

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION**

MediaOne of Massachusetts, Inc., MediaOne Group, Inc., and AT&T Corp.,	Appellants,	}	CTV 99-5
v.			
Mayor of the City of Somerville,	Appellee.		

**OPPOSITION OF THE CITY OF SOMERVILLE TO
MOTION FOR EXPEDITED PROCESSING OF APPEAL**

The City of Somerville ("Somerville") opposes the motion of MediaOne of Massachusetts, Inc, MediaOne Group, Inc., and AT&T Corp. (collectively, "Appellants") to expedite the hearing or processing of this matter. For the reasons set forth below, the Massachusetts Department of Telecommunication and Energy, Cable Television Division (the "Division"), should deny the Appellants' motion to expedite this proceeding and should schedule this matter for a full evidentiary hearing, giving appropriate consideration to the complex legal and factual matters at issue in the case.

I. Introduction

Somerville has moved that the Division consolidate any and all hearings with respect to the review of decisions by North Andover (CTV 99-2), Cambridge (CTV 99-4) and Quincy (CTV 99-3) and Somerville (CTV 99-5) to deny or to conditionally approve the transfer of cable licenses from MediaOne Group, Inc. ("MediaOne") to AT&T Corp. ("AT&T") pursuant to M.G.L. c. 166A §7 and applicable regulations. Each of the decisions has as a common requirement that AT&T provide open or nondiscriminatory access to cable broadband for Internet and on-line services. The open access requirement,

which preserves consumer choice and competition among Internet and on-line service providers, should be reviewed by the Division in a consolidated evidentiary hearing that will allow for a complete and efficient presentation of this critical public policy question.

Deciding this important public policy issue in a fair and impartial manner after developing a full administrative record is essential if due process requirements are to be met. Contrary to the thrust of Appellants' motion, the Division should not put the business interests of the Appellants to consummate quickly the pending merger between MediaOne and AT&T before the interests of the Issuing Authorities and their communities and tens of thousands of subscribers. There are substantial disputed issues of fact and law with respect to the "open access" issue and the propriety of the Issuing Authorities' decisions. These disputed issues involve complex questions of fact and law that merit detailed and deliberate consideration by the Division in evidentiary hearings. The proposed merger between AT&T and MediaOne is not scheduled for regulatory review until the middle of the year 2000. Accordingly, this appeal and the related appeals that AT&T filed can be heard with full evidentiary hearings in an orderly manner well in advance of any events substantially effecting the AT&T/MediaOne merger.

The complexity of the disputed issues of fact and law involved in this case is amplified by AT&T's recent commitment to the FCC to provide some level of "open access" to independent Internet service providers on AT&T's nationwide broadband network in or about mid-2002. AT&T essentially concedes in a December 6, 1999 filing with the FCC that "open access" is (a) financial feasible; (b) technical feasible; (c) beneficial to consumers; (d) pro-competitive and (e) will have no adverse effect on product innovation. This is directly contrary to the position that AT&T takes in this proceeding and

demonstrates that virtually every representation that AT&T and MediaOne made to the Issuing Authorities at the public hearings at the core of this case was misleading and inaccurate.

Accordingly, the Division should deny the Appellants' request for "expedited processing" of this matter.

II. The Applicable Regulation

The Appellants purport to move pursuant to 801 CMR 1.01(7)(a)(1) for an expedited hearing of this matter. However, that regulation deals only with the presentation of motions to Agencies or Presiding Officers and permits parties to submit motions for relief that are not inconsistent with law or 801 CMR 1.00. The regulation contains no specific provision authorizing or describing the relief that the Appellants seek.

To the extent that the Appellants seek a speedy hearing under 801 CMR 1.01(f), the Division should deny the request. 801 CMR 1.01(f) provides that "[u]pon motion of any Party and upon good cause shown, the Presiding Officer may advance a case for hearing." This regulation does not require the Division to move a complex case involving substantial public policy issues through the administrative process without proper evidentiary hearings and due consideration and deliberation of the issues of fact and law that govern the case. In support of their position, the Appellants cite two instances in which the Division has rendered final decisions on appeals within several weeks' time. However, the fact that the Division was able to hear and consider evidence in those cases and reach a conclusion rapidly as to the merits of those appeals has nothing whatsoever to do with this case. In neither case cited by the Appellants did the Division issue any mandate with respect to the parameters of 801 CMR 1.01(f) that applies here to the unique facts of this case.

