

FCC MAIL SECTION

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

FCC 98M-74

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

MEMORANDUM OPINION AND ORDER

Issued: June 9, 1998 ; Released: June 10, 1998

1. Under consideration are ClearComm's Motion to Compel the Production of Documents by Anthony T. Easton and Memorandum in Support Thereof, filed on May 27, 1998, by ClearComm, L.P. ("ClearComm"); and an Opposition to Motion to Compel, filed on June 3, 1998, by Anthony T. Easton ("Easton").

2. ClearComm seeks the issuance of an order compelling Easton to produce certain documents, or to comply with certain document production procedures, requested in ClearComm, L.P.'s First Requests for the Production of Documents by Anthony T. Easton, dated May 5, 1998. For the reasons which follow, ClearComm's Motion to Compel will be granted in part and denied in part.

3. Duty to Supplement (Instruction 1). ClearComm's request that Easton be compelled to supplement his disclosures appears to be moot in light of Easton's statement in the Opposition that he "agrees to supplement his response to the extent he learns that his previous production was inaccurate or incomplete." Opposition at 3. In any event, Easton is hereby directed to do so.¹

¹ Easton's request that this duty to supplement be imposed on all other parties to this proceeding is granted. Copies of any newly discovered documents shall be provided to all other parties within five business days of their discovery. Counsel are instructed to inform their clients of this obligation.

4. Duty to Produce Documents as Maintained and to Identify (Instructions 6 & 7). ClearComm's request that the documents produced by Easton be organized in the manner specified in the Federal Rules of Civil Procedure is denied. The Commission's discovery rules do not require any particular method of organization. *See* Section 1.325 of the Rules. In any event, Easton's counsel has represented in the Opposition that the "documents provided directly by Mr. Easton himself were made available to ClearComm exactly as provided to counsel," and that documents coming from counsel's files were produced, to the extent possible, in the order in which they were filed and were "grouped according to the file from which they were obtained." Opposition at 4. It therefore appears that Easton has substantially complied with ClearComm's request.

5. Definition of "You" (Definitions). Easton objects to ClearComm's definition of "You" to the extent that it encompasses persons not within his control. The objection is sustained. Easton cannot be expected to procure and produce documents in the possession or custody of persons who are beyond his control.

6. Documents in ClearComm's Possession or in the Public Domain (Definitions). Easton objects to producing documents already in the possession of ClearComm and any documents which are in the public domain. The objection will be sustained to the extent that Easton need not produce documents which are a matter of public record or which he believes are already in ClearComm's possession. However, to enable ClearComm to identify such documents, Easton is directed to prepare and exchange a detailed listing of all documents being withheld because they are a matter of public record or are believed to be in ClearComm's possession. In the alternative, Easton may produce such documents.

7. Identification of Documents Withheld on Grounds of Privilege or Work Product Protection (Definitions). ClearComm requests that Easton supplement his log of Privileged Documents withheld to include "documents prepared in anticipation of litigation." Motion at 4. Easton represents in the Opposition that "work product documents" were included in the log. Opposition at 4. ClearComm's request will be granted to the extent that counsel for Easton are directed to review the log of Privileged Documents to determine whether all "documents prepared in anticipation of litigation" have been listed. If they have not, then Easton shall supplement the log. If they have, Easton shall inform ClearComm of that fact.

8. Waiver of Privilege or Protection Through Voluntary Disclosure (Definitions). ClearComm contends that no attorney-client privilege exists with respect to documents that were conveyed or copied to Tony J. Tanke, Esq. (counsel for the SDE Trust²), or to Ms. Easton (Easton's wife), and that such documents should be produced. ClearComm's request will be denied. With respect to Ms. Easton, a marital communication privilege, which may be asserted by either spouse, would apply. Further, it appears that Easton and his wife have a common, and adversarial, relationship with ClearComm and/or its principals. Under these circumstances, it is concluded that there is a commonality of interests and that the exchange of documents by

² *See* Letter to the Presiding Judge from Tony J. Tanke, Esq., dated April 9, 1998.

attorneys for Easton, Ms. Easton, and the SDE Trust does not constitute a waiver of the attorney-client privilege. *See Georgia Public Telecommunications Commission*, 5 FCC Rcd 4560 (1990).

