

FCC MAIL SECTION

Before the
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Washington, D.C. 20554

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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: July 7, 1998 ; Released: July 9, 1998

1. Under consideration are: (a) a Motion to Compel Discovery, Request to Certify Issue of Discovery Compliance to the Commission for Consideration of the Imposition of Monetary Forfeiture, Motion to Dismiss ClearComm from Party Status and Request for Immediate Stay of Further Discovery Proceedings Pending a Ruling on this Request and the Compliance with Provision of the Discovery Rules by ClearComm, filed on June 22, 1998, by Anthony T. Easton ("Easton"); (b) a Supplement and Correction to (a), filed on June 26, 1998, by Easton; (c) an Opposition to (a), filed on June 26, 1998, by ClearComm, L.P. ("ClearComm"); (d) ClearComm's Renewed Motion to Compel the Production of Documents by Anthony T. Easton and Request for Sanctions, filed on June 25, 1998, by ClearComm; (e) an Opposition to (d), filed on July 1, 1998, by Easton; and (f) a supplement to (e), consisting of executed copies of two declarations included in the Opposition, filed on July 2, 1998, by Easton.

Easton's Motion

2. Easton claims that ClearComm has "flaunted the Commission's discovery rules and acted in bad faith" throughout the discovery phase of this proceeding. Easton's Motion at 2. Easton cites a number of particular instances of alleged misconduct and seeks the imposition of specific sanctions against ClearComm. Each of these matters will be considered below.

3. Martinez Deposition. Easton contends that the deposition of Fred H. Martinez, Chairman of ClearComm's Board of Directors, was improperly and prematurely terminated and requests that an order be issued directing Martinez to complete his deposition on an expedited

basis. In its Opposition, ClearComm explains the reasons behind the termination and states that it will make Martinez available for a second day of testimony.

4. Easton's request will be granted to the extent that Martinez will be required to appear and complete his deposition. In this regard, the deposition of Martinez shall take place in one of the Commission's hearing rooms, and will be taken under the Presiding Judge's supervision. Counsel are cautioned to avoid asking questions which have already been asked and answered, as well as questions which are beyond the scope of the issues.

5. Wilkinson, Barker Documents. Easton requests the production of certain documents from the law firm of Wilkinson, Barker, Knauer & Quinn which were withheld on the basis of the attorney-client privilege and/or the work product doctrine. Easton also argues that the privilege claims in question could not properly be made by ClearComm. In its Opposition, ClearComm argues that privilege was properly asserted, and that ClearComm had the right to make such claims. Easton's request will be denied for the reasons stated in the Opposition. See ClearComm's Opposition at 5 (line 9) through 8 (line 2).

6. February 1996 Board Minutes. Easton seeks an unredacted copy of the minutes of the February 19, 1996, meeting of the Board of Directors of Unicom and all drafts of that document. This request will be dismissed inasmuch as a ruling has already been made on this matter. See *Memorandum Opinion and Order*, FCC 98M-86, released June 26, 1998, at paragraphs 4 and 5.

7. Hamilton Binder. Easton initially requested that the Presiding Judge order ClearComm to produce a binder maintained by Cynthia Hamilton which contained certain bidding information. In his Supplement and Correction, Easton informed the parties that he does, in fact, have a copy of this document, and that he provided it to ClearComm in discovery. Nevertheless, Easton requests that ClearComm produce its copy of this document if it was obtained from an independent source. ClearComm states that it received a copy of the Hamilton binder from Quentin Breen, another party to this proceeding, and that it believes it has produced the same documents to all the other parties.

8. Easton's request will be granted to the extent that ClearComm will be required to compare the documents it believes constitute the Hamilton binder with the Hamilton binder provided to it by Easton. If the documents are the same, ClearComm shall notify Easton of that fact. If they are not the same, ClearComm shall specify the differences in detail. In addition, if ClearComm possesses additional documents or pages which it believes are part of the Hamilton binder, it shall produce those documents to Easton. This review and supplemental exchange shall be completed not later than July 10, 1998, or at such other time as may be mutually agreeable to counsel.

9. Milstein Binder. Easton requests the production of a binder of messages maintained by Ronit Milstein. ClearComm states that it has searched for the Milstein binder and that it is not in its possession. Easton's request will be denied. ClearComm cannot be expected to

produce what it does not have. However, should ClearComm later find the Milstein binder, or any portion thereof, it is directed to provide a copy to the parties within one business day of its discovery or at such other time as may be mutually agreeable to counsel. A statement describing the circumstances surrounding the discovery shall also be provided.

10. Request for Stay. Easton requests that discovery in this proceeding be stayed pending a ruling on the instant motion. This request will be dismissed as moot. Obviously, no stay has been ordered and discovery has continued as scheduled during the pendency of Easton's motion.

11. Request for Sanctions. Easton requests that ClearComm be sanctioned for its conduct regarding discovery. Specifically, Easton urges the Presiding Judge to refer this matter to the Commission for the imposition of a monetary forfeiture against ClearComm, and to dismiss ClearComm as a party from this proceeding. ClearComm opposes this request. Easton's request will be denied. Suffice it to say, the conduct complained of does not warrant such draconian sanctions.

ClearComm's Motion

12. ClearComm requests the issuance of an order compelling the immediate production by Easton of certain computer tapes, a computer hard drive, a listing of documents which are in the public domain in the *Easton v. Hamilton* litigation, and a listing of privileged documents in *Easton v. Hamilton*. ClearComm also seeks the imposition of sanctions against Easton for its allegedly dilatory conduct. ClearComm's motion will be granted in part.

13. First, ClearComm's request for the computer tapes, the hard drive, and a listing of documents in the public domain, will be dismissed as moot since all such materials have now been exchanged. In this connection, the explanation contained in Easton's Opposition establishes that the delay in exchanging this material was neither unduly excessive nor unreasonable. See Easton's Opposition at 11-12 and Exs. IV and IX. Moreover, and more importantly, it does not appear that the delay resulted from any attempt by Easton to withhold or conceal information from ClearComm. However, to avoid any possible prejudice which may have occurred from the delay, ClearComm's computer expert will be given whatever additional time he needs to review the material in question before his deposition may be taken.¹

14. Next, Easton need not provide to ClearComm a listing of privileged documents in *Easton v. Hamilton*. By *Memorandum Opinion and Order*, FCC 98M-74, released June 10, 1998, at paragraph 17, Easton was directed to provide a detailed listing of "documents which are being withheld [by Easton from Hamilton in the *Easton v. Hamilton* litigation] on the basis

¹ It is noted that ClearComm's production of a computer tape to Easton was also delayed. See Easton's Opposition at 6 and Ex. IV. Therefore, on the Presiding Judge's own motion, Easton will be granted similar relief. That is, Easton's computer expert will be given whatever additional time he needs to review ClearComm's tape before his deposition may be taken.

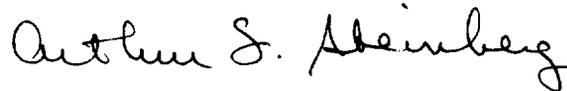
of privilege." In his Opposition, Easton represents that "Ms. Hamilton never requested the production of documents from Mr. Easton [and that] no privilege log was generated in that case." Easton's Opposition at 12. Under these circumstances, where no documents were "withheld on the basis of privilege," no listing will be required.

15. Finally, ClearComm requests the imposition of sanctions against Easton including the immediate production of the material in question, the payment by Easton of the parties' attorney and expert witness fees, and permission to re-depose witnesses on the material withheld. Easton opposes these requests. ClearComm's requests will be denied. The material in question has been (or need not be) produced, ClearComm's expert witness has been given additional time, and the payment by Easton of ClearComm's attorney and expert witness fees is simply not warranted.

Accordingly, IT IS ORDERED that the Motion to Compel Discovery, Request to Certify Issue of Discovery Compliance to the Commission for Consideration of the Imposition of Monetary Forfeiture, Motion to Dismiss ClearComm from Party Status and Request for Immediate Stay of Further Discovery Proceedings Pending a Ruling on this Request and the Compliance with Provision of the Discovery Rules by ClearComm, filed by Easton on June 22, 1998, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED that ClearComm's Renewed Motion to Compel the Production of Documents by Anthony T. Easton and Request for Sanctions, filed on June 25, 1998, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge