

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

MEDIAONE OF MASSACHUSETTS, INC.,
MEDIAONE GROUP, INC., and AT&T
CORP.

CTV 99-6

Appellants,

v.

MAYOR OF THE CITY OF NEWTON

Appellee.

**APPEAL FROM CITY OF NEWTON DENIAL
OF LICENSE TRANSFER**

MediaOne Group, Inc. (“MediaOne”), MediaOne of Massachusetts, Inc. (“Licensee”) and AT&T Corp. (“AT&T”) (collectively herein the “Appellants”) hereby submit this appeal pursuant to Mass. Gen. Laws 166A, §§ 7 and 14 and 207 C.M.R. § 4.06 seeking relief from the denial by the Mayor of the City of Newton, Massachusetts (“Mayor”) of the transfer of Licensee’s cable television license for the City of Newton, Massachusetts (“Newton”).

Parties

1. Licensee is a corporation organized under the laws of the State of Delaware, with its principal place of business in Andover, Massachusetts. The Licensee provides cable television services in Newton pursuant to a ten year cable renewal license granted on August 9, 1990, and effective beginning March 1, 1991 (the “License”). Licensee is a wholly owned subsidiary of MediaOne Group, Inc.

2. MediaOne is a corporation organized under the laws of the State of Delaware, with its principal place of business in Englewood, Colorado. MediaOne and AT&T jointly applied to the Mayor seeking consent to the transfer of control of Licensee from MediaOne to AT&T. MediaOne wholly owns and controls Licensee.

3. AT&T is a corporation organized under the laws of the State of New York with its principal place of business in New York, New York. AT&T jointly applied to the Mayor to acquire control of Licensee from MediaOne.

4. The Mayor of the City of Newton is the cable television license Issuing Authority for the City of Newton, Massachusetts pursuant to Mass. Gen. Laws ch. 166A, § 1.

I. Factual Allegations

5. MediaOne is the successor in interest to the “Cable Television Renewal License” for Newton originally granted to Continental Cablevision of Massachusetts, Inc. on August 9, 1990. The License was transferred from Continental to the Licensee (through U S WEST) in August 1996.

6. The federal renewal window opened on the License on March 1, 1998, and MediaOne filed its formal reservation of renewal rights under 47 U.S.C. § 546 on March 23, 1998. Newton has not yet conducted any performance review or public ascertainment.

7. On or about July 13, 1999, MediaOne and AT&T filed applications on FCC Form 394 with 175 cities and towns in Massachusetts, including Newton, seeking consent to the transfer of control of MediaOne-controlled cable television licensees to AT&T. The communities had 120 days to act upon the applications or they would have been deemed granted. *See* 47 U.S.C. § 537, 47 C.F.R. § 76.502; 207 C.M.R. § 4.02. Following the filing of the applications, the Cable Television Division of the Massachusetts Department of Telecommunications and Energy (the “Cable Division”) appointed a Special Magistrate to conduct eleven regional hearings in August and

September, 1999 concerning the applications. The Cable Division directed the Special Magistrate to prepare a report for participating communities analyzing the hearing record and making non-binding recommendations regarding whether to approve the transfer applications. Most of the towns and cities (165 of 175 municipalities), including Newton, participated in the hearings.

8. On September 24, 1999 the Special Magistrate issued his Report recommending that the transfer applications be granted because the hearing record established that AT&T had satisfied the legal requirements applicable in Massachusetts to the transfer of cable licenses. The Magistrate's Report noted that the hearings included discussions concerning the "open or forced access issue" that while "interesting and important" were not relevant to the criteria to be considered under Massachusetts law.

9. On October 28, 1999, the Mayor wrote to AT&T expressing the following concerns regarding the transfer: (i) "the lack of cable television management experience and technical expertise of AT&T itself;" and (ii) compliance issues related to the current License. With respect to the compliance issues, the Mayor alleged that (i) MediaOne had not complied with an Institutional Network requirement; (ii) that the repositioning of the local access channels had caused the City damages; and (iii) that there was a "lack of response and access to management at the local level." The Mayor also stated his view that "non-discriminatory access to the MediaOne/AT&T cable modem platform for unaffiliated providers of Internet and on-line services is essential" and requested a written response from AT&T concerning its position on forced access.

10. Following a meeting with the Mayor on November 4, 1999 to discuss these issues, on November 8, 1999, AT&T responded to the Mayor's October 28, 1999 letter and explained that the retention of MediaOne management together with AT&T's management and technical expertise, including the experience serving 11 million TCI customers, would ensure that the Licensee would

retain its management and technical qualifications. (“November 8 Response”). The November 8 Response reaffirmed AT&T’s commitment to “remain a community partner, and to ensure that senior management is available to work with [the Mayor] relative to any concerns that may arise.”

11. On November 9, 1999, the Mayor denied the transfer of the Newton license to AT&T, stating that his decision was based on AT&T’s lack of management experience and technical expertise. *See Letter to William Leahy, Regional Director Government Affairs, AT&T from David B. Cohen, Mayor, City of Newton, November 9, 1999 (“Denial Letter”).* The Mayor stated: “...AT&T indicated that it would retain the present MediaOne personnel. However, I understand that the regulatory criteria for transfer pertain to AT&T’s cable television management experience (as Transferee) not MediaOne’s (as Transferor).” Denial Letter at 1.

12. The Mayor also challenged AT&T’s reliance upon MediaOne’s management personnel based upon two allegations of License noncompliance by MediaOne, and the repositioning of the local access channel.

13. With respect to License non-compliance, the Mayor alleged that MediaOne failed (i) to comply with customer service requirements because local management was not responsive enough; and (ii) to comply with the Institutional Network requirement. The Mayor asserted that these represent “ongoing technical and managerial failure on the part of MediaOne. If AT&T is intending to rely solely upon MediaOne’s expertise in these areas, I continue to be concerned about AT&T’s proposed managerial plan.” Denial Letter at 2.

14. The Denial Letter stated that “although not a basis of denial, I have serious concerns about the open access issue.”

15. On November 10, 1999, MediaOne wrote to the Mayor urging an extension of the 120 day transfer review process to allow additional discussions to resolve outstanding issues. The

extension was not formally agreed to by the Mayor and on November 19, 1999, MediaOne received a letter from the City proposing “a resolution to the denial of the license transfer to AT&T.” (“City’s November 19 Letter”).

16. The City’s November 19 Letter claimed \$738,400 in monetary damages that the City had suffered from the alleged failure by MediaOne “to provide [the City] with a reliable and working I-Net system.” The letter then explained that the “Mayor is prepared to approve the transfer of the license to AT&T upon: (i) receipt of payment to the City of Newton in the amount of \$738,400;” (ii) the removal of I-Net equipment; and (iii) the grant of ““most favored nations’ status with respect to the open access issue.” City’s November 19 Letter at 2.

17. MediaOne acquired the Newton License just three years ago following the City’s July 30, 1996 letter approving MediaOne (through its predecessor U S WEST) under the relevant transfer criteria. In that transfer proceeding, Newton participated in the regional hearing process where the Special Magistrate concluded, after nine regional hearings in Massachusetts, that U S WEST had the managerial, technical and other qualifications to operate the Newton cable system, largely by virtue of its plan to rely on existing Continental management personnel. *See Transfer of Control of Cable Television Licenses from Continental Cablevision to U S WEST*, Report of Mass. Cable Television Comm’n Special Magistrate (July 16, 1996) at 8.

18. MediaOne has since upgraded the Newton system so that it has doubled its channel capacity, and offers competitive telephone service as well as high speed internet access. As a member of the Newton Cable Board testified at the Newton regional hearing, “MediaOne already has advanced services. We have one of the most advanced systems in the country in place in Newton.” Newton Hearing Transcript at 36.

19. The City and MediaOne are now also engaged in the renewal process (the renewal window opened on March 1, 1998) during which important issues appropriate for renewal, such as the Licensee's compliance with the terms of the franchise, will be reviewed.

20. The License provides no agreement by the parties giving the Mayor the right to unilaterally amend the terms of the License to require forced access during the course of a transfer proceeding or otherwise. Section 15.1 of the License states that: "This instrument contains the entire agreement between the parties...and cannot be changed orally but only by an instrument in writing executed by the parties." In addition, Section 15.6 of the License provides that "[a]ll conditions and requirements of...Massachusetts General Laws Chapter 166A, and the rules and regulations of the ... Commission [now the Cable Division] as the same exist or as they may be amended from time to time are incorporated herein by reference..."

II. Statement of Claims on Appeal

Count 1

21. Appellants reallege and incorporate herein the facts set forth in Paragraphs 1 - 20 of this Appeal.

22. The Mayor's denial of approval of the transfer of control of the Licensee from MediaOne to AT&T constitutes arbitrary and unreasonable action because the record demonstrates that AT&T, as transferee, has the management and technical qualifications to operate the system in compliance with the terms of the License.

Count 2

23. Appellants reallege and incorporate herein the facts set forth in Paragraphs 1 - 22 of this Appeal.

24. The Mayor's denial of the transfer of control of the Licensee from MediaOne to AT&T constitutes arbitrary and unreasonable action in direct violation of Mass. General Laws ch. 166A, § 7 and the Commission's regulations 207 C.M.R. §§ 4.04 and 3.07. In the Denial Letter, the Mayor failed to confine his considerations to the management experience, technical expertise, financial capability, or legal ability of AT&T to operate a cable system under the existing license.

25. The Mayor's denial on the ground that AT&T lacks management and technical qualifications is a pretext for obtaining a cash payment for alleged License compliance matters and a forced access License amendment through the transfer process.

III. Request for Relief

WHEREFORE, Appellants request that the Cable Division summarily reject the Mayor's erroneous determination that AT&T lacks the requisite managerial and technical qualifications to assume control of the Licensee. The Cable Division should also summarily reject the attempt by the Mayor to compel Licensee to make a cash payment to settle alleged License compliance matters and to impose an unlawful forced access provision to gain the approval of the license transfer from MediaOne to AT&T. Appellants request that the Cable Division enter an order determining that the denial of the approval by the Mayor was in error, and order that the transfer of control of the Licensee to AT&T is approved.

Respectfully submitted,

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