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

FCC 98M-89

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| In re Applications of | ) | WT Docket No. 97-199 |
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| 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 Communications Systems Facilities | ) | 00863-CW-L-97 |
| | ) | 00864-CW-L-97 |
| | ) | 00865-CW-L-97 |
| | ) | 00866-CW-L-97 |

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## MEMORANDUM OPINION AND ORDER

Issued: July 1, 1998 ; Released: July 2, 1998

1. Under consideration are: (a) ClearComm, L.P.'s Motion to Compel Testimony of Martin Blinder, M.D. and Production of Psychiatric Test Results ("Motion Re Dr. Blinder"), filed on June 12, 1998, by ClearComm, L.P. ("ClearComm"); (b) ClearComm's Motion to Compel the Production of Documents by Anthony T. Easton and Memorandum in Support Thereof ("Motion Re Documents"), filed on June 12, 1998, by ClearComm;[1] (c) a supplement to (b) consisting of "exhibits [which] were inadvertently omitted when the motion was filed," filed on June 12, 1998, by ClearComm; (d) an Opposition to Motion to Compel, filed on June 18, 1998, by Anthony T. Easton ("Easton"); and (e) an Opposition to Motion to Compel Testimony of Dr. Blinder and Production of Test Results, filed on June 23, 1998, by Easton.

### Background

2. On May 15, 1998, pursuant to the procedural schedule established in this proceeding,[2] Easton notified the parties that:

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[1] ClearComm requests the acceptance of this pleading, which was filed one day late. Motion Re Documents at 1 n.1. In the exercise of the Presiding Judge' discretion, and over the objection of Anthony T. Easton, ClearComm's request will be granted.

[2] *Order*, FCC 98M-36, released March 26, 1998.

> Martin Blinder, M.D., is expected to testify concerning emotional stress and Mr. Easton's capacity to form an intent to mislead with respect to the circumstances surrounding the mistaken bid made by PCS 2000 for the Norfolk, Virginia market in the Round 11 PCS C Block Auction, and will offer such *other rebuttal testimony* as appropriate in response to the direct case testimony of the Wireless Telecommunications Bureau and Clearcomm [sic], L.P.

Notification of Expert Witnesses, filed by Easton on May 15, 1998, at 1 (emphasis added).

3. On June 1, 1998, Easton exchanged with the parties the written statement of Dr. Blinder. This document is in the form of a letter addressed to Easton's counsel and is divided into sections entitled "Past History," "Present Problem," "Mental Status Examination," "Psychometric Testing," "Psychiatric Diagnosis," and "Conclusions."[3] The "Psychometric Testing" section reads in its entirety: "A Million III and a MMPI II were administered and scored by computer. The results shall be submitted under separate cover." Letter to Russell Lukas, Esq., from Martin Blinder, M.D., dated May 28, 1998, Re: FCC v. Anthony T. Easton, at 5. Dr. Blinder states in his Conclusions:

> In the opinion of this examiner, on January 3 [sic], 1996, much of Mr. Easton's cognition and behavior were informed by . . . adverse emotional factors [described in the report]. While I cannot definitively preclude the capacity for fraudulent intent, from the clinical data available to me it seems more probable than not that Mr. Easton was intent on trying to figure out "how could things go so terribly wrong after so much effort" rather than upon deceiving the government in some way.

*Id.*

4. By agreement of the parties, Dr. Blinder was scheduled to be deposed on June 10, 1998. Motion Re Dr. Blinder at 5 n.9. However, on the evening before his deposition was to be taken, Easton withdrew his designation of Dr. Blinder as his expert witness and refused to allow him to be deposed. *Id.* at 1, 5. The instant motions followed.

<u>Motion Re Dr. Blinder</u>

5. ClearComm seeks the issuance of an order "compelling the testimony" of Dr. Blinder and the "production of [the] psychiatric test results" referred to in Dr. Blinder's written statement. Motion Re Dr. Blinder at 1. In support, ClearComm argues that "Dr. Blinder has relevant information regarding Mr. Easton's emotional and psychological condition that is probative of whether Mr. Easton made misrepresentations and lacked candor before the

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[3] "Past History" is divided into sub-sections entitled "Early Years," "Schooling," "Work History," "Marital History," "Other Social Factors," and "Past Health." "Mental Status Examination" is divided into sub-sections entitled "Perception," "Mentation," "Affect," and "Behavior."

Commission regarding the bidding error of January 23, 1996." *Id.* at 4. ClearComm also claims that, by designating Dr. Blinder as its expert witness, Easton has "plac[ed] his psychiatric condition at issue" (*id.* at 6),[4] and that it is entitled to depose Dr. Blinder even though his designation as an expert witness was later withdrawn (*id.* at 3-4). Easton opposes ClearComm's motion.

6. ClearComm's motion will be denied to the extent that it requests that the deposition of Dr. Blinder be taken on Easton's psychiatric condition, and to the extent that it seeks the production of psychometric test results. The motion will be granted, however, to the extent that Dr. Blinder may be deposed on the facts communicated to him by Easton with respect to the January 23, 1996, bidding error.

7. Issue 1, which is the only issue specified against Easton, reads:

> 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.

*Westel Samoa, Inc.*, 13 FCC Rcd 6342, 6348 (1998) ("*HDO*"). It has been previously ruled in this proceeding that this is an extremely narrow issue which does not contemplate an expansive inquiry into all of Easton's past conduct, and that the scope of the issue must be interpreted in light of the facts recited in the *HDO*. *Memorandum Opinion and Order*, FCC 98M-74, released June 10, 1998. Neither the text of the issue itself, nor the facts recited in the *HDO*, place into issue Easton's psychiatric condition at the time the alleged misconduct took place.

