

FCC MAIL SECTION

FCC 98M-3

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

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DISPATCHED BY

In re Applications of)	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: January 14, 1998

;

Released: January 16, 1998

1. Under consideration are: (a) a Petition to Intervene, filed on November 13, 1997, by ClearComm, L.P. ("ClearComm"); (b) Comments in support of (a), filed on November 24, 1997, by the Wireless Telecommunications Bureau ("Wireless Bureau" or "Bureau"); (c) a Request for Acceptance and Consideration of Late Filed Pleading, filed on November 28, 1997, by Westel Samoa, Inc., Westel, L.P., and Quentin L. Breen (collectively "Westel");¹ (d) an Opposition to (a), filed on November 28, 1997, by Westel; and (e) a letter from counsel for ClearComm, dated December 2, 1997, addressed to the Presiding Judge, a copy of which was filed with the Office of the Secretary on December 2, 1997, "for association with the official record of [this proceeding]."

ClearComm's Letter

2. On the Presiding Judge's own motion, the December 2, 1997, letter from counsel for ClearComm to the Presiding Judge will be dismissed. First, counsel's letter is in actuality a pleading opposing Westel's Request for Acceptance and replying on the merits to Westel's Opposition to Petition to Intervene. It is well settled that the letter form of pleading is neither

¹ Good cause having been shown, Westel's Request for Acceptance and Consideration of Late Filed Pleading will be granted and its Opposition to Petition to Intervene will be accepted. Westel is advised, however, that in the future it is expected that, if a pleading deadline cannot be met, a motion seeking an extension of time be filed prior to the due date of the pleading, as contemplated in Section 1.46(c) of the Rules.

countenanced by Commission precedent nor contemplated by the Commission's Rules. See Belo Broadcasting Corp., 44 FCC 2d 534, 537 (1973), and Action Radio, Inc., 37 FCC 2d 351, 353 (1972). Although ClearComm, at note 1 of its letter, requests permission to file "its reply . . . in letter form," no reasons for the request have been advanced and no good cause for granting such a departure from established practice has been demonstrated.²

3. Second, and more significantly, the Commission's rules do not permit the filing of a reply to an opposition to a petition to intervene. Ellis Thompson Corporation, 10 FCC Rcd 7325, 7326 (¶ 7) (Rev. Bd. 1995), rev. denied 10 FCC Rcd 11434 (1995); see Sections 1.223 and 1.294 of the Rules. Therefore, counsel's letter, even if it had been filed in the form of a pleading, constitutes an unauthorized reply and, as such, is entitled to no consideration. See D. H. Overmyer Communications Co., 4 FCC 2d 496, 505 (Rev. Bd. 1966); see also Filing of Supplemental Pleadings Before the Review Board, 40 FCC 2d 1026 (Rev. Bd. 1972).³ ClearComm, at note 1 of its letter, implicitly contends that it has a right to file a reply pursuant to Section 1.45 of the Rules. However, that section is not applicable to pleadings filed in adjudicatory proceedings. See Sections 1.201 and 1.294 of the Rules, and the Note to Section 1.45 of the Rules.

Petition to Intervene

4. ClearComm argues that it has a direct financial interest in the outcome of this proceeding which is sufficient to confer party-in-interest status as a matter of right pursuant to Section 1.223(a) of the Commission's Rules. Specifically, ClearComm states that it "may be affected" by this proceeding due to the pendency of a civil lawsuit in the Superior Court of San Juan, Puerto Rico, between ClearComm and its former corporate bidding services provider, Romulus Telecommunications, Inc. ClearComm contends that any factual or legal finding regarding the events in question in this proceeding "may have a collateral impact" on the outcome of this civil litigation. According to ClearComm, this is sufficient to grant it status as an intervenor as of right. (Petition at 3.)

5. In addition, ClearComm maintains that the factual findings in the instant case "could clearly affect [its] standing before the [Commission]." This is so, ClearComm alleges, because this proceeding will undoubtedly examine the conduct of certain individuals in connection with bids placed on January 23, 1996, in the Commission's Broadband PCS C Block auction. ClearComm avers that such an examination "may result in evidence of ClearComm's corporate conduct in the auctions" and possibly cause that conduct to "be specifically reviewed." Since

² In Order, FCC 97M-192, released November 21, 1997, it was stated that ClearComm, as a non-party, was not entitled to file pleadings "unrelated to its petition to intervene." Since the subject matter of its letter was related to the Petition to Intervene, it could have been filed in pleading form.

³ Although Overmyer and Supplemental Pleadings were issued by the Review Board, they were cited as precedent by the Commission in KAYE Broadcasters, Inc., 47 FCC 2d 360, 361 n.4 (1974).

evidence of that nature "might collaterally reflect adversely"⁴ on ClearComm, it asserts that it has "an obvious interest in the outcome of this proceeding." (Petition at 4-5.)

6. Alternatively, ClearComm argues that it should be permitted to intervene under Section 1.223(b) of the Rules as a matter of the presiding officer's discretion. In support, ClearComm states that this proceeding had its genesis in an earlier proceeding in which ClearComm's predecessor was involved and "many of the questions raised in the [hearing designation order in this case] are based on information supplied to the Commission by ClearComm during the course of the Commission's previous investigation." ClearComm further contends that its participation "may well help 'sharpen up the evidence'"⁵ because ClearComm and its employees "undoubtedly will be valuable sources of information," and ClearComm has an "interest distinct from that of Westel." (Petition at 6-7.)

7. The Wireless Bureau supports ClearComm's position that it may intervene as a matter of right. In this regard, the Bureau states that "evidence could be adduced [herein] which could affect ClearComm's interests." In addition, the Bureau submits that ClearComm has an "identifiable interest" because the proceeding "involves the conduct of officers of [ClearComm's predecessor]." (Comments at 2.)⁶ The Bureau also maintains that ClearComm should be allowed discretionary intervention since it has demonstrated that it will be able to assist in the adduction of evidence, and current employees of ClearComm "may be valuable witnesses in this proceeding." (Id. at 3.)

8. Westel opposes ClearComm's petition, arguing that ClearComm does not have any cognizable interest upon which party-in-interest status might be based and there has been no demonstration that ClearComm's intervention would enhance the development of a complete and accurate record. (Opposition at 3-8.)

9. The Petition to Intervene will be denied. Section 1.223(a) of the Rules, which implements Section 309(e) of the Communications Act of 1934, as amended, states that "any person who qualifies as a party in interest," but who has not been named a party by the Commission, may acquire the status of a party by filing a petition for intervention "showing the basis of its interest." A "party in interest" has been defined as "a person aggrieved or whose interests are adversely affected by grant or denial of the application [under consideration in the proceeding]." Hertz Broadcasting of Birmingham, Inc., 46 FCC 2d 350, 352 (Rev. Bd. 1974) (emphasis added). Further, a petitioner seeking intervention must show "a potential direct and substantial injury which could result from the outcome of [the] proceeding," i.e., the grant or

⁴ Palmetto Communications Co., 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991).

⁵ Id.

⁶ However, the Bureau further remarks that it "does not intend to use the instant proceeding to investigate ClearComm's qualifications [because] the Bureau is satisfied that the Commission fully resolved that issue in [PCS 2000, L.P., 12 FCC Rcd 1681 (1997), recon. pending]." (Comments at 2, emphasis added.)

denial of the application in question. Id. Moreover, the burden of making such a showing is on the petitioner, and "specific allegations of fact" must be provided supporting its claims. Ellis Thompson Corporation, 10 FCC Rcd at 11435.

10. ClearComm has failed to meet these stringent requirements. Specifically, ClearComm has not satisfied its burden of showing that it will be "aggrieved" or that its "interests [will be] adversely affected" by the grant or denial of the Westel applications involved in this proceeding. Nor has ClearComm demonstrated "a potential direct and substantial injury" which could result from the grant or denial of those applications. In this connection, ClearComm's arguments relating to the civil lawsuit in Puerto Rico do not provide any basis for intervention as of right. It does not appear that this civil suit involves the Westel applications, and it is well established that intervention will not be granted to protect the private interests of the petitioner. Arizona Mobile Telephone Co., 80 FCC 2d 87, 90 (Rev. Bd. 1980), citing Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1001 (D.C. Cir. 1966).