III. Lack Of Good Cause For An Expedited Proceeding

The Appellants state that "[e]xpeditious processing will permit the parties to this Appeal to present their arguments, and the Division to render a decision, as soon as possible, *without causing delay in the closing of the merger*" (emphasis added). Expediting the merger of MediaOne and AT&T – more accurately the takeover of MediaOne by AT&T – seems to be the sole motivation for this motion. The Appellants have implied, but failed to show, that absent the extraordinary relief they now seek, their merger will be unduly delayed. Somerville submits that in deciding this motion the public policy interests of the Issuing Authorities and the communities and subscribers that AT&T seeks to serve are at least as important as the business interests of the Appellants, and the Division must proceed with the best interests of all parties in mind.

AT&T's emerging cable television and Internet services empire will not rise or fall with the fate of the Issuing Authorities' decisions with respect to AT&T's FCC Form 394 requests. Notably, the Appellants do not indicate in their motion when the contemplated merger is scheduled to close and how, if at all, the filing of this appeal has any impact on the merger. On information and belief, the FCC is not expected to make any finding, recommendations or rulings with respect to the contemplated AT&T/MediaOne merger until the second fiscal quarter of 2000. Accordingly, there is no need to rush this proceeding to conclusion in any manner that precludes interested parties from developing a full evidentiary record.

Given the scope of its acquisition of 175 cable franchises in Massachusetts, it is evident that the disposition of this appeal in the ordinary course of the Division's administrative process is not a "deal breaker" for AT&T. Rather, the Appellants seek to

prevent altogether the Division from hearing or considering evidence on the "open access" issue by seeking an expedited review of the subject appeals within a narrow channel that does not include this important public policy issue. The Appellants state in their memorandum supporting their motion for summary disposition, that the "open access" issue is not relevant here but then devote one-half of the narrative portion of their brief to arguments suggesting that "open access" is not in the public interest. Given the obvious significance of "open access" in this proceeding and the fact that AT&T's refusal to unbundle its independent Internet service provider's services from its broadband cable service was a factor in each Issuing Authority's decision, the Division should hear evidence on this important public policy issue in a full evidentiary hearing.

As set forth in the Issuing Authorities' Memorandum in Support of Motion to Consolidate Hearings, each of the Issuing Authorities considered AT&T's refusal to permit nondiscriminatory access to cable lines for unaffiliated Internet service providers as an important issue, among others, in either denying or conditionally approving AT&T's transfer requests. Magistrate Charles Beard in his non-binding recommendations issued in connection with the regional public hearings that the Division held around the Commonwealth on AT&T's transfer requests found that the "open access" was an extremely important public policy issue, regardless whether it was within the specific parameters of 207 CMR 4.04. (See Summary of Proceedings and Magistrate's Report dated September 24, 1999). Magistrate Beard also noted:

[i]t is clear from the record in this proceeding that the transfer of MediaOne's licenses to AT&T is an event far different from the hundreds, if not thousands, of license transfers that have taken place to date in the Commonwealth. Never before has a company as large and as diversified as AT&T, and with so many plans for transforming the delivery

of cable services, sought to enter the Massachusetts cable market.

(See *id.*)

There can be no doubt that the transfer of MediaOne's cable licenses to AT&T will truly transform the cable industry in Massachusetts. As Magistrate Beard recognized, the landscape of cable services in the Commonwealth will be forever altered as a result of the MediaOne/AT&T merger (*id.*). The Appellants cannot seriously contend that this is a simple case and that ". . . the legal issues raised in the Appeal are neither novel or complex." (See Appellants' Motion, para. 3). Indeed, the issues *are* complex because, as Magistrate Beard noted, AT&T intends to transform the delivery of cable services in Massachusetts by, *inter alia*, bundling telephone, Internet and other on-line and data transmission services with the delivery of the one service that the Division is mandated to oversee, cable television service.

To suggest that this fundamental transformation of cable service in Massachusetts does not present novel and complex issues of fact and law is to view AT&T's vision of this new landscape with blinders on. AT&T's stonewall defense against open access to its high speed cable modem Internet platform is central to this transformation.¹ AT&T should not be permitted to undertake this effort without a full evidentiary hearing before the Division on the merits of the Issuing Authorities' decisions.

¹ Notably, as set forth in the Issuing Authorities' Opposition to Motion for Entry of Summary Decision filed contemporaneously with this Opposition, AT&T promised in a December 6, 1999 letter filed with the FCC that AT&T would permit some form of "open access" on its nationwide broadband network by approximately mid-2002. AT&T essentially concedes in that filing that "open access" is technical and financial feasible, pro-competitive and beneficial to consumers. Curiously, AT&T continues to present argument to the Division that contradicts the position it has now taken with the FCC.

IV. A Full Evidentiary Hearing Is Required

The hearing to which the parties are entitled is broadly described in 207 CMR 4.06. More particularly, the regulation states, in pertinent part, that "[a]ppeals to the [Division] by aggrieved parties seeking a transfer . . . shall be initiated in accordance with . . . M.G.L. c. 166A, §14." The regulation further states that "[t]he [Division] may, after a hearing conducted pursuant to M.G.L. c. 166A, §14, issue such order as it deems appropriate to carry out the purpose of 207 CMR 4.00."

M.G.L. c. 166A, §14 does not contain specific guidelines with respect to the parameters of the hearing that is required. The statute simply states "[t]he division shall hold a hearing upon each such appeal, requiring due notice to be given to all interested parties." Clearly, the Division has discretion to conduct as comprehensive a hearing as the facts and law of each appeal may dictate.

The provisions of 801 CMR 1.01, *et. seq.* provide guidance here. The Appellants have acknowledged that the provisions of 801 CMR 1.01 apply by their own citation to these regulations in the context of this proceeding. These regulations contemplate a full evidentiary hearing with pre-hearing procedures and discovery, the presentation of documentary and testimonial evidence, post-hearing briefs and argument. In pertinent part, the regulations provide for:

- party representation by counsel or other authorized representatives provided that such counsel file an appearance in the proceeding (See 801 CMR 1.01(3)).
- the filing of pleadings, claims for adjudicatory proceedings and responsive pleadings (See 801 CMR 1.01(6)(a)(e)).

- the joinder and/or intervention of necessary or other interested parties and the amendment of pleadings prior to hearings (See 801 CMR 1.01(6)(f), 101(9)).
- dispositive pre-hearing motions and other motions for general relief (See 801 CMR 1.01(a)-(l)).
- extensive discovery via written discovery requests and depositions including mechanisms to compel discovery from a non-responsive Party (See 801 CMR 1.01(8)(a)-(i)).

The regulations contain detailed provisions regarding the scope and parameters of formal hearings in 801 CMR 1.01(10). Notably, the regulations provide for:

- pre-hearing conferences to consider the resolution of any undisputed issues and the conduct of the hearing generally (See 801 CMR 1.01(10)(a)).
- provisions for the waiver of the party's right to hearing by submitting its case to the Presiding Officer upon written submissions (See 801 CMR 1.01(10)(c)).
- the subpoenaing of witnesses in accordance with M.G.L. c. 30A §12 (See 801 CMR 1.01(10)(g)).
- the completion of post-hearing briefs after the Agency or Presiding Officer has heard testimony and considered documentary evidence (See 801 CMR 1.01(10)(j)).

The regulations contain specific provisions governing the introduction of evidence in testimonial and documentary form. Paragraph (f) of the regulation provides:

Presentation of Evidence. All Parties shall have the right to present documentary and oral evidence, to cross-examine adverse or hostile witnesses, to interpose objections, to make motions and oral arguments. Cross-examination is to follow the direct testimony of a witness. Whenever appropriate, the Presiding Officer shall permit reasonable redirect and

recross-examination and allow a Party an adequate opportunity to submit rebuttal evidence. Except as otherwise provided, evidence of the Respondent shall be presented after the presentation of the Petitioner's case in chief. The Respondent shall first argue in summation.

A full evidentiary hearing is made available to any interested party in all adjudicatory agency proceedings. *See* 801 CMR 1.01(1) and (2)(a), which make the so-called formal rules generally applicable in any hearing. As the regulations state, "801 CMR 1.00 governs the conduct of formal Adjudicatory Proceedings of all Commonwealth agencies governed by M.G.L. c.30A." Here, the Division cannot rush these proceedings to accommodate the Appellants' unsubstantiated representation that they need a quick decision to accommodate their merger schedule without running afoul of the rights of the Issuing Authorities and any other interested parties who may seek to intervene in the case to a full evidentiary hearing on the merits.

As set forth above, the issues of fact and law in this case are at once complex and novel. Moreover, although feigning that the "open access" issue is not relevant, the Appellants, by asking the Division to consider the merits of their narrative summary of purported evidence that "open access" is not in the public interest, have opened the door for interested parties to present opposing evidence that would support a Division finding that the Issuing Authorities' insistence on "open access" as a condition of license transfer was proper. Although the Issuing Authorities respond to the Appellants' factual claims in their own responsive filing, the Issuing Authorities must be permitted to challenge further in a full evidentiary hearing the Appellants' false and misleading representations about the merits of "open access" set forth in their brief and elsewhere in the record before the Division. The applicable regulations and the requirements of due process require that the

Division conduct a full evidentiary hearing in the manner prescribed in 801 CMR. 1.00, *et. seq.*

V. Conclusion

For the reasons set forth above, the Division should deny the Appellants' request for expedited processing of this matter and should convene a full evidentiary hearing in this case.

Respectfully submitted,
City of Somerville,
by its counsel,

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