



**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division**

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In the Matter of)	
)	
AT&T Broadband)	Docket No. CTV 01-6
)	
and)	Date Issued: May 1, 2002
)	
Town of Concord, MA)	
)	
Re: Obligation to Remedy)	
Alleged Non-Compliance)	
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I. INTRODUCTION

AT&T Broadband (“AT&T”) filed a petition with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy on June 21, 2001, requesting a determination of whether AT&T is obligated to remedy alleged non-compliance in the Town of Concord (“Town”) relating to an expired license where a new renewal license is in place. On August 1, 2001, the Cable Division issued a Notice of Request for Comment to the parties. The Cable Division received comments from the Board of Selectmen as the Issuing Authority (“Issuing Authority”) and AT&T.

The Cable Division was informed by the parties that negotiations for a renewal license were ongoing and included discussions of the alleged non-compliance.¹ The Cable Division postponed issuance of an Advisory Opinion to allow the parties to settle all outstanding issues. However, AT&T recently renewed its request for an Advisory Opinion.

II. BACKGROUND

¹ The current license expires on January 5, 2004, and therefore the parties are in the three year renewal period provided by the formal renewal process.

Since 1985, the Town has executed three licenses with cable operators. The first license commenced on September 16, 1985, and expired in September of 2000 (“Initial License”). AT&T and the Town executed a renewal license that had an expiration date of July 1, 2001 (“First Renewal License”). A second renewal license commenced on July 1, 2001, and had an expiration date of January 1, 2001, with an automatic extension to January 5, 2004 (“Second Renewal License”). This Second Renewal License is currently in effect.

Both the First Renewal License and the Second Renewal License adopted all of the terms and conditions contained in the Initial License. In addition, the Second Renewal License contains a section specifically referencing the alleged non-compliance and an acknowledgment by both parties of the Issuing Authority’s right to “continue the determination of breach process.” Second Renewal License, at Section 1.3.

III. ANALYSIS AND FINDINGS

An Advisory Opinion issued by the Cable Division constitutes a non-binding opinion provided to ensure uniform understanding of a particular regulation or body of law. G.L. c. 30A, § 8. An Advisory Opinion is appropriate to provide guidance as to the proper interpretation of laws or policies; however, it does not provide for specific factual findings or conclusions of law. In addition, the issuance of an Advisory Opinion by the Cable Division does not preclude interested parties from pursuing the matter through the appropriate adjudication or litigation process. Id.

In assessing whether a cable operator is obligated to remedy alleged non-compliance relating to an expired license where a new renewal license is in place, we note that a stated purpose of the Communications Act of 1934 is to “establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator’s past performance and proposal for future performance meet the standards established by this title.” 47 U.S.C. § 521. As part of this orderly process, the Issuing Authority must determine whether to grant or deny the renewal license and must issue a statement that fully explains the rationale behind its decision.² 47 U.S.C. § 546(c)(3); 207 C.M.R. § 3.06. Federal law and Massachusetts regulations provide the Issuing Authority with four criteria to use in its determination. 47 U.S.C. § 546(c)(1); 207 C.M.R. § 3.06(1). The first criterion is whether the cable operator has substantially complied with the material terms of the existing franchise and applicable law. Id. The second criterion is the quality of the cable operator’s service. Id. The third criterion is whether the cable operator has the financial, legal, and technical ability to provide the cable services, and the final criterion is whether the cable operator’s proposal is reasonable to meet future cable-related community needs and interests. Id.

² Massachusetts regulations require that the Issuing Authority submit its written statement to the Cable Division. 207 C.M.R. § 3.06(2).

While all four criteria are important considerations, the first criterion is of special interest in this situation. Based on our interpretation of the statutory framework, the period prior to execution of a renewal license should be used by the Issuing Authority to determine the appropriateness of granting or denying the franchise agreement based on the four criteria.³ Further, in conjunction with a determination to grant a renewal license, the Issuing Authority is required to issue a written statement acknowledging that the cable operator has substantially complied with each of the four criteria. Even if the Issuing Authority fails procedurally to issue the written statement, the Issuing Authority, by executing a renewal license, is determining implicitly that the cable operator has substantially complied with the four criteria, and most notably, the first criterion, that is the cable operator has substantially complied with the material terms of the existing franchise. Having made this finding, it follows, therefore, that the Issuing Authority may not raise additional compliance issues with respect to that license.

In this matter, the Issuing Authority sent AT&T formal notification of AT&T's alleged non-compliance with the Initial License on May 22, 2001. This formal notification made specific reference to non-compliance with the Initial License even though the Initial License had expired and the Issuing Authority had granted the First Renewal License. While it appears that the Issuing Authority failed to raise the compliance issues appropriately, we cannot opine that AT&T's obligation to remedy any alleged non-compliance is absolved. First, presenting formal notification of alleged non-compliance with a license that was expired could be either a case of poor draftsmanship or, more problematically, representative of the confusion that occurs during the renewal process when a renewal license is inappropriately treated as an extension of an expiring license.⁴ We are unclear as to whether the alleged non-compliance relates to the Initial License or the then-existing license. Second, additional questions of fact are raised because the parties chose to incorporate all of the terms and conditions of the Initial License into each renewal license and the parties negotiated in the Second Renewal License to include a clause providing for the continuation of a breach proceeding, which presumably was in process. In their comments, the parties fail to address with supportive argument whether the clause obligates AT&T to remedy non-compliance as a matter of contract law even though such

³ An Issuing Authority is not limited to alleging non-compliance during the renewal process; rather any compliance issues should be raised as soon as discovered.

⁴ See G.L. c. 166A, §§ 3 and 13.

obligation might have been relieved under our licensing guidelines. Given these factual questions, the Cable Division finds that a determination of whether AT&T is obligated to remedy alleged non-compliance relating to the expired license is a matter for adjudication, and we, therefore, decline to issue an Advisory Opinion addressing the parties' specific situation.

**By Order of the
Department of Telecommunications and Energy
Cable Television Division**

**/s/ Alicia C. Matthews
Alicia C. Matthews
Director**