COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
CABLE TELEVISION DIVISION

MEDIAONE OF MASSACHUSETTS, INC., AT&T CORP., and AT&T COMCAST CORPORATION,	)	
Appellants,	)	**Docket No. CTV – 02-14**
v.	)	
BOARD OF SELECTMEN OF THE TOWN OF LAKEVILLE,	)	
Appellee.	)	

OPPOSITION TO APPELLEE'S CROSS-MOTION FOR SUMMARY DECISION

Appellants MediaOne of Massachusetts, Inc., AT&T Corp., and AT&T Comcast Corporation oppose the Cross-Motion of the Board of Selectmen of the Town of Lakeville (the "Board" or "Lakeville") for Summary Decision.[1] The parties agree that there are no disputed material facts and that the case can be disposed of on summary decision, but for different reasons. The undisputed record submitted to the Board demonstrates that AT&T Comcast has the management experience, financial capability, technical expertise, and legal ability to be the ultimate parent of the licensee that will continue to operate the Lakeville cable system under the existing License. As set forth in Appellants' Motion for Summary Decision, the Board denied the transfer request based on considerations outside the scope of an issuing authority's narrow field of review set forth in 207 C.M.R. §4.04.

Lakeville moved for summary decision relying on the same set of undisputed facts, but arguing that AT&T Comcast failed to prove its qualifications by a "preponderance of the

[1] Appellants incorporate by reference the legal and factual arguments raised in their Memorandum in Support of Appellants' Motion for Summary Decision.

evidence" and urging the Cable Division to defer to the Board's decision. But transfer proceedings before an issuing authority are not subject to a "preponderance of the evidence" requirement, they do not involve an adjudication of facts, and the Board has no specialized knowledge or expertise in the cable television field that would justify affording its decision any deference whatsoever. The Board asks for deference because anything other than a wholly deferential review of the Board's decision would reveal that its denial is fundamentally devoid of any legally or factually valid basis. Lakeville's Cross-Motion for Summary Decision must be denied, and its decision found, as a matter of law, to violate G.L. c. 166A, §7.

ARGUMENT

I. THE BOARD FAILS TO DEMONSTRATE A SUFFICIENT LEGAL BASIS FOR ITS DENIAL.

While G.L. c. 166A grants municipal officials authority to assess proposed cable license transfers, they may exercise their authority only to the extent that it was delegated to them by the legislature. *See New England Tel. and Tel. Co. v. City of Brockton*, 332 Mass. 662, 664 (1955); *MediaOne of Mass., Inc., v. Board of Selectmen of the Town of North Andover*, Docket No. CTV 99-2, 99-3, 99-4, 99-5, *Order on Motions For Summary Decision/Consolidation* (May 1, 2000) at 16 (*"MediaOne I"*). The authority to deny a request for transfer of control of a cable television license is authorized only to the extent that consent is not "arbitrarily or unreasonably" withheld. G.L. c. 166A, §7. Withholding consent based on grounds outside the four factors set forth at 207 C.M.R. §4.04(1) is, as a matter of law, unreasonable and arbitrary in violation of G.L. c. 166A, §7. *MediaOne I* at 33. In both its Denial Report (Appendix Exhibit A) and its Cross-Motion for Summary Decision, the Board has adduced no facts or legitimate reasons within the bounds of the four criteria in 207 C.M.R. §4.04(1) to justify denying the transfer request. Instead, the

Board merely repeats what it stated in its Denial Report and asks the Cable Division to accept it blindly.

The Board knows that it cannot defend (and therefore does not even attempt to) its use of the transfer process to renegotiate the license, or basing its decision on alleged noncompliance with the License. But a plain reading of the Denial Report confirms that such improper factors form the bases of the Board's decision. The Board makes the uncontroversial point that it was permitted to discuss compliance issues at the public hearing. What the Board cannot rationalize, and therefore ignores in its cross-motion, are the numerous explicit references to compliance issues contained *in the Denial Report itself* that underlie the Board's denial.[2] While it is true that, with respect to alleged noncompliance, an issuing authority may inquire about a transferee's "intent to satisfy the area in question," still an issuing authority "may not refuse a transfer based on a breach or noncompliance issue with the transferor, in this case AT&T Corp. Any breach proceeding must be separated from the transfer proceeding." *April 2, 2002 Letter from Alicia C. Matthews, Director, to Thomas P. McCusker, Westwood Town Counsel* at 1, as amended.