9. Attorney-Client Privilege Claims on Behalf of Ms. Easton (Definitions). ClearComm urges the production of documents for which privilege was claimed, arguing that no attorney-client privilege exists between Ms. Easton and Lukas, Nace, Gutierrez & Sachs ("Lukas, Nace"), counsel for Easton in this proceeding, and that, even if such privilege exists, it may only be invoked by Ms. Easton. In the Opposition it is represented that Lukas, Nace has provided legal services to Ms. Easton and the SDE Trust in connection with other litigation, and that counsel for Ms. Easton and the SDE Trust has conferred with Lukas, Nace on legal strategies, tactics, and the result of their factual investigations. Opposition at 6. It appears from these representations that an attorney-client relationship exists between Ms. Easton and Lukas, Nace. However, as ClearComm correctly notes, such claim of privilege must be asserted by Ms. Easton. Ms. Easton should, if she wishes to claim privilege with respect to the requested documents, specifically and in writing invoke the attorney-client privilege. If she does not do so, the documents must be produced.

10. Lack of Specificity as to Documents for Which Privilege or Protection is Claimed (Definitions). ClearComm asserts that some listings in Easton's log of Privileged Documents withheld are vague in that further information is needed with respect to certain named individuals. This request appears to be moot in light of the identification in Easton's opposition of the individuals in question. Opposition at 11.

11. Communication Between Movshin and Lassart (Privileged Document 8). ClearComm requests the production of a fax from L. Movshin to L. Lassart. Motion at 5, 13. Easton represents that ClearComm already has a copy of the fax. Opposition at 12. In light of Easton's representation, this request appears to be moot.³

12. All Documents Relating to the PCS C Block Auction (Request 2). ClearComm requests "[a]ll documents that refer to, reflect, evidence, constitute, or describe the F.C.C. PCS Block C auction." Easton objects, arguing that the request is overbroad, burdensome, oppressive and immaterial. ClearComm's request will be granted in part. Issue 1 seeks inquiry into a 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."⁴ Therefore, all documents relating to that specific round of bidding shall be produced to the extent they have not already been produced in response to other document production requests. Such documents manifestly appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules. The remainder of ClearComm's request is too broad.

³ If ClearComm does not possess a copy of this fax, it shall notify counsel for Easton who is hereby directed to produce it.

⁴ *Westel Samoa, Inc.*, 13 FCC Rcd 6342, 6348 (1998).

13. Past Bad Acts Evidence (Requests 6, 7, 9, 10, 13 & 14). ClearComm requests that documents be produced evidencing "past investigations, disciplinary proceedings, adjudicatory proceedings, court actions, and other actions or proceedings initiated by regulatory or government entities against Mr. Easton." Motion at 6. Easton objects on the grounds that ClearComm is "fishing for evidence to move for enlargement of issues." Opposition at 8.

14. This request will be granted in part and denied in part. Issue 1 in this proceeding, the only issue pertaining to Easton, reads in its entirety:⁵

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.

It is clear from even a cursory reading of this issue that it is very specific and detailed with respect to the factual matters and alleged misconduct under consideration in this proceeding. It is an extremely narrow issue and does not contemplate an expansive inquiry into all of Easton's past conduct. Indeed, the order designating this case for hearing, *Westel Samoa, Inc.*, 12 FCC Rcd 14057 (1997) ("*HDO*"), did not discuss any other instances of alleged misconduct on the part of Easton, and did not indicate that the Commission was concerned with any other matter relating to Easton. Moreover, even assuming, *arguendo*, that Issue 1 was phrased in broad, general terms, the wide ranging inquiry sought by ClearComm still would not be appropriate. Suffice it to say, Commission precedent requires that Issue 1 be interpreted in light of the facts recited in the *HDO*. *Kittyhawk Broadcasting Corporation*, 20 FCC 2d 1011, 1021 (Rev. Bd. 1969); *Catamount Broadcasters, Inc.*, 56 FCC 2d 730, 736 n.22 (Rev. Bd. 1975). Consequently, the documents requested by ClearComm go well beyond the scope of Issue 1 and do not appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules.

15. ClearComm's reliance on the Commission's *Character Policy Statements*, 102 FCC 2d 1179 (1986) and 5 FCC Rcd 3252 (1990), is misplaced. Although the *Character Policy Statements* discussed the character-related misconduct which would be of concern to the Commission, those *Statements* did not obviate the requirement that discovery be related to specifically designated issues. *Discovery Procedures*, 11 FCC 2d 185, 187 (1968) (the scope of the examination in discovery will be limited to matters relevant to the hearing issues; discovery may not be used to ascertain whether grounds exist for the enlargement of the issues). Thus, the *Character Policy Statements* do not give ClearComm a license to delve wholesale into Easton's "character." To rule otherwise would have the effect of converting every hearing proceeding into a general character inquiry regardless of the specific issues set for hearing.

⁵ *Id.*

16. Nevertheless, it is well established that Easton's credibility may be attacked by a showing that he was convicted of a crime which involved dishonesty or false statement, or one which was punishable by death or imprisonment for a period in excess of one year, Fed. R. Evid. 609, and by evidence of Easton's reputation for truthfulness or untruthfulness, Fed. R. Evid. 608. Therefore, Easton will be required to produce documents relating or referring to any proceedings or actions wherein, within the past 10 years, he was convicted of a crime which involved dishonesty or false statement, or one which was punishable by death or imprisonment for a period in excess of one year. Easton will also be required to produce documents relating or referring to any administrative proceedings or actions wherein, within the past 10 years, a final determination was made that he gave a false statement or testimony, or that he acted dishonestly. In addition, Easton will be required to produce documents referring or relating to his reputation for truthfulness or untruthfulness.

17. Hamilton Litigation (Request 8). ClearComm requests that documents dealing with this lawsuit be produced. Easton represents that he has already produced all such documents except those which are a matter of public record and those which are protected by privilege. ClearComm's request will be granted in part and denied in part. To the extent that documents in the Hamilton litigation are in the public domain, they need not be produced. However, to enable ClearComm to identify such documents, Easton will be required to prepare and exchange a detailed listing of all documents being withheld because they are a matter of public record.⁶ Similarly, with respect to documents which are being withheld on the basis of privilege, Easton is directed to provide the parties with a detailed listing of such documents.

18. Easton's Immediate Family (Requests 6, 7, 9, 10, 11, 12, 13, 14 & 21). ClearComm seeks documents relating to Easton's immediate family and their business or financial involvements. ClearComm states that it believes Easton exerts control over his immediate family and that, "[t]o the extent these family members have been involved in misdeeds, these bad acts may also be attributable to Mr. Easton." Motion at 7. ClearComm also requests documents relating to Ms. Easton's communications with certain named individuals because they are contacts between "someone potentially under Mr. Easton's control[] and potential witnesses." *Id.* at 21. Easton objects on the ground that ClearComm is "fishing for evidence [for the] enlargement of issues." Opposition at 9. The requested documents need not be produced since they do not appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules. Issue 1 does not encompass inquiry into any alleged misdeeds by members of Easton's immediate family. On the contrary, as discussed above, Issue 1 has been very narrowly crafted to explore only the alleged misconduct of Easton with regard to a specific incident.

19. Documents Relating to Communications (Requests 15, 17 & 18). ClearComm requests documents relating to Easton's communications during specific time periods. Easton objects to these requests as overbroad and an invasion of privacy. The documents should be produced. Documents relating to when and with whom Easton spoke about the bidding error

⁶ Alternatively, Easton may produce such documents.

appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules.

20. Documents Regarding Actual or Contemplated Communications with Young, Harlick, Wilson & Simpson, L.L.P. ("Young, Harlick") (Request 25). ClearComm seeks these documents, claiming that "they will reveal continual shifts in Mr. Easton's story." Motion at 8. Easton objects on the grounds of "relevance, materiality, and vagueness as to what is a 'contemplated' communication." Opposition at 10. ClearComm's request will be granted in part.⁷ To the extent that there were actual written communications (including drafts) created by and for Easton for submission to Young, Harlick, these should be produced. It is axiomatic that prior inconsistent statements, if any, are relevant and material to Easton's credibility. Fed. R. Evid. 613. If documents are being withheld on the basis of privilege, Easton is directed to provide the parties with a detailed listing of such documents.

Accordingly, IT IS ORDERED that ClearComm's Motion to Compel the Production of Documents by Anthony T. Easton and Memorandum in Support Thereof, filed on May 27, 1998, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED that the documents requested, and the other materials required to be exchanged, SHALL BE PRODUCED within seven (7) days of the release of this order, or at such other time as may be mutually agreeable to counsel.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge

⁷ Easton's vagueness objection is overruled in light of ClearComm's clarification. See Motion at 22.