11. Further, ClearComm has not provided "specific allegations of fact" establishing that any of the findings in this case "could . . . affect [its] standing before the [Commission]." On the contrary, ClearComm's assertions in this regard appear to be based on nothing more than sheer speculation. Moreover, the Commission's rulings in PCS 2000, L.P., make it clear that ClearComm's qualifications to be a licensee are not in any way dependent upon the past actions of Westel or its principals. See 12 FCC Rcd 1703, 1717-18 (¶ 50) (1997) and 12 FCC Rcd 1681, 1682 (¶ 1) (1997). Additionally, in light of the Bureau's representation in its Comments that it "does not intend to use the instant proceeding to investigate ClearComm's qualifications [because] the Bureau is satisfied that the Commission fully resolved that issue [emphasis added]," it is highly unlikely that any of the findings in this case would ever be used against ClearComm in the future.

12. Palmetto Communications, cited by ClearComm in support of its intervention request, is distinguishable from the instant case. In Palmetto, which the Review Board termed an "unorthodox situation," it was clear that the petitioner had fully satisfied his burden of showing by specific allegations of fact that the evidence adduced at the hearing might reflect adversely on the petitioner himself and result in his "personal culpability" under the existing issues of that proceeding. 6 FCC Rcd at 5024.⁷ Here, as discussed above, ClearComm has not established by specific allegations of fact that it would be adversely affected by the outcome of this proceeding. Rather, its contentions are purely conjectural. Moreover, the fact that the Bureau has stated that it "is satisfied that the Commission [has] fully resolved" the issue of ClearComm's qualifications, indicates that the possibility of any further factual exploration of that matter is extremely remote.

⁷ Although the petitioner in Palmetto was officially on record at the Commission as a 50 percent general partner of that applicant, he had given an affidavit to the opposing applicant stating that he had withdrawn as a general partner.

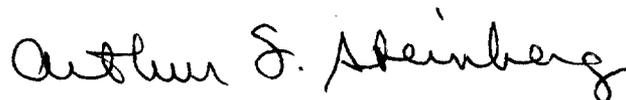
13. Next, ClearComm has not demonstrated that discretionary intervention pursuant to Section 1.223(b) of the Rules is warranted. This subsection provides, in pertinent part, that a petitioner seeking intervention thereunder must show how its participation "will assist the Commission in the determination of the issues in question." ClearComm has not met this test. First, the Commission has rejected as a basis for intervention familiarity with the facts of a case through participation in an earlier proceeding. Kenneth J. Crosthwait, 79 FCC 2d 191, 192-95 (1980). Further, ClearComm has failed to show that it alone possesses any factual evidence that would be necessary for the development of a full and complete record, or that the information which it does possess is not available for the use of the Wireless Bureau. In this regard, the appearance of ClearComm's employees as "valuable witnesses" at the hearing does not hinge on ClearComm's party status; such appearance may, if necessary, be compelled. Finally, ClearComm's petition virtually ignores the role of the Commission's operating bureaus, which are "entit[ies] expressly devised to take an independent role in Commission proceedings in the public interest,"⁸ and ClearComm does not even contend that the Wireless Bureau is unwilling, unable, or incapable of fulfilling its responsibilities. Under these circumstances, ClearComm's participation in this proceeding as a party would be superfluous.

Accordingly, IT IS ORDERED that the December 2, 1997, letter to the Presiding Judge from counsel for ClearComm IS DISMISSED.

IT IS FURTHER ORDERED that the Request for Acceptance and Consideration of Late Filed Pleading, filed by Westel on November 28, 1997, IS GRANTED, and the Opposition to Petition to Intervene, filed by Westel on November 28, 1997, IS ACCEPTED.

IT IS FURTHER ORDERED that the Petition to Intervene, filed by ClearComm on November 13, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge

⁸ Muncie Broadcasting Corp., 89 FCC 2d 123, 125 n.1 (Rev. Bd. 1982), quoting Pressley v. FCC, 437 F.2d 716, 719 (D.C. Cir. 1970). Although the quoted statement referred to the (then) Broadcast Bureau, it is submitted that the Wireless Bureau performs an identical role in proceedings such as this.