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

DEC 18 1998

In re Applications of	)	WT Docket No. 97-199	
WESTEL SAMOA, INC.	)	File No. 00560-CW-L-96	FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
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 Communications Services Facilities	)	00863-CW-L-97	
	)	00864-CW-L-97	
	)	00865-CW-L-97	
	)	00866-CW-L-97	

To: Honorable Arthur L. Steinberg  
Administrative Law Judge

MOTION TO SEAL

Anthony T. Easton, by his attorneys, and pursuant to section 13 of the Settlement Agreement (“Agreement”) between the parties to this proceeding (and others), hereby requests that the Presiding Officer place under seal Attachment E to the Agreement, a sealed copy of which is being filed simultaneously herewith. In support thereof, the following is respectfully submitted:

We begin with what is not at issue. Mr. Easton does not seek a determination that Attachment E may be withheld from public inspection under the provisions of the Freedom of Information Act (“FOIA”). See 5 U.S.C. § 552(b). See also 47 C.F.R. § 0.457(b). That issue need be addressed only in the event that a FOIA request is made to inspect Attachment E. At issue here is whether good cause exists for the Presiding Officer to exercise his discretion to seal a specific portion of a private settlement agreement.

We believe that a decision to seal papers is committed to the sound discretion of any judicial officer “to be exercised in light of the relevant facts and circumstances of the particular case.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978). That discretion may be exercised even when protective measures “are not strictly and inescapably necessary.” *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979). The Presiding Officer should exercise his discretion in this

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case to protect Mr. Easton from the injury that will result from the dissemination and misuse of Attachment E.

Attachment E contains Mr. Easton's acknowledgment that evidence exists which, if unexplained or uncontradicted, could sustain a finding that he misrepresented facts to the Commission. Accordingly, Mr. Easton did nothing more than acknowledge the existence of prima facie evidence of misrepresentation. He did not admit that he in fact "made misrepresentations and/or lacked candor before the Commission" as charged under Issue 1 in this case. *Westel Samoa, Inc.*, 13 FCC Rcd 6342,6348 (1998). However, because it was phrased in language most favorable to the Wireless Telecommunications Bureau ("Bureau"), Mr. Easton's acknowledgment could be misconstrued or mischaracterized as an admission. Taking into consideration, as *Nixon* requires, all of the relevant facts and circumstances, the Presiding Officer should protect Mr. Easton from such misconstruction or mischaracterization.

First and foremost, the Presiding Officer must recognize that Mr. Easton's decision to settle this case was both painful and difficult. Ultimately, Mr. Easton's decision was based on considerations unrelated to the merits of his defense or to his desire to exonerate himself. Some of those considerations were practical, others highly personal and private. In the end, those considerations left him with little choice.

Of the practical considerations, the most apparent was financial. Mr. Easton cannot get a direct financial benefit from this extraordinary case. He has no application for a Commission authorization pending. Yet, his qualifications to hold such an authorization are at issue. *See Westel*, 13 FCC Rcd at 6344-48. However, while Mr. Easton appeared in this proceeding to clear his name, his qualifications are not the real controversy as among the private parties to this case. Really in dispute is the stock ownership of SuperTel Communications Corp. and the more than \$7 million in a trust account in San Juan, Puerto Rico.

The dispute over the funds in escrow in the San Juan trust account led ClearComm, L.P. ("ClearComm") to intervene in this proceeding. However, that intervention eventually increased

the cost of this litigation exponentially. When that cost was combined with the expenses engendered by the related actions (listed at Attachment A to the Agreement), it became apparent that Mr. Easton's litigation expenses threatened to exceed his interest in the funds in the trust account. Thus, the continuation of the litigation made no sense financially.

More importantly, the burden of the litigation and the very nature of the disputes extracted a terrible toll emotionally on Mr. Easton and his wife. The litigation not only became all consuming, but it pitted the Eastons against their former friends, colleagues and counsel. The cumulative effect of the various actions was so debilitating that Mr. Easton concluded that he and his wife had to put the entire matter behind them as quickly as possible. But having decided to attempt to reach a global settlement of all the "bid-related" litigation, Mr. Easton found the settlement process to be as difficult and debilitating as the litigation itself.

The agreement in principle that Mr. Easton thought he reached with ClearComm and Quentin Breen in August 1998 was conditioned on Mr. Easton reaching an agreement with the Bureau. That forced Mr. Easton into negotiations with the Bureau in which he had no bargaining power and no realistic opportunity to negotiate terms. Attachment E reflects that gross disparity in bargaining power. It is a one-sided, legally meaningless acknowledgment drafted by the Bureau to appear as an admission to a lay person. Thus, the acknowledgment extracted from Mr. Easton is susceptible to use for improper purposes damaging to Mr. Easton's reputation and the well being of his family. For that reason, and because the Bureau refused to modify the language of Attachment E, Mr. Easton was extremely reluctant to enter into the Agreement.