The Board argues that the future appointment of the remaining members of the AT&T Comcast Board of Directors is reason to reject AT&T Comcast's management experience because those new directors have yet to be named. But the inapposite cases involving the initial licensing process on which the Board relies in making this point do not assist its cause here. *See United Cablevision Funding, L.P. v. Board of Selectmen of the Town or Townsend*, CATV Docket No. A-45 (Nov. 30, 1984); *In re Campbell CATV Assocs.--Part III*, Docket No. NA-2 (May 14, 1986). Neither is the statement on which the Board relies for this argument, which was

[2] For instance, the Board states in its Denial Report that it rejected AT&T Comcast's management experience "for the following *reasons*" and then proceeds to decribe how alleged non-compliance "*indicates* poor and inadequate management experience." Denial Report at 1-2. The Board did not merely discuss non-compliance, it explicitly (and improperly) looked to alleged non-compliance as "reasons" and "indicators" for withholding its consent.

pulled out of an issuing authority's brief and attached as an exhibit to a Cable Division Order to Show Cause, persuasive or of precedential value. *See In re Campbell CATV Assocs.--Part III,* Exhibit A to Order to Show Cause.

The Board's argument here is essentially that no merger can be the subject of a transfer review because the new entity remains unknown until every last manager and board member is identified. This argument ignores the reality that a merger will typically (and in this case will) include the continuation of experienced management from the highly qualified pre-merger entities. The Board's point about unnamed AT&T Comcast board members (even if relevant) only undermines its simultaneous rejection of AT&T Comcast's management experience for the stated reason that "the current management and staff of AT&T Broadband will remain in place after the transfer has been effectuated and will continue to operate the Lakeville Cable System." Denial Report at 2. To suggest, as the Board does, that it cannot evaluate AT&T Comcast flies in the face of the more than 200 towns and municipalities in Massachusetts and more than 1,100 communities nationwide that have approved or allowed the transfer,[3] as well as the history of such mergers in the cable television industry in Massachusetts.[4]

Lakeville's Cross-Motion for Summary Judgment raises no proper justification for its decision to deny the transfer request; it only avoids the stated *grounds* for its decision and argues—incorrectly—that the Cable Division must defer to the Board's decision. As explained below, the Board bears the burden to justify withholding its consent to the transfer, and its decision is not entitled to deference.

[3] The Connecticut DPUC recently issued a draft approval of the transfer, joining the more than 1100 towns and communities nationwide that have approved the transfer.

[4] Warner Cable and American Express merged into Warner-Amex, then Warner Cable and Time Inc. into Time Warner, and Time Warner and America Online into AOL Time Warner.

II. THE BOARD HAS NOT ESTABLISHED A GENUINE ISSUE OF MATERIAL FACT TO OVERCOME SUMMARY DECISION AGAINST IT.

As set forth in the Memorandum in Support of Appellants' Motion for Summary Decision, AT&T Comcast has fully demonstrated that it can "assume the obligations of the transferor and continue the level of service provided by the transferor" and thereby " 'step into the shoes' of the transferor." *Bay Shore Cable TV Assocs. v. Weymouth*, CATV Docket No. A-55 (1985) at 3. Against Appellants' motion for summary decision, the Board bears the burden to "respond and allege specific facts which would establish the existence of a genuine issue of material fact." *MediaOne I* at 11. The Board has not met this burden. Nowhere does the Board place in dispute the information AT&T Comcast supplied in support of its transfer application. Indeed, the Board's Opposition and Cross-Motion for Summary Decision fails to marshal any additional facts to show the basis for its decision other than the improper grounds stated in the Denial Report.

The only factor that the Board rejected was AT&T Comcast's management experience. The fundamental question in review of the AT&T/Comcast merger is whether any changes in AT&T Broadband's management caused by adding Comcast to the parent company materially reduces the qualifications of the ultimate parent. Nothing in the Board's Denial Report adduces any facts to support a conclusion that the merger reduces the existing parent's qualifications in any way. To the contrary, the Board largely ignores the demonstrated management experience and financial strength that Comcast brings to the merger.

So long as AT&T Comcast can "step into the shoes" of AT&T as ultimate parent of the existing cable television operator in Lakeville, as it has demonstrated it can do, then it satisfies the requirements for transfer. *Bay Shore Cable TV Assocs., supra* at 3. The Board must come forward with ***evidence*** to justify its conclusion to the contrary. The Board has not even met its

own selectively borrowed "substantial evidence" standard,[5] which requires a showing of "such evidence as a reasonable mind might accept as adequate to support [the Board's] conclusion, after taking into consideration opposing evidence in the record." *Hotchkiss v. State Racing Comm'n*, 45 Mass.App.Ct. 684, 696 (1998). The Board fails to demonstrate adequate factual support for its Denial Report and its conclusion that AT&T Comcast is unqualified to act as the parent of the existing operator of the Lakeville cable system.

III. THE BOARD'S DECISION IS NOT ENTITLED TO ANY SPECIAL LEGAL WEIGHT.

A. The "Preponderance of Evidence" Standard Does Not Apply.

The Board's position boils down to the faulty argument that the Cable Division should simply defer to the Board's decision. Out of thin air, the Board claims now (but nowhere in its Denial Report) that AT&T Comcast did not demonstrate its qualifications by a "preponderance of the evidence." Appellee's Cross-Motion for Summary Decision at 4. The Board cites no specific authority for importing such a standard into the cable television transfer review process; that a "preponderance of the evidence" standard may apply in some non-cable cases does not support the leap that it applies in this context. The cases the Board cites are unrelated to cable television transfer proceedings, and they do not apply here. *See Tartas' Case*, 328 Mass. 585 (1952) (appeal of personal injury case brought in Superior Court under Workers' Compensation Act); *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246 (1940) (action on accident insurance policy in Superior Court); *In re Sponatski*, 220 Mass. 526 (1915) (insurer's appeal of award confirmed by Industrial Accident Board for injuries under the Workers' Compensation

[5] As demonstrated *infra* at pages 8-9, this standard does not apply here, where the Board neither has specialized expertise nor has conducted an evidentiary hearing.

Act). Moreover, the transfer review process here does not involve an adjudicatory hearing, so AT&T Comcast has not even had a full and fair opportunity to meet such a standard.[6]

In the context of the regulatory scheme applicable here, the burden rests on the issuing authority to justify its denial. That an issuing authority may not "arbitrarily or unreasonably" withhold its consent suggests that consent to a transfer request is the norm. Indeed, if an issuing authority fails to act on a transfer request within 120 days, the request is approved by operation of law. G.L. c.166A, §7. Because such consent may not be "arbitrarily or unreasonably" withheld, an issuing authority must have reasons for its denial, and those reasons must have some basis in fact (or else they would be arbitrary). Confirming this reasoning, regulations require an issuing authority that denies a transfer request to "set forth a detailed statement of reasons for the denial." 207 C.M.R. §4.05.[7] This contrasts with the requirement that an issuing authority need only provide "a brief statement from the issuing authority approving an application for transfer," where consent is granted.[8]

In this context, the Board's claim that the Division gives the local franchising authority discretion is misplaced. Unlike the grant of an initial license "the issuing authority's discretion in approving or disapproving a license transfer is . . . more circumscribed." *Teleprompter of*

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[6] A "preponderance of the evidence" refers not to a certain *amount* of evidence, but to its power to convince the finder of fact: "The weight or preponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the minds of the tribunal notwithstanding any doubts that may still linger there." *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 250 (1940). Here, there was no adjudicatory hearing to render the issuing authority a finder of fact, and the tribunal appears to have made up its mind prior to a hearing taking place. In such a context, to refer to a "preponderance of the evidence" standard makes no sense.

[7] Although addressing agency decisions (not issuing authority decisions), G.L. c. 30A, §11(8) is analogous, providing (emphasis added):

> Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including ***determination of each issue of fact or law necessary to the decision,*** unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so.

[8] *In re Amendment of 207 C.M.R. 4.01-4.06*, CATV Docket No. R-24, *Report and Order* (Nov. 27, 1995) at 16.

Weymouth, Inc. v. Board of Selectmen of the Town of Weymouth, CATV Docket A-14, *Memorandum Opinion and Order on Motion to Dismiss* at 5 (May 4, 1981). The decision is not a choice whether the applicant is "better" than another operator. Rather, it is equivalent to a decision that an initial license applicant is not eligible to pursue an application. *See Continental Cablevision of Mass., Inc. v. Board of Selectmen of the Town of Danvers*, CATV Docket No. A-29, *Decision* at 11 (Nov. 29, 1983) (applicant for initial license ineligible due to complicity in bribery attempt); *Inland Bay Cable TV Assocs.*, CATV Docket No. A-16, *Decision* at 5 (Sept. 4, 1981) (ineligible due to material misrepresentation on application); *Teleprompter of Weymouth*, *supra* at 5-6 (ineligible due to conflict with cross-ownership rules). The transfer review process "reflects a protective intent: to ensure that a transferee . . . is nonetheless fully qualified to fulfill the existing franchise obligations." *In the Matter of MediaOne of Mass., Inc. v. City Manager of the City of Cambridge*, Docket No. 99-4 *Interlocutory Order on Scope of the Proceeding* (Sept. 1, 2000) at 4 ("*MediaOne II*").

The transfer review process simply protects against transferees who are so unqualified that they cannot step into the shoes of the existing licensee. It requires only a prima facie showing of qualifications to "step into the shoes" of the existing licensee and operate the system under the existing License. Form 394 provides this prima facie showing.[9] Once that prima facie showing is made, the burden shifts to the issuing authority to supply "a detailed statement of reasons" that establish that consent to a transfer is not "arbitrarily or unreasonably" withheld. 207 C.M.R. §4.05.

[9] Form 394 was created "with the expectation that the information required by the form would establish the legal, technical, and financial qualifications of the proposed transferee or assignee." *In the Matter of Implementation of Sections 111 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264, *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd 4654 (Jan. 12, 1995) at 23 (¶52). *See id.* at 25 (¶55).

B. The Board's Decision Is Not Entitled To Deference.

There is no basis for deferring to the Board's decision. As the cases the Board cites show, judicial deference to agency decisions is a function of the agency's "experience, technical competence and specialized knowledge in the field." *Fioravanti v. State Racing Comm'n*, 6 Mass. App. Ct. 299, 302 (1978); *see Hotchkiss*, 45 Mass.App.Ct. at 692, n.10 (judicial deference to expert agency interpretation under G.L. c. 30A, §11(5) and 14(7) based on "experience, technical competence and specialized knowledge of the agency"). The Board has no "experience, technical competence and specialized knowledge in the field" of corporate finance, corporate governance, the technical operations of cable systems, or the cable industry. Instead, the Cable Division is far more experienced and knowledgeable than the Board about the cable television industry, as well as the interpretation and application of its own regulations, such as 207 C.M.R. §4.04.[10]

Moreover, unlike the Board's decision here, deference is appropriate for agency decisions that are the product of adjudications by neutral arbiters with full due process, as the cases the Board cites reflect. *See, e.g., Fioravanti*, 6 Mass.App.Ct. at 300 (state Racing Commission held a hearing with testimony and cross-examination); *Hotchkiss, supra* at 686 (agency held full evidentiary hearing). As the Cable Division has stated, an issuing authority's decision is exempted from the full procedural protections of Chapter 30A and is therefore not such an adjudicatory hearing. *MediaOne I* at 6, n.5. Nor does the transfer application process involve the neutrality of an agency.

Finally, as the Department of Telecommunications and Energy has stated, under G.L. c. 166A, §§7, 14, "the statutory licensing scheme in Massachusetts allows municipalities to act as

[10] Where decisions of franchising authorities have received any deference, it is on "a community's cable-related needs and interests" developed after full ascertainment. *See Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F.3d 434, 440-441 (6th Cir. 1997).

issuing authorities while the Cable Division retains ***ultimate authority*** over the licensing matters, including transfers." *Re City of Cambridge*, D.T.E. 00-49, D.T.E. 00-50, *Interlocutory Order on City of Cambridge's Appeal and MediaOne's Appeal of Cable Television Division's Order on Motion for Summary Decision/Consolidation*, 2000 WL 1035867, at *5 (May 30, 2000) (emphasis added). To defer to an issuing authority's decision, rendered without a fair and impartial adjudicatory hearing, would be contrary to the Division's "ultimate authority" in the transfer process. The Cable Division not only *may* substitute its judgment for that of the Board, but here, where the Board's decision lacks an proper legal basis, the Cable Division *must* do so as the "ultimate authority."

IV. THE CABLE DIVISION IS NOT CONFINED TO THE RECORD BEFORE THE BOARD.

The appellants disagree that the Cable Division is limited to reviewing the record before the Board, even though on this record the issues are capable of being decided summarily. The Board's reliance on *Rollins Cablevision of Southeast Mass., Inc. v. Board of Selectmen for the Town of Somerset*, CATV Docket No. A-64 (1988), disregards that this decision was expressly overruled. In *MediaOne I*, the Cable Division announced that "*Rollins* incorrectly stated the role of the Cable Division in appeals of license transfers." *MediaOne I* at 6, fn. 5. Because the issuing authority's review is not subject to the protections of an adjudicatory review, "we cannot apply the 'arbitrary and capricious' standard of review and we therefore will not confine ourselves to the record below." *Id.* The Department of Telecommunications and Energy implicitly affirmed this holding when it decided not to conduct a *de novo* review of the Cable Division's decisions of transfer denial appeals because the Cable Division "conducted its transfer proceedings pursuant to the Massachusetts Administrative Procedure Act, and all procedural

protections have been afforded the parties." *City of Cambridge*, *supra*, at *5. Indeed, in the absence of a full adjudicatory hearing the Board cannot claim to have acted as a "finder of fact," and there is no "record" to review.

If the Division finds that there is a genuine and material factual dispute on some issue, then it must conduct an adjudicatory hearing. Issuing authorities—which control completely the proceedings below by determining the questions to be asked, the scope of information to be provided, and the decision to be rendered—are in little need of the procedural protections provided by Chapter 30A. But unlike the issuing authority, AT&T Comcast has a liberty or property interest at stake and therefore has a greater concern for the procedural protections that the Cable Division has held it must provide. *See MediaOne I* at 4-6, n.5; *City of Cambridge*, *supra*, at *5. AT&T Comcast is entitled to introduce evidence "relevant to the issue of whether [it] provided reasonable 'forward looking' presentations" as to its qualifications to step in as the ultimate corporate parent of the licensee operating the Lakeville cable system under the existing License. *MediaOne II* at 5.

CONCLUSION

The parties agree that the focus of the Cable Division's review is whether the Board "unreasonably or arbitrarily" withheld its consent to the transfer request under G.L. c. 166A, §7. Without marshaling any legally sufficient grounds for its decision, the Board has failed to demonstrate that its denial was anything ***other than*** unreasonable or arbitrary. Instead, the Board attempts to avoid its obligation to supply a reasoned, factually supported basis for its decision by urging the Cable Division to shift the burden, to accept the Board's decision on its face, and to defer to it. This misdirection cannot disguise that the Board's reasons for denying the transfer

request were outside the permissible bounds of its review, and its Cross-Motion for Summary Judgment never squarely confronts or overcomes this fundamental and fatal flaw. The Board's conclusion that AT&T Comcast lacks the qualifications to be the ultimate corporate parent of the cable operator in Lakeville is inconsistent with the factual record before it, and inconsistent with the conclusions of the more than 200 towns and municipalities that approved the license transfer.

For these reasons, Appellants request that the Division deny Lakeville's Cross-Motion for Summary Decision and enter summary decision in Appellants' favor.

Respectfully submitted,

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