall make a determination "in the case of each application filed." Easton has not filed any application. Section 312 provides that the Commission "may revoke any station license or construction permit" or "order [a person committing misconduct listed in the section] to cease and desist such action." The issue designated in this proceeding does not seek revocation of an existing authorization held by Easton. Similarly, it does not contemplate ordering Easton to cease and desist specific misconduct, but rather contemplates barring him from holding Commission authorizations or participating in Commission auctions.

⁴ The Section further provides:

The Commission shall have . . . the power to make or enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the

that the jurisdictional basis for the hearing about Easton is sections 4(i), 303(r), and 403 of the Act, not sections 309 and 312, as set forth in the HDO.

11. In the area of auctions, we have found it appropriate to institute exceptional safeguards to protect the integrity of the competitive bidding process. Thus, as noted above, for example, bidders⁵ who have been found to have violated the Commission's rules in connection with the auction process may be subject to a variety of sanctions, including being prohibited from participating in future auctions. 47 C.F.R. § 1.2109(d). See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 2348, 2388 ¶ 226 (1994). Thus, while in most circumstances we do not adjudicate a person's qualifications in advance of their filing an application (See A.S.D. Answer Service, Inc., 1 FCC Rcd 753, 756 ¶ 22 (1986)), in the auctions context we have done so where an individual has been implicated in especially egregious misconduct. See Commercial Realty St. Pete, Inc., 10 FCC Rcd 4313 (1995). Accordingly, we reaffirm the designation of the issue against Easton.

B. Scope of the Hearing

12. We find that it is appropriate to clarify the scope of the hearing designated in this proceeding as regards Easton. The pleadings before us evidence some confusion over the intended scope of the hearing with respect to the issue of the alleged misrepresentations. Compare Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration at 5 ("As . . . Mr. Easton did not file for reconsideration of the . . . NAL's conclusion that he misrepresented facts [footnote omitted], that action is now final. Accordingly, his argument that he is entitled to a hearing or to further due process on the question of whether he misrepresented facts or lacked candor is untimely and must be rejected.") with id. at 12 ("Nevertheless, the Bureau believes that the issue designated against Mr. Easton contemplates that he will be afforded a full and complete opportunity to demonstrate why he should not be barred from holding Commission authorizations. Such an inquiry might include whether he misrepresented facts or lacked candor before the Commission"). Our reexamination of the HDO discloses ambiguous language that may be the source of this difficulty. Compare FCC 97-332 at ¶ 48 ("Mr. Easton has engaged in serious misconduct which calls into question his basic qualifications to be a Commission applicant or licensee") with id. at ¶ 41 ("Under these circumstances, we believe that it is appropriate to issue this Order and proceed to a hearing where a decision regarding the credibility of all witnesses will be made by an Administrative

payment of money.

⁵ "Bidders" have been defined as applicants and all holders of attributable interests in applicants. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 7684 7687-88 ¶¶ 8-9 (1994).

Law Judge").

13. We therefore wish to clarify that, as Easton argues, any findings made in the NAL (which are recited in slightly modified form in the HDO) are not binding on him, the ALJ, or the Commission. Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits. . . ." See Montana v. United States, 440 U.S. 147, 153 (1979). Thus, the prior adjudication of an issue is not binding in a subsequent proceeding unless (1) the identical issue was previously litigated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. See, e.g., Raytech Corp. v. White, 54 F.3d 187, 190 (3rd. Cir. 1995). The nature of a notice of apparent liability does not warrant treating it as a decision reflecting the actual litigation of an issue. The Communications Act provides that the fact the Commission issues a notice of apparent liability "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom the notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of the forfeiture, and such order has become final. 47 U.S.C. § 504(c). As to subsection (i), PCS 2000, not Easton, paid the forfeiture, and thereby conceded liability for purposes of the statutory provision. Thus, while the findings in the NAL are binding against PCS 2000 on that basis, the payment does not make the findings binding against Easton. As to subsection (ii), no court has ordered payment of the forfeiture, which, would first require the court's de novo review of the facts and issues. Absent such de novo review, the findings and conclusions in the notice of apparent liability do not have any weight against Easton.⁶ See United States F.C.C. v. Summa Corp., 447 F. Supp. 923, 925 (D. Nev. 1978) (upon review, "the findings and conclusions of the Commission in this case [do not] carry any weight whatsoever"). Thus, the NAL here does not have the effect of a binding adjudication. See also Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 403 (D.C. Cir. 1974) (the Communications Act contemplates that a notice of apparent liability will contain charges not terms and conclusions).