The possibility that Attachment E would be placed under seal was instrumental in obtaining Mr. Easton's acquiescence to the Bureau's language. Indeed, Mr. Easton finally agreed to the language of Attachment E during a break in an informal status conference at which the Presiding Officer urged the parties (who were in attendance) to settle and indicated that he would entertain a request to place the attachment under seal. Absent the prospect of having Attachment E sealed, Mr. Easton would not have agreed to the terms demanded by the Bureau, and this case likely would not

have settled.

The Presiding Officer may take protective measures to prevent the Agreement from being used to "gratify private spite" or from becoming the source of libelous statements against Mr. Easton. *Nixon*, 435 U.S. at 598. We submit that there are sound policy and equitable considerations that favor taking such measures in this case.

Commission policy "strongly encourages settlements of unusual, complex, multi-party cases, even where basic licensee qualifications are unresolved." *Spanish International Communications Corp.*, 1 FCC Rcd 92, 96 n.13, *recon. denied*, 1 FCC Rcd 844 (Rev. Bd. 1986), *modified*, 2 FCC Rcd 3336 (1987). Certainly, the Presiding Officer strongly and persistently encouraged settlement in this unusual case. In large part as a result of that encouragement, the parties ultimately agreed to settle two Commission proceedings, an arbitration, and six court actions - - a result clearly consistent with public policy and favored by the courts. *See, e.g., American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986). Having played a key role in a multiple litigation, multi-party settlement, the Presiding Officer should take reasonable actions to support and sustain that settlement. One such action would be to grant Mr. Easton the limited protection of having one portion of the Agreement held under seal. And while such protection is of utmost significance to Mr. Easton, it will be of little consequence to the other parties or the public interest.

Even if Attachment E is under seal, section 13 of the Agreement expressly provides that the Bureau and ClearComm may make use of, or refer to, Attachment E under specified circumstances. Moreover, placing the attachment under seal will not preclude its inspection in the event that it must be made available under the FOIA. Nor will the suppression of one attachment to the Agreement prevent a public understanding of what transpired in this proceeding. The materials gathered in the Bureau's pre-hearing investigation and the record compiled by the parties during discovery are available for perusal by the public. And the Bureau's view of what transpired is already well documented. *See PCS 2000, L.P.*, 12 FCC Rcd 1681 (1997); *PCS 2000, L.P.*, 12 FCC Rcd 1703 (1997).

The Bureau has no compelling interest in seeing Attachment E made public. By entering into the Agreement, the Bureau waived its opportunity to attempt to prove by a preponderance of evidence that Mr. Easton made misrepresentations and/or lacked candor sufficient to warrant barring him from holding Commission authorizations and participating in Commission auctions. *See Westel*, 13 FCC Rcd at 6348. All Attachment E shows is that Mr. Easton was willing to acknowledge that the Bureau could produce evidence that, if not rebutted or contradicted, could support a finding that he misrepresented facts in violation of 47 C.F.R. § 1.17 (which applies only to misrepresentations in a "written statement" or "written matter"). Mr. Easton never conceded that the Bureau could carry its burden in the hearing to prove that he made an intentional misrepresentation, or misrepresented a material fact, in his fax to Mr. Sigalos. And he certainly never acknowledged that the Bureau could prove a disqualifying violation of 47 C.F.R. § 1.17. Thus, the Bureau in good faith could not point to Attachment E as an admission by Mr. Easton that he engaged in any misconduct.

Finally, it would be entirely equitable to seal Attachment E. Mr. Easton unquestionably sacrificed the most in furtherance of a settlement that all agree will benefit the public interest. Having been pronounced guilty in three published orders without the benefit of a hearing, Mr. Easton is relinquishing the opportunity to make public what really happened. He should at least be permitted to walk away from the litigation (and from the Commission) with knowledge that Attachment E cannot be mischaracterized to again publicly pronounce him guilty of unproven misconduct.

For all the foregoing reasons, Mr. Easton asks that the Presiding Officer place (or maintain) Attachment E of the Agreement under seal.

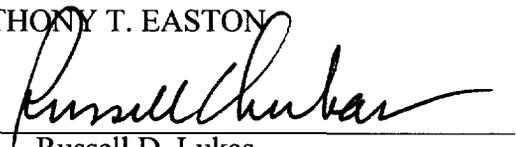
Lukas, Nace, Gutierrez & Sachs, Chartered  
1111 19<sup>th</sup> Street, N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036

December 18, 1998

Respectfully submitted,

ANTHONY T. EASTON

By

  
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Russell D. Lukas  
George L. Lyon, Jr.

His Attorneys

**CERTIFICATE OF SERVICE**

I, Paula Rogers, a secretary in the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on behalf of all of the parties to the proceeding, this 18th day of December 1998, sent by hand delivery copies of the foregoing "MOTION TO SEAL" to the following:

Hon. Arthur I. Steinberg  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 229  
Washington, D.C. 20554

Katherine Power, Esq.  
Judy Lancaster  
Enforcement Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 8308  
Washington, D.C. 20554

Nicholas Singh, Esq.  
Brown & Wood, LLP  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006-4004

A. Thomas Carroccio, Esq.  
Bell, Boyd & Lloyd  
1615 L Street, N.W.  
Washington, D.C. 20036

  
\_\_\_\_\_  
Paula Rogers