

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

FCC 99M-3

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 8, 1999

Released: January 11, 1999

Under consideration are: (a) a Joint Request for Approval of Settlement Agreement, Grant of Licenses and Termination of Proceeding, filed on December 18, 1998, by Westel Samoa, Inc. ("WSI"), Westel, L.P. ("WLP"), Quentin L. Breen ("Breen"), Anthony T. Easton ("Easton"), ClearComm, L.P. ("ClearComm"), and the Wireless Telecommunications Bureau ("Bureau");¹ (b) a Motion to Seal, filed on December 18, 1998, by Easton; and (c) Wireless Telecommunications Bureau's Comments on Motion to Seal, filed on December 28, 1998, by the Bureau.

Joint Request for Approval of Agreement

The Petitioners have entered into a Settlement Agreement ("Agreement") which has been submitted for approval. By the Agreement, the Petitioners seek to resolve, in addition to the instant proceeding, another pending Commission proceeding relating to the authorizations held by ClearComm, six proceedings before other tribunals, and all other claims and controversies among the Petitioners. The Agreement provides, *inter alia*, that: (a) by entering into the Agreement, neither WSI, WLP, Breen, Easton, nor ClearComm admit to having engaged in any wrongdoing in connection with the matters which are the subject of the instant proceeding or any of the other proceedings which are being settled; (b) Romulus Telecommunications, Inc. ("Romulus")² will make a voluntary contribution to the U.S. Treasury in the amount of \$100,000; (c) Romulus will pay ClearComm the amount of \$1.5 million, plus interest; (d) for a period of eight years, Easton will refrain from applying for or holding an attributable interest in any Commission authorization, regardless of the radio service involved; (e) during this eight-

¹ WSI, WLP, Breen, Easton, ClearComm, and the Bureau will be referred to collectively as the "Petitioners."

² Romulus was the contract auction bidding consultant for PCS 2000, L.P. ("PCS 2000"), ClearComm's predecessor, in the Commission's Broadband PCS C Block Auction.

year period, Easton will not become an officer, director, principal, or authorized party of any Commission applicant or licensee, or any affiliate thereof; (f) Easton will not acquire any interest in ClearComm or SuperTel Communications Corp., Inc. ("SuperTel"), ClearComm's general partner, and will not seek to serve on SuperTel's board of directors or as an officer or in any other capacity in ClearComm or SuperTel; (g) a pending petition to enlarge issues filed by ClearComm against Easton will be dismissed with prejudice; and (h) WSI, WLP, Breen, Easton, ClearComm and all the other signatories to the Agreement will release each other from various pending claims and causes of action. Further, the Agreement specifically provides that WSI, WLP, and Breen possess the requisite character qualifications to hold Commission authorizations, that Breen is qualified to participate in future Commission auctions, and that the grant of the above-captioned applications of WSI and WLP would serve the public interest, convenience and necessity.

The Joint Request will be granted and the Settlement Agreement will be approved. It appears that approval of the Agreement is in the public interest in that it will end all of the litigation among the parties to this proceeding, thereby permitting the public to receive service from the facilities of WSI, WLP, and ClearComm many years earlier than would otherwise have been possible. In this connection, the Commission generally encourages the parties to adjudicatory proceedings to settle their differences on a mutually agreeable basis, since eliminating the need for further litigation and the expenditure of the time and resources of the Commission is in the public interest. *See, e.g., Longview Cable TV Company, Inc. v. Southwestern Electric Power Company*, 5 FCC Rcd 686 (1990). In addition, approval of the Agreement will serve to protect the integrity of the Commission's rules and enforcement policies. Thus, for a period of eight years, an individual who allegedly misrepresented facts to the Commission will refrain from applying for or holding an attributable interest in any Commission authorization, and will not become an officer, director, principal, or authorized party of any Commission applicant or licensee. *See Commercial Realty St. Pete, Inc.*, FCC 95M-204, released November 1, 1995.

The Petitioners also seek the grant of the above-captioned applications of WSI and WLP. In *Westel Samoa, Inc.*, 12 FCC Rcd 14057, 14076 (1997) ("*HDO*"), *recon. granted in part*, 13 FCC Rcd 6342 (1998), the Commission designated this proceeding for hearing and specified the following issues against Breen, WSI, and WLP:

2. (A) To determine the facts and circumstances surrounding the conduct of Quentin L. Breen in connection with PCS 2000's bids placed on January 23, 1996, in the Commission's Broadband PCS C Block auction;
- (B) To determine, based on the evidence adduced above, whether Quentin L. Breen engaged in misrepresentations before and/or exhibited a lack of candor towards the Commission[; and]
3. To determine, based on the evidence adduced in Issue 2, whether Westel Samoa, Inc., and Westel, L.P., possess the requisite character qualifications to be granted the captioned C Block and F Block Broadband Personal Communications Services applications, and accordingly, whether grant of their applications would serve the public interest, convenience, and necessity.

By *Memorandum Opinion and Order*, FCC 97M-203, released December 10, 1997, the Presiding Judge ruled that Breen's personal character qualifications to hold a Commission license were subsumed within the above issues.

The Commission's concerns regarding Breen's qualifications arose out of his possible complicity in a January 23, 1996, overbid in the Broadband PCS C Block Auction, and in the oral and written submissions made to the Commission with regard to the overbid. *HDO* at 14059-60. The Commission also expressed concern regarding Breen's treatment of information that may have been conveyed to him at a January 26, 1996, meeting with Cynthia Hamilton. *Id.* at 14067, 14074-75.

On November 16, 1998, a hearing was held on Issues 2 and 3. *See Order*, FCC 98M-125, released November 18, 1998. For the reasons which follow, these issues are resolved in favor of Breen, WSI, and WSL.

The evidence of record demonstrates that Breen was not present at the PCS 2000 bidding site on January 23, 1996, and did not make any representations to the Commission regarding the bidding error on that date. (Westel Ex. A, pp. 1-5, 109.) Although Breen was involved in the preparation of PCS 2000's Request for Expedited Waiver or Reduction of Withdrawal Penalty, filed with the Commission on January 26, 1996 ("Waiver Request"), which contained inaccurate factual statements regarding the overbid (*id.* at 79-101), Breen has made it clear in his testimony that the Waiver Request presented a true and accurate picture of the situation *as he understood it at the time* (*id.* at 1-20). He also explained why his meeting with Hamilton did not cause him to question the validity of the statements made in the Waiver Request. (*Id.* at 10-17, 110-12.)

Hamilton's testimony supports Breen's recollection of their meeting in all material respects. (Westel Ex. A, pp. 113-14; Joint Exs. 4 and 5.) In addition, Rosalind Makris, who was with Hamilton when she met with Breen on January 26, 1996 (Joint Ex. 3, pp. 8-9), testified that Hamilton did *not* tell Breen that falsified documents had been sent to the Commission (*id.* at 10).

Further, there is no indication in the evidence of record that, at any relevant time, Breen knew or perceived any reason to believe that the Commission had not been presented with a true and accurate picture of the facts surrounding the overbid and the related submissions. Consequently, Breen could not have possessed the intent to deceive which is "[t]he *sine qua non* of willful misrepresentation or lack of candor[.]" *Lompoc Minority Broadcasters Partnership*, 10 FCC Rcd 9396 (Rev. Bd. 1995).

In sum, the record warrants a conclusion that Breen never had an understanding of the situation such as would have caused him to have either been a knowing or intentional participant in any misrepresentation to the Commission, or to have lacked candor with regard to any material information. In view of this conclusion, the Presiding Judge concurs with the determination of the Petitioners, as expressed in the Settlement Agreement, that Breen, WSI, and WLP, possess the requisite character qualifications to become Commission licensees, and that a grant of the above-captioned applications will serve the public interest, convenience and necessity.³

³ Since Issues 2 and 3 have been resolved in favor of WSI, WLP, and Breen, no Order of Forfeiture will be issued against Breen. *See HDO* at 14076.

Easton's Motion to Seal

Pursuant to the Settlement Agreement, Attachment E thereto was filed with the Commission under seal. "Attachment E contains Mr. Easton's acknowledgement that evidence exists which, if unexplained or uncontradicted, could sustain a finding that he misrepresented facts to the Commission." Motion to Seal at 2.⁴ Because Easton and the Bureau were unable to agree on whether Attachment E was to remain under seal, the Settlement Agreement provides that the Presiding Judge shall make this determination after considering the arguments of Easton and the Bureau. The instant Motion and the Bureau's responsive Comments followed.

Easton's Motion will be granted and Attachment E will remain under seal. As noted above, this attachment contains certain statements of "fact" from which a reasonable decision-maker could conclude that Easton made misrepresentations to the Commission. However, as Easton correctly argues, the language contained in Attachment E could very easily be mischaracterized and misconstrued as an admission of wrongdoing.⁵ Given this, a real possibility exists that this attachment could be disseminated and utilized unfairly against Easton. In this connection, it must be recalled that in *Westel Samoa, Inc.*, 13 FCC Rcd 6342 (1998), the Commission modified the *HDO*, in part, because it prejudicially adopted and used against Easton the findings and conclusions about Easton's alleged misconduct contained in a related *Notice of Apparent Liability for Forfeiture, PCS 2000, L.P.*, 12 FCC Rcd 1703 (1997) ("*NALF*"). As a result, the *HDO* was susceptible to misconstruction and misinterpretation, and Easton's due process rights were adversely affected. To prevent similar harm from occurring, the equities favor keeping Attachment E under seal.

Keeping Attachment E under seal will not impair or prevent the public from acquiring a complete understanding what transpired in this proceeding. Suffice it to say, the materials gathered by the Bureau in its pre-*HDO* investigation, and those compiled by the parties during the discovery phase of this case (including transcripts of several depositions of Easton) are available for public inspection. In addition, the Bureau's view of this case is well expressed in both the *NALF* and the *HDO*. Further, the Bureau's and the public's interest are adequately protected by the provision of the Settlement Agreement which provides that the Commission may use Attachment E if Easton breaches the Agreement, or in any future proceeding involving other allegations that Easton has engaged in FCC-related or other misconduct. Finally, keeping Attachment E under seal will not preclude its inspection in the event that it must be made available under the provisions of the Freedom of Information Act. See Motion at 1, 4.

⁴ See also Motion at 5 where it is stated: "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')." "

⁵ It is important to understand that Easton does nothing more in Attachment E than acknowledge the existence of certain specific "facts" which may constitute *prima facie* evidence of misrepresentation. He does not admit that he did, indeed, make misrepresentations to or lack candor before the Commission.

Ordering Clauses

Accordingly, IT IS ORDERED that the Joint Request for Approval of Settlement Agreement, Grant of Licenses and Termination of Proceeding, filed by Petitioners on December 18, 1998, IS GRANTED, and that the Settlement Agreement IS APPROVED.

IT IS FURTHER ORDERED that the Motion to Seal, filed by Easton on December 18, 1998, IS GRANTED, and that Attachment E to the Settlement Agreement SHALL REMAIN under seal subject to the conditions specified in the Settlement Agreement.

IT IS FURTHER ORDERED that Issues 2 and 3 ARE RESOLVED in favor of Quentin L. Breen, Westel Samoa, Inc., and Westel, L.P., and that the above-captioned applications of Westel Samoa, Inc., for broadband Block C personal communications systems facilities, and Westel, L.P., for broadband Block F personal communications systems facilities, ARE GRANTED, conditioned as follows:

The licenses are granted subject to the conditions set forth in the Communications Act of 1934, as amended (47 U.S.C. § 151, *et seq.*), and in the Commission's Rules (47 C.F.R. § 0.1, *et seq.*).

These licenses are subject to the condition that the licensee make full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules, 47 C.F.R. §§ 1.2110 and 24.711, and, if applicable, the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of the licenses.

Grant of the licenses is expressly conditioned upon the licensee filing with the Commission, within ten (10) business days of the effective date, as defined in 47 C.F.R. § 1.302(b), of the order granting the licenses, a C block election notice in accordance with the *Second Report and Order and Notice of Proposed Rule Making*, the *Order on Reconsideration of the Second Report and Order*, and the *Implementation Procedures for the Order on Reconsideration of the Second Report and Order Concerning the Broadband Personal Communications Service (PCS) C and F Block Installment Payment Plans*.

In the event that the licensee is eligible for the Commission's installment payment plan and elects installment payments, the following are included among the conditions imposed on the grant of these licenses:

° These licenses are subject to the condition that the licensee execute and return to the Commission a Note, Security Agreement, and other related documentation commemorating its installment payment obligations, the Commission's security interest in the licenses, and other matters within ten (10) business days from the licensee's receipt of those documents. Failure to execute and return the documents will result in the automatic cancellation of the licenses.

° These licenses are subject to the condition that the licensee pay, within ten (10) business days of the issuance of a public notice announcing the conditional grant of these licenses, the remaining five (5) percent down payment due on the C block license and the remaining ten (10) percent down payment due on the F block licenses. If the licensee fails to submit the required payments by the specified deadline, it will be considered in default and subject to automatic license cancellation and additional default payments.

In the event that the licensee is ineligible for the Commission's installment payment plan or elects not to participate in such plan, the following is included among the conditions imposed on the grant of these licenses:

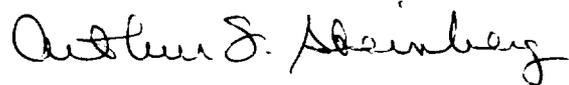
° These licenses are subject to the condition that the licensee make full payment of all monies due for the licenses within ten (10) business days of the issuance of a public notice announcing the conditional grant of the licenses. Failure to comply with this condition will result in the automatic cancellation of the licenses.

IT IS FURTHER ORDERED that ClearComm's Motion to Enlarge Issues, filed by ClearComm on August 12, 1998, IS DISMISSED with prejudice.⁶

IT IS FURTHER ORDERED that the following pleadings ARE DISMISSED as moot: (a) Wireless Telecommunications Bureau's Motion to Compel the Testimony of Anthony T. Easton and Quentin Breen at the Hearing, filed by the Bureau on August 21, 1998; (b) Request for Issuance of Subpoena Duces Tecum, filed by Easton on August 21, 1998; and (c) Motion to Quash Subpoena, filed by Easton on September 3, 1998.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.⁷

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge

⁶ A preliminary review of this motion indicates that it was late filed, that no good cause for late filing was shown, and that the motion raises no questions of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. See Section 1.229(c) of the Commission's Rules and *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 (1991). Further, even assuming, *arguendo*, that the motion does warrant consideration on the merits, it appears that the facts underlying the motion could have been raised and considered under the existing issues, and that the formal enlargement of those issues would not have been necessary.

⁷ In the event a notice of appeal is not filed within 10 days after the release of this *Memorandum Opinion and Order*, and the Commission does not review the case on its own motion, this *Memorandum Opinion and Order* shall become effective 30 days after its public release pursuant to Section 1.302(b) of the Rules.