



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

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In the Matter of)
)
AT&T CSC, Inc.,)
AT&T Corp., and)
AT&T Comcast Corporation)
)
Appellants)
)
v.)
)
Board of Selectmen of the)
Town of Bedford)
)
Appellee)
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Docket No. CTV 02-11

Date Issued: November 18, 2002

ORDER ON MOTIONS FOR SUMMARY DECISION

This action comes before the Cable Television Division of the Department of Telecommunications and Energy upon Appellants AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation's appeal of the disposition of the cable license transfer application by Appellee, the Board of Selectmen of the Town of Bedford.

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FOR: BOARD OF SELECTMEN OF THE TOWN OF
BEDFORD
Appellee

I. INTRODUCTION

This action comes before the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy upon appeal pursuant to G.L. c. 166A, § 14. On March 1, 2002, AT&T Corp., as the Transferor and the ultimate parent company of the licensee AT&T CSC, Inc., (d/b/a “AT&T Broadband”), and AT&T Comcast Corporation (“AT&T Comcast”), as the Transferee (together “Appellants”) submitted to the Board of Selectmen of the Town of Bedford as the Issuing Authority (“Appellee” or “Bedford”) an application for approval of a change of control of the Cable Television Renewal License (the “License”). Upon receipt of the application, Bedford had sixty days within which to hold a public hearing and a further sixty days to render its final vote on the matter. 207 C.M.R. §§ 4.02(2) and 4.03(1); see also 47 U.S.C. § 537. During this 120-day period, Bedford was allowed to consider the appropriateness of approving or denying the License transfer application based on the following criteria: (a) management experience, (b) technical expertise, (c) financial capability, and (d) legal ability to operate a cable system under the existing license. 207 C.M.R. § 4.04(1).

Appellee held its required public hearing on April 22, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit D, Public Hearing Transcript (“Exhibit D”)). Bedford voted to deny the transfer application and issued a written decision to the Cable Division on June 26, 2002, pursuant to 207 C.M.R. § 4.05 (see Appellants’ Appendix in Support of Appeal at Exhibit A, Cable Television Transfer Report issued by the Selectmen of Bedford

("Exhibit A")). Appellee found that AT&T Comcast did not have the requisite management experience or financial capability to operate the cable system under the License (id.).

Pursuant to G.L. c. 166A, § 14, Appellants appealed Bedford's decision to the Cable Division on July 26, 2002. Concurrent with the appeal, Appellants filed a Motion for Summary Decision ("Appellants Motion") with a supporting memorandum ("Appellants Memorandum"), and a Motion for Expedited Processing of the Appeal.¹ On August 16, 2002, Bedford filed an Answer as well as an Opposition to Appellants Motion and a Cross Motion for Summary Decision ("Appellee Opposition/Motion").² On August 23, 2002, Appellants filed an Opposition to the Cross Motion for Summary Decision.

II. STANDARD OF REVIEW FOR SUMMARY DECISION

The Standard Adjudicatory Rules of Practice and Procedure, which govern the conduct of formal proceedings of agencies subject to Chapter 30A, authorize the use of full or partial summary decision in agency decisions. 801 C.M.R. § 1.01(7)(h). The Rules specifically provide that "[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense." Id.

¹ On August 2, 2002, Bedford filed an Opposition to Appellants' Motion for Expedited Processing and a Motion to Extend the Time to respond to Appellants Motion. On August 2, 2002, Appellants filed an Opposition to Bedford's Motion to Extend Time. On August 6, 2002, the Cable Division issued an Interlocutory Order granting Appellants' Motion for Expedited Processing to the extent deemed appropriate, granting Appellee's Motion to Extend Time, and establishing preliminary ground rules.

² Appellee's Opposition to Appellants Motion and Appellee's Cross Motion for Summary Decision were filed as one document.

Summary decision may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Mass. Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-786, 405 N.E.2d 151 (1980). Moreover, an evidentiary hearing is never required if the dispute only involves issues of law or policy. Kenneth Culp Davis, Administrative Law Treatise, Volume 1, § 8.4, at 389, citing Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). The Cable Division has stated that summary judgment is “appropriate where it has been demonstrated that no genuine issue [of] material fact exists and where the moving party is entitled to judgment as a matter of law.” Belmont Cable Associates v. Belmont, CTV A-65, at 3 (1988), citing Greater South Shore Cablevision, Inc. v. Board of Selectmen of Scituate and Scituate Cablesystems Corporation, CTV A-32 (1983).

The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if it would have no burden on an issue if the case were to go to trial. Attorney General v. Bailey, 386 Mass. 367, 371, 436 N.E.2d 139, cert. denied sub nom Bailey v. Bellotti, 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. O’Brion, Russell & Co. v. LeMay, 370 Mass. 243, 245, 346 N.E.2d 861 (1976).

III. ANALYSIS AND FINDINGS

Each party has submitted a motion for summary decision claiming there is no genuine issue of material fact and that it is entitled to summary decision as a matter of law (Appellants Motion at 2; Appellee Opposition/Motion at 1). Further, neither party has alleged any specific fact to establish the existence of a genuine issue of fact. See O’Brion, at 245. The parties dispute only the conclusions to be drawn from the undisputed facts.³

Appellants assert that they are entitled to summary decision as a matter of law because Bedford’s decision to withhold consent to the License transfer was based on considerations beyond the scope of a transfer review (Appellants Motion at 2). Specifically, Appellants assert that Appellee sought to leverage its position as Issuing Authority to obtain a commitment to upgrade its cable system and address compliance issues (id.; Appellants Memorandum at 2, 15-19). Appellee asserts that it, not Appellants, is entitled to summary decision as a matter of law (Appellee Opposition/Motion at 14). Appellee contends that its decision was not based on considerations outside the scope of review, but was properly based on its determination that the Transferee lacks the requisite management experience and financial

³ Appellee also questions the appropriate standard of review the Cable Division must apply to appeals brought pursuant to G.L. c. 166A, § 14 (Appellee Opposition/Cross Motion at 3-7). The standard of review was established in MediaOne of Massachusetts, Inc., et al. v. Board of Selectmen of the Town of North Andover, et al., CTV 99-2, 99-3, 99-4, 99-5, Order on Motions for Summary Decision/Consolidation (2000). Affirmed by the full Commission in MediaOne of Massachusetts, Inc., et al., D.T.E. 00-49 (2000), the standard continues to apply. See AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford, CTV 02-5, Order on Motions for Reconsideration (2002).

capability to operate the Bedford cable system (id. at 7, 12-13). Specifically, Appellee argues that its denial could not have been based on upgrade issues because AT&T Broadband had already committed to a rebuild of the cable system and that “License noncompliance, per se, was not discussed at the public hearing” (id. at 12-13).

The Cable Division’s regulations provide that, in reviewing a license transfer application, an issuing authority “shall not propose amendments to or renegotiate the terms of the existing license. . . .” 207 C.M.R. § 4.04(2). We have held that subsection 4.04(2) “preserves the purpose of the transfer approval process by requiring a meaningful review of the applicant’s relevant qualifications and preventing the dilution of the process by the introduction of peripheral issues.” MediaOne of Massachusetts, Inc., et al. v. Board of Selectmen of the Town of North Andover, et al., CTV 99-2, 99-3, 99-4, 99-5, at 29, Order on Motions for Summary Decision/Consolidation (2000) (“MediaOne I”). Based on our review of the record, we find that to the extent upgrade issues were discussed at the transfer hearing, it was in the context of a renewal license that was being negotiated contemporaneously.⁴ Further, there is no indication in the transfer report that Appellants actually denied the License transfer based on the desire to obtain an upgrade commitment (see Exhibit A). Therefore, we are

⁴ The License expires in December of 2002, and negotiations for a renewal license are ongoing. Discussions of the renewal license were interspersed with those regarding the transfer review at the public hearing; shortly before the transfer hearing concluded, the Town Administrator stated: “Just to be clear for the public record here and the public in attendance, the purpose of this hearing is discussion of the transfer of this franchise – of control of the franchise and, although, the discussion recently in this hearing has been related to the license renewal, I don’t want the general public to get a misunderstanding that that’s what we’re debating and considering tonight” (Exhibit D, at 43).

unable to find, from the record before us, that Bedford denied the license in order to obtain a commitment to upgrade its cable system.

With respect to Appellants' assertion that the License transfer was denied in order to resolve compliance issues, the Cable Division has held that evidence of noncompliance may be relevant in the context of a license transfer review to the extent that it is used to determine the requirements of the license. AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford, CTV 02-5, at 20 Interlocutory Order on Motions for Summary Decision (Sept. 18, 2002) ("Westford Interlocutory Order"), citing MediaOne of Massachusetts, Inc., et al. v. City Manager of the City of Cambridge, CTV 99-4, at 5, Interlocutory Order on Scope of the Proceeding (2000) ("MediaOne II"). While Appellee argues that License noncompliance was not even discussed at the transfer hearing, Appellants contend that the transfer report itself contains "broad assertions" that the current AT&T Broadband management is not meeting its obligations and that such constitutes allegations of noncompliance (Appellee Opposition/Motion at 12; Appellants Memorandum at 18). It is unclear as to whether Appellee is actually alleging noncompliance with the License. Appellee found that AT&T Broadband "lacks adequate management of its cable-related resources" (Exhibit A, at 2). Thus, Appellee does not state that AT&T Broadband is not in compliance with the License, only that it lacks adequate management. As such, we are unable to determine based on the record before us that Bedford withheld consent to the License transfer as a pretext to resolve any compliance issues.

However, even though Appellee acted within the scope of its review authority, Appellee failed to appropriately consider the qualifications of the Transferee, AT&T Comcast. This

proceeding involves the corporate merger of two entities, AT&T Broadband, after its spin-off from AT&T Corp., and Comcast Corporation. In analyzing the merger, Appellee states that “representatives of AT&T Comcast repeatedly pointed to the management experience of AT&T Broadband” (Appellee Opposition/Motion at 9). Yet the record indicates that AT&T Comcast referred to the transaction as a merger and presented information about both AT&T Broadband and Comcast Corporation (FCC Form 394; Exhibit D at 8-15, 18-19, 22, 29). Hence, the Transferee does not rely solely on the qualifications of the current licensee. Cf. MediaOne II at 5. Therefore, while the qualifications of AT&T Broadband are relevant, so too are the qualifications of Comcast Corporation. In making no findings regarding Comcast Corporation’s qualifications, and by reviewing only AT&T Broadband’s qualifications, Bedford provided no reasonable basis for its ultimate conclusion that AT&T Comcast lacks the requisite qualifications.

Further, Appellee rejected AT&T Comcast’s qualifications, in part, on its determination that the Transferee lacked any historical managerial or financial structure on which it could be evaluated (Exhibit A at 1, 2). Specifically, Appellee found that the Transferee exists only as a paper-filing with no track record to analyze its management experience or to verify its financial capability and that the Transferee provided financial information based on historical AT&T Broadband and Comcast Corporation figures “in an attempt to substantiate the Transferee’s financial capability” (id. at 1, 2). Appellants counter that the transaction involves a merger rather than an acquisition, and thus there can be no historical records (Appellants Memorandum at 11). Furthermore, Appellants contend that Appellee refused to consider forward looking

presentations that set forth the management and financial structure based on historical information of the two merging entities, AT&T Broadband and Comcast Corporation (id. at 11, 13).

Appellee's determination that it was unable to evaluate the Transferee disregards the very essence of the underlying transaction. Under Appellee's rationale, no entity created as a result of merger could ever receive approval to assume control of a license. Yet, as Appellants contend, such mergers are commonplace in the cable industry (id. at 11). For example, the fact that AOL Time Warner was only a paper company did not prevent the issuing authorities who held licenses with Time Warner from reviewing the new entity's qualifications (id.). Further, in a merger situation, it is impossible for the merging entities to have any historical qualifications. Therefore, it was appropriate for the Transferee to submit information based on a combination of historical information for the two merging entities. Appellee was required to consider the qualifications of both of the merging entities. Yet, Appellee simply determined that because AT&T Comcast lacked a history of its own, Appellee was unable to evaluate it (Exhibit A at 1, 2). Thus, we determine that Appellee arbitrarily analyzed only certain information and, even assuming it did conduct an appropriate review of the transfer application, failed to provide any reasoned analysis to support its rejection of Comcast Corporation's qualifications. Given these findings, we determine that Appellee acted arbitrarily and unreasonably in withholding consent to the License transfer. We therefore conclude that there are no genuine issues of material fact, that Bedford's decision to withhold consent to the License transfer was arbitrary and unreasonable, and that Appellants are entitled to a decision

as a matter of law. In reaching this conclusion, we make no findings as to the accuracy of the information submitted by Appellants or the qualifications of AT&T Comcast.

IV. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: Appellants' Motion for Summary Decision is hereby GRANTED; and it is

FURTHER ORDERED: Appellee's Cross Motion for Summary Decision is hereby DENIED; and it is

FURTHER ORDERED: Appellee must conform with the above decision and grant consent to the License transfer application.

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

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

APPEALS

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 1997, c. 164, § 273. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within 7 days of the filing of the initial petition for appeal.