



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 Westford)
)
Appellee)
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Docket No. CTV 02-5

Date Issued: October 31, 2002

ORDER ON MOTIONS FOR RECONSIDERATION

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 Westford.

APPEARANCES: Cameron F. Kerry, Esq.
Daniel B. Trinkle, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston MA 02111

FOR: AT&T CSC, INC., AT&T CORP., and AT&T
COMCAST CORPORATION
Appellants

Peter J. Epstein, Esq.
Epstein & August, LLP
101 Arch Street, 9th Floor
Boston MA 02110

-and-

Steven F. Smoot, Esq.
Smoot & Associates, PC
101 Arch Street, 9th Floor
Boston MA 02110

FOR: BOARD OF SELECTMEN OF THE TOWN OF
WESTFORD
Appellee

I. INTRODUCTION

This action comes before the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy (“Department”) upon appeal by 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” or the “Companies”) of the denial of a cable license transfer application by the Board of Selectmen of the Town of Westford (“Appellee” or “Westford”). This Order addresses the Motions for Reconsideration filed by the parties pursuant to 801 C.M.R. § 1.01(7)(l) regarding the Interlocutory Order issued by the Cable Division on September 18, 2002, and as a result, reconsiders certain findings contained in the Interlocutory Order. See AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford, CTV 02-5, Interlocutory Order on Motions for Summary Decision (2002) (“Interlocutory Order”).

II. PROCEDURAL HISTORY

On June 18, 2002, Appellee, as the Issuing Authority for the Town of Westford, denied Appellants’ application for approval of a change of control of the Cable Television Renewal License (the “License”) (see Appellants’ Appendix in Support of Appeal at Exhibit A, Westford Board of Selectmen Transfer Report dated June 18, 2002 (“Exhibit A”)). Pursuant to G.L. c. 166A, § 14, the Companies appealed Westford’s decision (“Appeal”) to the Cable Division on July 18, 2002. On that same date, the Companies also filed a Motion for Summary Decision (“Appellants Motion”) with a supporting memorandum (“Appellants Memorandum”),

and a Motion for Expedited Processing of the Appeal, pursuant to 801 C.M.R. § 1.01(7)(h).¹ In Appellants Motion, Appellants requested that the Cable Division find, as a matter of law, that Westford arbitrarily or unreasonably withheld its consent to the transfer application (Appellants Motion at 2-3). On August 8, 2002, Westford filed an Opposition to Appellants Motion and a Cross Motion for Summary Decision (“Appellee Opposition/Cross Motion”).² On August 19, 2002, Appellants filed an Opposition to the Cross Motion for Summary Decision (“Appellants Opposition”). On August 27, 2002, the Cable Division held a procedural conference.

On September 18, 2002, the Cable Division issued an Interlocutory Order that granted in part and denied in part the Motion for Summary Decision submitted by Appellants and determined that Appellee had effectively withdrawn its Cross Motion for Summary Decision (Interlocutory Order at 3, 25). On September 30, 2002, Westford filed a Motion to Reconsider pursuant to 801 C.M.R. § 1.01(7)(l) (“Appellee Motion to Reconsider”). On October 2, 2002, Appellants filed a Motion for Reconsideration (“Appellants Motion for Reconsideration”) along with two supporting memoranda ((1) AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation’s Petition for Appeal of Cable Division’s Interlocutory Order on Motions for

¹ On July 25, 2002, Westford filed an Opposition to Appellants’ Motion for Expedited Processing and a Motion to Extend the Time to respond to the Motion for Summary Decision. On July 31, 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 (“Appellants Reconsideration Petition”); and (2) Appellants’ Memorandum of Law In Support of Its Petition for Appeal of Cable Division’s Interlocutory Order on Motions for Summary Decision (“Appellants Reconsideration Memorandum”). On October 7, 2002, Appellants filed an Opposition to Westford’s Motion to Reconsider (“Appellants Opposition to Reconsider”).³

III. MOTIONS FOR RECONSIDERATION

A. Standard For Granting Reconsideration

While the Cable Division has not previously addressed the appropriate standard for granting reconsideration, we find guidance in our procedural rules as well as the Department’s standard of review.⁴ The Cable Division’s Procedural Rule, 801 C.M.R. § 1.01(7)(l), authorizes a party to move for reconsideration after a decision has been rendered and before the expiration of the time for filing a request for review or appeal. The motion for reconsideration must identify “a clerical or mechanical error in the decision or a significant factor” overlooked in rendering the decision. 801 C.M.R. § 1.01(7)(l). A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact on the decision; it should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Co., D.P.U. 92-3C-1A at 3-6 (1995);

³ Appellee’s Motion to File Opposition Late opposing Appellants Motion for Reconsideration was denied as untimely and failing to establish good cause (Ruling on Appellee’s Motion to File Opposition Late, issued October 25, 2002).

⁴ The Department’s rules at 220 C.M.R. and decisions related thereto are analogous to the codified rules at 801 C.M.R. that govern the Cable Division.

Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). A motion for reconsideration may also be based on an argument that the Cable Division's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Co., D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. Whether The Cable Division Must Reconsider The Standard Of Review Under Section 14

Both Appellee and Appellants seek reconsideration, albeit for different reasons, of the standard of review governing the Cable Division's review of transfer proceedings. Appellee argues that the Cable Division should be guided by a substantial evidence test⁵ rather than conduct a de novo review, that the Issuing Authority serves as the ultimate authority in licensing matters, and that the Cable Division may not substitute its judgment for that of the Issuing Authority (Appellee Motion to Reconsider at 1-5). These arguments presented by Appellee in its Motion to Reconsider are simply a rehash of similar arguments made previously

⁵ Appellee's definition of the substantial evidence test would require that if the Cable Division found just one basis for denial reasonable, Appellee's decision must stand regardless of any determination that the remaining factors were arbitrary and unreasonable (Appellee Motion to Reconsider at 4-5). Appellee's interpretation does not accurately reflect Massachusetts law, which provides that a substantial evidence test requires a determination to be made "upon consideration of the entire record" and not merely on a finding that the record contains evidence from which a rational mind might draw the desired inference. New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466, 420 N.E.2d 298 (1981).

by Appellee and rejected by the Cable Division in the Interlocutory Order (see Appellee Opposition/Cross Motion at 2, 4-7; see also Interlocutory Order at 3-8). As stated above, a motion for reconsideration should not attempt to reargue issues previously considered and decided. Commonwealth Electric Co., D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). Thus, Appellee's arguments do not satisfy the test for granting a motion for reconsideration.

Appellee also argues that the Ninth Circuit's recent ruling in Charter Communications, Inc., et al. v. County of Santa Cruz, 2002 U.S. App. LEXIS 19631 (2002), requires the Cable Division to adjust its standard of review (Appellee Motion to Reconsider at 2, 5). However, the Santa Cruz decision is wholly inapplicable to the present case. Beyond the fact that it was decided in the Ninth Circuit and does not stand as precedent in Massachusetts, Santa Cruz is a decision that applies federal law to California's method of regional franchising. In California, unlike in Massachusetts, there is no cable licensing authority at the state level. Santa Cruz, at *8; see also Charter Communications et al. v. County of Santa Cruz, 133 F.Supp. 2d 1184, 1186 (N.D. Cal. 2001). We find Santa Cruz to be inapplicable to the instant case. As such, Appellee's introduction of Santa Cruz does not present a ground for reconsideration.

Appellee also asserts in its Motion to Reconsider that the Cable Division committed plain legal error by determining that an issuing authority must comply with our decision rather than undertake the matter on remand (Appellee Motion to Reconsider at 3-4). Appellee argues that the plain reading of Section 14 requires that the matter be remanded since "the Cable

Division cannot order the issuance of a license” (*id.* at 3, *citing* G.L. c. 166A, § 14).

Nevertheless, in a transfer proceeding, the Cable Division is not ordering the issuance of a license; it is ordering that a transfer application be granted. There is a subtle and yet distinct difference. The statute specifically states that “if the division disapproves of [the issuing authority’s] action it shall issue a decision in writing advising said issuing authority of the reasons for its decision and ordering the issuing authority to conform with such decision.”

G.L. c. 166A, § 14. Therefore, if the Cable Division ultimately finds that the issuing authority acted arbitrarily or unreasonably, the Cable Division must order the issuing authority to conform with a determination to grant the transfer application. Appellee does not present a mistake of law or “a significant factor overlooked or mistake or inadvertence” or “previously unknown or undisclosed facts,” and hence its argument does not meet the level necessary to grant a motion for reconsideration. *See Commonwealth Electric Co., D.P.U. 92-3C-1A at 3-6 (1995); see also 801 C.M.R. § 1.01(7)(l).* Because Appellee does not establish grounds for reconsideration of the Cable Division’s standard of review in transfer proceedings, Appellee’s Motion to Reconsider as it pertains to the standard of review is denied.

Upon review of Appellants Motion for Reconsideration, we determine that Appellants’ arguments are based on a misinterpretation of our standard of review and thus do not support reconsideration. Nonetheless, we recognize that our standard of review in transfer proceedings was subject to an interpretation that we did not intend. In the Interlocutory Order, we attempted to more clearly delineate the analysis required under the standard of review as set forth 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) (“MediaOne I”).⁶ Our attempt however resulted only in additional confusion. Thus, while we decline to grant reconsideration to Appellants on this issue, we find it appropriate to clarify our statements made in the Interlocutory Order and reiterate that the standard of review as set forth in MediaOne I governs transfer proceedings under G.L. c. 166A, § 14.⁷

The ultimate question in any transfer proceeding filed pursuant to G.L. c. 166A, § 14, is whether an issuing authority arbitrarily or unreasonably withheld its consent of the application to transfer a license. See G.L. c. 166A, § 7; MediaOne I at 13. Section 19 requires the Cable Division acting under Section 14 to conduct a Chapter 30A proceeding (see Interlocutory Order at 7, citing MediaOne I at 6). Chapter 30A explicitly provides the Cable Division with the opportunity to develop a record, and in particular, to allow new evidence. See G.L. c. 30A, § 11. The fact that the Cable Division may consider information

⁶ While Westford was not a party in MediaOne I, and could therefore challenge the standard of review and its applicability to the instant proceeding, Westford’s challenge was based on many of the same arguments that were raised, considered, and rejected in MediaOne I. Westford made no attempt to distinguish itself from any of the communities involved in MediaOne I or to explain why the standard of review was inapplicable to it. While Appellants recount a long history of what they term a “disregard for the transfer process by issuing authorities,” we did not view Appellee’s position as so dismissive (Appellants Reconsideration Memorandum at 15). Rather, we believed further explanation of the analysis required under our standard of review was warranted.

⁷ The mere fact that MediaOne I was upheld by the full Commission of the Department on appeal defeats Appellee’s assertion that, as an interlocutory order, it has no precedential value. See MediaOne of Massachusetts, Inc., et al., D.T.E. 00-49, Interlocutory Order (May 30, 2000).

that was not even before the issuing authority highlights the conflict that we reconcile by our standard of review.

Our efforts to present the analysis required under the Section 14 standard of review in bifurcated steps apparently led Appellants to the erroneous conclusion that the Cable Division, in all instances, would conduct a de novo review of the transferee's qualifications under the four criteria of 207 C.M.R. § 4.04(1) (see Appellants Reconsideration Petition at 2). We did not intend this conclusion. Our explanation of the appropriate standard of review in the Interlocutory Order incorporated the analysis required for the case at hand, which involved a motion for summary decision. Thus, the "first step" in our analysis was whether the ultimate issue could be determined as a matter of law. In this regard, we stated that a finding that the municipality was not arbitrary and unreasonable would complete our review and the issuing authority's decision would stand (Interlocutory Order at 7). We further stated that a contrary finding would require the Cable Division to proceed to the "second step" (id. at 7). We were referring to a situation where there were genuine issues of material fact and where we were therefore required to analyze those facts in order to determine whether to deem the issuing authority's actions arbitrary and unreasonable.⁸ As we stated in MediaOne I, in order to determine whether to deem the actions of the issuing authority arbitrary or unreasonable where

⁸ Appellants contend that our conclusion that Westford's denial was arbitrary and unreasonable as a matter of law with respect to certain bases of the denial entitled them to relief. Indeed, we granted Appellants partial summary decision with respect to these bases of the denial. However, given our ultimate finding, which we reconsider below, that genuine issues of fact material to this License transfer existed, full summary decision was inappropriate.

factual issues exist requires an analysis of the transferee's qualifications under 207 C.M.R. § 4.04(1). MediaOne I at 37. Therefore, we applied our standard of review for summary decision together with the standard of review established in MediaOne I, although our presentation of the analysis required under the latter differed from prior presentations.

C. Whether The Cable Division Must Reconsider Our Determination That Appellee's Cross Motion For Summary Decision Was Withdrawn

Appellee seeks reconsideration of the Interlocutory Order based, in part, on the Cable Division's failure to consider Appellee's Cross Motion for Summary Decision (Appellee Motion to Reconsider at 6). Appellants also argue that Appellee did not withdraw its Cross Motion for Summary Decision and that by finding such Motion to be withdrawn, the Cable Division misapplied the summary decision standard (Appellants Reconsideration Petition at 1, 7, 9). In particular, Appellants allege the Cable Division inappropriately relieved Appellee of its burden of proof under that standard (id.).

In the Interlocutory Order, we determined that Appellee asserted at the procedural conference that there were genuine issues of material fact, and that such an assertion constituted further opposition to Appellants' Motion for Summary Decision and a withdrawal of Appellee's Cross Motion for Summary Decision (Interlocutory Order at 3, citing Tr. at 9). However, Appellee now unequivocally states that it did not withdraw its Cross Motion for Summary Decision (Appellee Motion to Reconsider at 6). Given the unequivocal position of Appellee, we determine that we misinterpreted Appellee's statements made at the procedural conference and hence erred in failing to consider Appellee's Cross Motion for Summary Decision. Our

analysis did not recognize Appellee's concession that there are no genuine issues of material fact, and the resultant error has a significant impact on the proceeding, especially as it relates to the burden to which we held Appellee (see Appellee Opposition/Cross Motion at 1; see also Appellants Reconsideration Memorandum at 6-7; see e.g., Commonwealth Electric Co., D.P.U. 92-3C-1A at 3-6). Both Appellee and Appellants have established grounds for reconsideration. Therefore, we reconsider, below, Appellee's Cross Motion for Summary Decision and our application of the burden of proof.

IV. RECONSIDERATION OF MOTIONS FOR SUMMARY DECISION

In the Interlocutory Order, we found that genuine issues of material fact existed such that only partial summary decision was appropriate (Interlocutory Order at 23). Appellee maintains that no such issues exist, and Appellants agree (Appellee Motion to Reconsider at 6; Appellee Opposition/Cross Motion at 1; Appellants Reconsideration Petition at 2; Appellants Motion at 2). Given the concurrence of the parties, on reconsideration we must find that there are no genuine issues of material fact. We must now determine whether either party is entitled to a decision as a matter of law.

Appellee contends that it is entitled to such a decision (Appellee Opposition/Cross Motion at 15). We found in the Interlocutory Order that Westford's approval of the License transfer conditioned on AT&T Comcast's commitment to upgrade the cable system was an attempt by Westford to renegotiate the current License and, as such, was arbitrary and unreasonable as a matter of law (Interlocutory Order at 12-13). We also found that Westford's denial of the License transfer on the basis that AT&T Broadband's failure to upgrade the cable

system was indicative of the Transferee's lack of the requisite qualifications was pretextual and prohibited, and as such, Westford's decision to deny the License transfer as a pretext for obtaining an upgrade commitment was arbitrary and unreasonable (*id.* at 14). In addition, we found that Appellee arbitrarily reviewed and analyzed only that information supporting its desire to deny the License transfer, and even assuming it did conduct an appropriate review of the application, Appellee failed to provide any reasoned analysis of the information regarding Comcast Corporation, one of the two merging entities (*id.* at 18).⁹ Based on these findings, which we reaffirm here, and given that there are no disputed facts, we find that Appellee is not entitled to a decision as a matter of law. Therefore, we deny Appellee's Cross Motion for Summary Decision.

Appellants contend that they, not Appellee, are entitled to a decision as a matter of law (Appellants Motion at 2). As we stated in the Interlocutory Order, Appellants provided information regarding Comcast Corporation's ability to assume the obligations of the license (Interlocutory Order at 23).¹⁰ Thus, Appellants established a factual basis on which a decision could be made (Appellants Reconsideration Petition at 2). The burden therefore was on Appellee to respond and allege specific facts that would establish the existence of a genuine issue of material fact in order to defeat the motion. O'Brion, Russell & Co. v. Lemay, 370 Mass. 243, 245, 346 N.E.2d 861 (1976). On reconsideration, we must find that Appellee

⁹ Appellee does not seek reconsideration as to any of these findings.

¹⁰ Appellants inappropriately attribute a more significant meaning to this finding (see Appellants Opposition to Reconsider at 6).

established no such genuine issues. Most significantly, Appellee explicitly states that there are no factual issues in dispute (Appellee Opposition/Cross Motion at 1). However even absent this concession, Appellee failed to allege any facts that would have established the existence of a material dispute. Rather, Appellee simply provided unsubstantiated allegations as to why the Transferee does not have the requisite qualifications to operate the cable system. For example, one of Appellee's stated reasons for withholding consent to the transfer application is the "tremendous size and scope inherent in the transfer" (Exhibit A, First Financial Capability Reason for Denial at 3). Appellee makes no attempt to provide a basis for such a determination but rather merely speculates that the size and scope of the transfer will somehow negatively impact the Transferee's financial capability to operate the cable system.

Another example is found where Appellee based its denial on the amount of debt being incurred by the Transferee (*id.*). Appellants provided evidence that following the merger of AT&T Broadband and Comcast Corporation, the merged entity, AT&T Comcast, will have a debt to operating cash flow of less than 5 to 1, and that such is an improvement of AT&T Broadband's current debt to operating cash flow ratio (Appellants Memorandum at 7). Appellee does not dispute such evidence but nonetheless argues that the amount of debt being incurred by the Transferee prevents AT&T Comcast from establishing the requisite qualifications to operate the Westford cable system (Appellee Opposition/Cross Motion at 11). Appellee asserts that "[i]t is all too evident today that companies involved in these types of mergers are incurring very substantial amounts of debt, amounts of debt that often cannot be repaid" (*id.*). Here, again, Appellee simply speculates without substantiating citation that other

companies have been unable to repay its debts and therefore the Transferee similarly will be unable to repay its debts. Appellee has failed to advance any facts that would contradict the evidence offered by Appellants and thus raise a genuine issue of material fact.¹¹ Therefore, Appellee did not meet the required burden as set forth in O'Brion to establish such disputed facts.

Because Westford has not met its burden to establish the existence of genuine issues of material fact, and in fact concedes the absence of any such factual dispute, and given our determination that Appellee's denial of the transfer application was arbitrary and unreasonable because it was inappropriately based on upgrade concerns and its examination of only certain evidence with no reasoned analysis, we find that Appellants are entitled to a decision as a matter of law. Although we make no independent findings as to AT&T Comcast's qualifications, this Order should not be taken as an absence of concern. However, just as the Cable Division does not conduct an independent review of a transferee's qualifications where a municipality takes no action within the 120-day review period and allows the transfer to be deemed approved pursuant to 47 U.S.C. § 537, we may not extend our review on an appeal under Section 14 to issues that are not properly before us. Nevertheless, we put the Transferee on notice that we have concerns, particularly with respect to customer service issues during the

¹¹ By finding disputed issues of fact where none were demonstrated by Appellee, we inappropriately supplanted Appellee's role. We afforded Appellee's arguments in its Opposition/Cross Motion a standard of interpretation more favorable than appropriate in this instance. See Longval v. Maloney, Civ. No. 01-11458-GAO (D. Mass. 2002), citing Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972).

transition. We also emphasize that it is incumbent on issuing authorities to act expediently and appropriately to identify and resolve any future compliance issues.

V. ORDER

Accordingly, it is

ORDERED: Appellee's Motion to Reconsider is hereby GRANTED in part and DENIED in part; and it is

FURTHER ORDERED: Appellants' Motion for Reconsideration is hereby GRANTED in part and DENIED in part; and it is

FURTHER 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 determinations and grant consent to the License transfer.

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.