14. In these circumstances, we agree with Easton that he is entitled to a full hearing on the question of misrepresentation and lack of candor before any findings on this matter can be used as a binding determination as to his disqualification to hold a license or to participate in future auctions. Under the Act, an applicant may not be denied a license without a full

⁶ The only circumstance in which judicial enforcement of a forfeiture assessment is not de novo is where the Commission imposes a forfeiture after notice and a hearing on the record in accordance with the adjudicatory hearing provision of Administrative Procedure Act. See 47 C.F.R. §§ 503(b)(3), 504(a); 5 U.S.C. § 554. It is the absence of such a hearing that otherwise deprives the NAL of binding effect unless payment is made.

hearing. See 47 U.S.C. § 309(e) (If . . . for any reason the Commission is unable to make the finding [that grant of an application will serve the public interest, convenience, and necessity], it shall formally designate the application for hearing Any hearing subsequently held upon such application shall be a full hearing). According to the Supreme Court in United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1956):

We agree that a "full hearing" under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts.

See also RKO General, Inc. v. FCC, 670 F.2d 215, 231-36 (D.C. Cir. 1981) (discussing the scope of proceedings required to consider allegations of misrepresentation and/or lack of candor). Given that the hearing in this case serves as a substitute for any hearing under section 309 that would take place if we simply waited to adjudicate Easton's qualifications until he applied for an authorization, we will modify the wording of the issue to remove the ambiguity and clarify that Easton is entitled to a full evidentiary hearing on this issue.

III. PROCEDURAL MATTERS

15. After this case was designated for hearing, Easton notified the Presiding Judge that he declined to submit a notice of appearance. Westel Samoa, Inc., FCC 97M-172 (Oct. 20, 1997). He explained that he would instead challenge the validity of the HDO. The Presiding Judge thereupon held that Easton had forfeited his hearing rights and certified the matter to the Commission pursuant to 47 C.F.R. § 1.92(c). Id. Because Easton's conduct may have been prompted in part by the ambiguity in the scope of the designated issue, we will afford Easton an additional ten days after the release of this Memorandum Opinion and Order to file a notice of appearance for the purpose of participating in this evidentiary hearing.

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED, That, good cause having been shown, the Consent Motion for Extension of Time, filed October 23, 1997, by Anthony T. Easton IS GRANTED.⁷

⁷ The motion seeks a one-day extension of time to file a Reply to the Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration to enable counsel to incorporate new information. The motion recites that the Bureau consents to the extension.

17. IT IS FURTHER ORDERED, That the Motion to Strike [ClearComm, L.P.'s] Comments or for Leave to File Response, filed December 4, 1997, by Anthony T. Easton IS GRANTED in part and IS DENIED in part and his responsive comments are accepted.

18. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed October 6, 1997, by Anthony T. Easton, IS GRANTED to the extent indicated herein and otherwise IS DENIED.

19. IT IS FURTHER ORDERED, That the jurisdictional statement in Paragraph 53 of the hearing designation order IS AMENDED to read:

53. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), 309(e), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(e), 403, ,

and Issue 1 IS AMENDED to read:

1. To determine whether Anthony T. Easton made misrepresentations and/or lacked candor before the Commission regarding the bid submitted by PCS 2000 for Basic Trading Area 324 for Norfolk, Virginia, in Round 11 of the Commission's Broadband C Block auction of January 23, 1996, and in view of the findings made, whether he should be barred from holding Commission authorizations and participating in future Commission auctions;

22. IT IS FURTHER ORDERED, That Anthony T. Easton may within ten (10) days of the release date of this order submit a notice of appearance to avoid a finding that he forfeited his hearing rights in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary