



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

_____)	
In the Matter of)	
MediaOne of Massachusetts, Inc.)	Docket No. CTV 02-10
AT&T Corp., and)	
AT&T Comcast Corporation)	
Appellants)	
v.)	Date Issued: November 15, 2002
City Manager of the)	
City of Cambridge)	
Appellee)	
_____)	

**ORDER ON MOTIONS FOR SUMMARY DECISION AND
PETITION FOR LEAVE TO PARTICIPATE**

This action comes before the Cable Television Division of the Department of Telecommunications and Energy upon Appellants MediaOne of Massachusetts, Inc., AT&T Corp., and AT&T Comcast Corporation's appeal of the disposition of the cable license transfer application by Appellee, the City Manager of the City of Cambridge.

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: MEDIAONE OF MASSACHUSETTS, 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: CITY MANAGER OF THE CITY OF
CAMBRIDGE
Appellee

John F. Kamp, Esq.
Wiley, Rein & Fielding, LLP
1776 K Street NW
Washington DC 20006

FOR: PRIME COMMUNICATIONS

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 MediaOne of Massachusetts, Inc., (d/b/a “AT&T Broadband”), and AT&T Comcast Corporation (“AT&T Comcast”), as the Transferee (together “Appellants”) submitted to the City Manager of the City of Cambridge as the Issuing Authority (“Appellee” or “Cambridge”) an application for approval of a change of control of the Cable Television Renewal License (the “License”). Upon receipt of the application, Cambridge 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, Cambridge was allowed to consider the appropriateness of approving or denying the transfer 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 30, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit D, Cable Television License Transfer Hearing Transcript (“Exhibit D”)). Cambridge voted to deny the License transfer application and issued a written decision on June 28, 2002, pursuant to 207 C.M.R. § 4.05 (see Appellants’ Appendix in Support of Appeal at Exhibit A, Office of the City Manager of Cambridge Transfer Report dated June 28, 2002 (“Exhibit A”)). Appellee found that AT&T Comcast did not have the

requisite management experience, financial capability, or legal ability to operate the cable system under the License (id.).

Pursuant to G.L. c. 166A, § 14, Appellants appealed Cambridge's decision to the Cable Division on July 25, 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, Cambridge filed an Opposition to the Motion for Summary Decision and a Cross Motion for Summary Decision ("Appellee Opposition/Motion").² On August 22, 2002, Appellants filed an Opposition to the Cross Motion for Summary Decision ("Appellants Opposition").

On August 26, 2002, Prime Communications ("Prime"), an advertising firm for automobile dealers in Massachusetts, New Hampshire, Rhode Island, and Connecticut, filed a Petition for Leave to Participate ("Prime Petition") in this proceeding pursuant to G.L. c. 30A, § 10, and 801 C.M.R. § 1.01(9). On August 30, 2002, Appellants filed an Opposition to the Prime Petition ("Appellants Opposition to Petition"). Appellee did not file comments. This Order will address the Motions for Summary Decision as well as the Prime Petition.

¹ On August 5, 2002, the parties filed a stipulation that Appellee's responsive pleading to Appellants Motion could be filed concurrently with Appellee's answer to the appeal. On August 7, 2002, the Cable Division issued an Interlocutory Order granting Appellants' Motion for Expedited Processing to the extent deemed appropriate, granting the parties' stipulation, 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.

II. PETITION FOR LEAVE TO PARTICIPATE

Prime alleges that AT&T Broadband has used its cable systems to restrict competition unfairly by refusing Prime's desire to make direct purchases of cable television advertising and that AT&T Broadband has used proprietary data to effect "price squeezing" by offering Prime's customers below-cost rates subsidized by AT&T Broadband's other holdings (Prime Petition at 3). Prime's desire to participate is based upon the premise that AT&T Broadband would become stronger by becoming larger after the merger, and hence Prime's existence would be even more threatened (id.). Prime seeks to prevent a reversal of the Cambridge denial since, according to Prime, a reversal would allow the merger to occur (id.) Appellants argue that Prime lacks standing to participate under G.L. c. 166A, § 14, or 207 C.M.R. § 3.09, is not "substantially and specifically affected" by this proceeding within the meaning of 801 C.M.R. § 1.01(9), and has made an untimely petition for leave to participate (Appellants Opposition to Petition at 1). Appellee takes no position on this issue.

Pursuant to G.L. c. 30A, § 10, the Cable Division may "allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose." The issue in this case is whether Cambridge withheld consent to Appellants' request for a transfer of the License arbitrarily or unreasonably, in violation of G.L. c. 166A, § 7. Prime's allegation of unfair competition by AT&T Broadband is unrelated to this question. Moreover, the fact that there is a zero-threshold of cable systems required to approve the license transfer in order for

the merger to occur defeats Prime's argument that its existence will be further threatened by requiring Cambridge to grant consent to the License transfer since such will "permit the consummation of a merger" (Prime Petition at 1; see Exhibit 2 of Federal Communications Commission Form 394, Agreement and Plan of Merger dated as of December 19, 2001, by and among AT&T Corp., AT&T Broadband Corp., Comcast Corporation, AT&T Broadband Acquisition Corp., Comcast Acquisition Corp., and AT&T Comcast Corporation). Given this zero-threshold, the approval or denial of the transfer of the License by Cambridge will have no impact on whether the merger is ultimately consummated, and thus Prime is not substantially or specifically affected by this proceeding.

Appellants also argue that Prime's intervention is untimely. The Cable Division received Prime's brief on August 26, 2002, one day before the scheduled procedural conference. Although we usually require petitions well before the procedural conference is held, we had set no specific deadlines for filing petitions to intervene in this matter. In any event, the issue of whether Prime's Petition was timely is moot, since the Cable Division has found that Prime is not "substantially and specifically affected" by the Cambridge proceedings. Based on these determinations, Prime's Petition for Leave to Participate is denied.

III. MOTIONS FOR SUMMARY DECISION

A. Standard of Review

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. 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).

B. 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, in withholding consent to transfer the License, Cambridge disregarded the transfer review criteria provided by 207 C.M.R. § 4.04 and instead based its decision on considerations beyond the scope of a transfer review (Appellants Motion at 2). Appellants specifically assert that Cambridge acted unreasonably by using the transfer process to resolve alleged noncompliance with the License on the part of AT&T Broadband and to ensure better service

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/Motion at 4-7). 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 (May 3, 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 (Oct. 31, 2002).

from the Transferee (Appellants Motion at 2). Appellee counters that the Transferee lacks the qualifications necessary to meet three of the four transfer criteria and, thus, its decision to deny the transfer was reasonable (Appellee Opposition/Motion at 2). Appellee maintains that the denial of the transfer was not based on AT&T Broadband's alleged noncompliance with the License (Appellee Opposition/Motion at 14-15). In support, Appellee argues that while License noncompliance was discussed at the public hearing, it had commenced noncompliance proceedings prior to receipt of the Form 394 transfer application (Appellee Opposition/Motion at 14-15).

The Cable Division has held that while 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"). Therefore, to the extent that Appellee discussed compliance issues in order to determine whether AT&T Comcast possesses the requisite qualifications to operate the cable system under the License, rather than in order to ensure better service, Appellee acted within the scope of its review.⁴

⁴ Cambridge's position here would, of course, be stronger had it established AT&T Broadband's noncompliance through a properly conducted breach proceeding such that the Transferee would have been on notice that the Transferor's performance does not
(continued...)

We have also held that it is impermissible for an issuing authority to base a transfer denial on past noncompliance with license requirements. Id., citing MediaOne II, at 5. We are not persuaded by Appellee's argument that since it commenced noncompliance proceedings before it received the Form 394, its denial must somehow be deemed reasonable. We have stated that noncompliance proceedings must be distinct from the transfer proceedings. MediaOne II, at 3. Thus, the fact that two proceedings are being conducted simultaneously is not in and of itself sufficient evidence that a transfer denial was not improperly based on compliance issues. Nevertheless, from the record before us, we cannot determine that Cambridge denied consent to the transfer due to AT&T Broadband's alleged noncompliance as a pretext to resolve such compliance issues.

However, assuming Appellee acted within the scope of its review authority, Appellee failed to appropriately consider the qualifications of the transferee, AT&T Comcast. Appellee rejected AT&T Comcast's qualifications, in part, based on its determination that the Transferee lacked any historical managerial, financial, or legal structure on which the Transferee could be evaluated (Exhibit A at 3, 4, 5). Specifically, Appellee found that (1) AT&T Comcast exists only as a paper filing with no track record, rendering it a "functionally nonexistent entity," (2) financial information was based on historical AT&T Broadband and Comcast Corporation data rather than that of the Transferee, and (3) the federal regulatory approvals required for the

⁴(...continued)

represent an accurate measurement of the requisite management experience, financial capability, technical expertise, and legal ability. See Westford Interlocutory Order at 20.

merger have not yet been issued (Appellee Opposition/Motion at 14; Exhibit A at 3, 4, 5). These issues as set forth by Appellee, however, disregard the very essence of the underlying transaction. This proceeding involves the corporate merger of two entities, AT&T Broadband, after its spin off from AT&T Corp., and Comcast Corporation. Under Appellee's rationale, no entity created as a result of a merger of two other entities could ever receive approval to assume control of a license. Yet as Appellants argue, such mergers are commonplace in the cable industry (Appellants Memorandum at 17). For example, Appellants correctly note that 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.*). Similarly, as Appellants contend, it is impossible in a merger situation for the Transferee to have historical financial information (Appellants Memorandum at 19). Moreover, it is appropriate for the two merging entities to submit information based on a combination of the historical data for each entity. Hence, Appellee's denial because the Transferee failed to provide historical financial information and instead relied on information derived from the historical performance of AT&T Broadband and Comcast Corporation was unreasonable.

Appellee's proposition that the denial is appropriate because federal regulatory approvals have not yet been issued also disregards the fact that the federal and issuing authority reviews of license transfers follow concurrent but yet nonparallel schedules. Federal law requires the issuing authority review to be completed within 120 days of the FCC Form 394 filing, while placing no similar time restriction on the federal reviews. More important, the possibility that the federal reviewing authorities might not approve the transaction would have

no adverse consequences for an issuing authority who had approved a license transfer application and later learned that the federal government did not approve the underlying corporate transaction. The merger would not occur, and control of the license would not be transferred.

Given that this transfer involves a merger, Appellee was required to review the qualifications of both merging entities. Appellee specifically stated in the Transfer Report its understanding that the qualifications of the Transferee rather than the Transferor should be considered (Exhibit A at 3). However, Appellee then goes on to assert that AT&T Broadband lacks the requisite qualifications and therefore AT&T Comcast will lack the requisite qualifications without appropriate consideration and reference to the second merging company, Comcast Corporation (Appellee Opposition/Motion at 10-11; Exhibit A at 3, 5). Moreover, Appellee makes no specific findings regarding Comcast Corporation, but rather reviews only AT&T Broadband and draws conclusions about AT&T Comcast from that review.⁵ Appellants provided numerous documents that addressed the qualifications of both AT&T Broadband and Comcast Corporation (see e.g., Exhibit 10 of Federal Communications Commission (“FCC”)

⁵ Comcast Corporation is only mentioned three times in the Transfer Report: (1) “In its presentation to the City at the public hearing, AT&T Broadband repeatedly referenced the historical management experience of AT&T Broadband and Comcast,” (2) “AT&T Comcast provided to the Issuing Authority a Preliminary Joint Proxy Statement/Prospectus filed by AT&T and Comcast with the Securities and Exchange Commission on February 11, 2002, together with unaudited Pro Formas which are based on AT&T Broadband’s historical performance and Comcast’s historical performance for 2000 and 2001,” and (3) “AT&T Comcast has provided unaudited Pro Formas based only upon AT&T’s and Comcast’s historical past performance.” (Exhibit A, at 3-5).

Form 394; Exhibit D at 20-28; Appellants' Appendix in Support of Appeal at Exhibit A-II, Letter Response from AT&T Comcast dated April 3, 2002 ("Exhibit A-II"); Appellants' Appendix in Support of Appeal at Exhibit A-IV, Letter Response from AT&T Comcast dated May 16, 2002 ("Exhibit A-IV"). Appellants also stated that AT&T Broadband and Comcast Corporation would have an equal portion of Board members on AT&T Comcast's Board of Directors (Attachment to Section I, Question 2 of FCC Form 394). Appellants also provided references by way of the names of individuals at municipalities served by Comcast Corporation that could be contacted by Cambridge (Exhibit A-IV).

Appellee did note its concern that due to the structure of the merger, it will be nearly impossible to remove Brian L. Roberts or C. Michael Armstrong from their management positions and that these two individuals "will have considerable power in AT&T Comcast, and can (and will) be making important policy, management and economic decisions regarding the Cambridge system" (Exhibit A at 4; Appellee Opposition/Motion at 11).⁶ Appellee specifically highlights its concern regarding Brian L. Roberts' 33.3% non-dilutable voting interest (Exhibit A at 4). However, Appellee makes no findings regarding Brian L. Roberts' qualifications, except to argue that it is "unclear" as to whether he is capable of managing a company with 22 million subscribers since he has previously managed a company with only 8 million subscribers

⁶ This argument directly conflicts with Appellee's position that since the full Board of Directors of AT&T Comcast has not yet been named, Appellee is unable to evaluate the management experience of the Transferee (Appellee Opposition/Motion at 8). The relevance of the other Board members is diminished by Appellee's finding that all of the power will be vested in two individuals (Exhibit A at 4).

(Appellee Opposition/Motion at 12). Appellee instead focuses on a determination that C. Michael Armstrong does not have the requisite qualifications to operate the cable system (id.). Appellants provided additional information as to the management experience of both Brian L. Roberts and Ralph J. Roberts, the other two named members on the Transferee's Board of Directors (Exhibit 10 of FCC Form 394). Due to the nature of the transaction as a merger, such information should have been analyzed along with the analysis of C. Michael Armstrong's experience.

Although we found that Appellee's discussion of AT&T Broadband's alleged noncompliance may have been appropriate, we need not make any findings as to the reasonableness of Appellee's determinations regarding AT&T Broadband's qualifications since its failure to properly analyze Comcast Corporation's qualifications and its ultimate rejection thereof without substantiated reasoning is arbitrary and unreasonable. 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 Cambridge'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.

IV. ORDER

Accordingly, it is

ORDERED: Prime Communications' Petition for Leave to Participate is hereby DENIED;

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 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.