8. ClearComm argues that Easton's psychiatric condition was placed into issue by virtue of his designation of Dr. Blinder as his expert witness. This argument is without merit. First, under long-standing and well established Commission practice, the "issues" in a hearing proceeding are those formally set forth in the order designating a case for hearing, and those are the only "issues" which are authorized to be heard.[5] Second, to the extent that ClearComm may have intended to use the word "issue" to mean "question," the question of Easton's psychiatric condition will arise only if *he himself* raises that defense against the direct cases presented at the hearing. In other words, Easton has to claim that he lacked the capacity to form an intent to mislead, for psychological reasons, before his psychiatric condition becomes a relevant matter.

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[4] In this connection, ClearComm further maintains that "Mr. Easton . . . put his emotional and psychological states at issue in this proceeding by designating Dr. Blinder as an expert 'to testify concerning emotional stress and Mr. Easton's capacity to form an intent to mislead with respect to the circumstances surrounding the mistaken bid' and by submitting Dr. Blinder's report." Motion Re Dr. Blinder at 8-9 (footnote omitted).

[5] *See*, however, Section 1.229 of the Commission's Rules.

At that point, and only at that point, may evidence be taken on his psychiatric condition at the time the alleged misconduct took place.

9. It is clear that Easton has made the decision that he will not defend himself at the hearing by contending that he lacked the capacity, from a psychological standpoint, to form an intent to mislead the Commission with respect to the circumstances under consideration in this case. In other words, despite his original plans, he no longer intends to use the testimony of Dr. Blinder in this regard. Given Easton's decision, the bulk of Dr. Blinder's written statement, including his conclusions and the bases therefor, are not now pertinent to Issue 1, and his deposition on Easton's psychological condition, as well as the production of the psychometric test results, do not appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules.

10. Despite the above, there are portions of Dr. Blinder's written statement in which he summarizes the facts communicated to him by Easton concerning the specific events which are the subject of Issue 1. *See, e.g.*, the section entitled "Present Problem." ClearComm may depose Dr. Blinder with respect to those facts. Fed. R. Evid. 613. In this regard, even assuming, *arguendo*, that a physician-patient privilege exists between Dr. Blinder and Easton, that privilege was waived upon the distribution of Dr. Blinder's written statement to the parties to this proceeding. To this very limited extent, ClearComm's motion will be granted.

Motion Re Documents

11. ClearComm seeks the issuance of an order compelling Easton to produce three categories of documents requested in ClearComm, L.P's Supplemental Requests for the Production of Documents by Anthony T. Easton, dated May 22, 1998. ClearComm states that it seeks these documents because they are related to "Mr. Easton's mental or physical health [and/or] Mr. Easton's history with controlled substances." Motion Re Documents at 2. ClearComm contends that Easton put his "drug use or dependency" in issue because Dr. Blinder's written statement mentions such use. *Id.* at 3-4. Easton opposes ClearComm's request. For the reasons which follow, ClearComm's motion will be denied.

12. Category 1. ClearComm seeks documents that "refer to, reflect, evidence, constitute, or describe contact by Mr. Easton with medical and mental health personnel . . . during the period between January 1, 1995 and the present." ClearComm's request will be denied. The request is overly broad and beyond the scope of the issues in this proceeding. The mere fact that a portion of Dr. Blinder's written statement summarizes Easton's "Past Health" does not serve to place that general subject in issue.

13. Category 2. ClearComm seeks documents that "refer to, reflect, evidence, constitute, or describe" any use of or dependency on illegal drugs or alcohol by Easton. ClearComm's request will be denied. The requested documents are beyond the scope of the issues in this proceeding. The only portion of Dr. Blinder's written statement which mentions past drug use by Easton are the following two sentences which appear in the sub-section entitled

"Past Health": "He used marijuana a bit in college. In the 1980's he and his wife tried cocaine." Letter to Russell Lukas, Esq., at 3. The mere fact that these two brief references are contained in Dr. Blinder's written statement does not serve to place "drug use or dependency" in issue. In addition, the Commission has made it clear that only felony convictions are relevant to a determination of basic qualifications. *Character Qualifications*, 102 FCC 2d 1179, 1196-98 (1986) and 5 FCC Rcd 3252, 3252 (1990); *Richard Richards*, 10 FCC Rcd 3950, 3955 (1995).

14. Category 3. ClearComm seeks documents relating to contacts between Easton and Bryant McFadden, asserting that McFadden has "knowledge of Mr. Easton's mental health and/or his history with controlled substances." Motion Re Documents at 2. This request will be denied. As noted above, Easton's health and past drug use are beyond the scope of the issues in this proceeding. The requested documents do not, therefore, appear reasonably calculated to lead to the discovery of admissible evidence. Section 1.311(b) of the Rules.

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 June 12, 1998 (one day late), IS ACCEPTED.

IT IS FURTHER ORDERED that ClearComm's Motion to Compel the Production of Documents by Anthony T. Easton and Memorandum in Support Thereof, filed on June 12, 1998, IS DENIED.

IT IS FURTHER ORDERED that ClearComm, L.P.'s Motion to Compel Testimony of Martin Blinder, M.D. and Production of Psychiatric Test Results, filed on June 12, 1998, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE MAILED to:

Martin Blinder, M.D.
50 Idalia Road
San Anselmo, CA 94960

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge