



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

_____)	
In the Matter of)	
AT&T CSC, Inc.,)	Docket No. CTV 02-7
AT&T Corp., and)	
AT&T Comcast Corporation)	
Appellants)	
v.)	Date Issued: November 8, 2002
Board of Selectmen of the)	
Town of Belmont)	
Appellee)	
_____)	

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 Belmont.

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
BELMONT
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 Belmont as the Issuing Authority (“Appellee” or “Belmont”) an application for approval of a change of control of the Cable Television Renewal License (the “License”). Upon receipt of the application, Belmont 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, Belmont 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 11, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit F, Cable Television License Transfer Hearing Transcript (“Exhibit F”)). Belmont voted to deny the License transfer application and issued a written decision on June 24, 2002, pursuant to 207 C.M.R. § 4.05 (see Appellants’ Appendix in Support of Appeal at Exhibit A, Belmont Board of Selectmen Cable Television Transfer Report dated June 25, 2002 (“Exhibit A”)). Appellee found that AT&T Comcast did not have the

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

Pursuant to G.L. c. 166A, § 14, Appellants appealed Belmont's decision to the Cable Division on July 24, 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 15, 2002, Belmont filed an Opposition to Appellants Motion and a Cross Motion for Summary Decision ("Appellee Opposition/Cross Motion").² On August 22, 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,

¹ On July 31, 2002, Belmont 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 Belmont'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.

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, CATV A-65, at 3 (1988), citing Greater South Shore Cablevision, Inc., v. Board of Selectmen of Scituate and Scituate Cablesystems Corporation, CATV 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/Cross Motion at 1).³ 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.⁴

Appellants assert that they are entitled to summary decision as a matter of law because Belmont's decision to withhold consent to the License transfer was based on considerations beyond the scope of a transfer review (Appellants Motion at 2). Appellants specifically contend that Belmont sought to leverage its position as Issuing Authority to renegotiate the terms of the License in order to obtain a written commitment that the cable system be upgraded

³ While the parties agree that there are no issues of fact, they do not agree as to the record before the municipality. The only dispute regarding the record before the Cable Division is to one document that, even if we were to consider it, would not affect our findings herein (see Appellants' Appendix in Support of Appeal at Exhibit G).

⁴ 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 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 (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).

(Appellants Motion at 2; Appellants Memorandum at 23). Appellants state that the License contains no such provision requiring a system upgrade (Appellants Memorandum at 20). Appellants also allege that Appellee sought to resolve issues of noncompliance through the transfer review process (Appellants Motion at 2; Appellants Memorandum at 24-26).

Appellee counters that the Transferee lacks the qualifications necessary to meet the four transfer criteria (Appellee Opposition/Cross Motion at 8; see Exhibit A). Appellee maintains that the denial was not based on AT&T Broadband's failure to upgrade the cable system or on AT&T Broadband's alleged noncompliance (Appellee Opposition/Cross Motion at 15). Rather, Appellee argues that since the Transferee will rely on the abilities of AT&T Broadband to run the cable system, and that since AT&T Broadband has been unable to upgrade the cable system and comply with the License and other legal requirements, the Transferee will likewise neither upgrade the system nor comply with the License and other legal requirements (Appellee Opposition/Cross Motion at 10-11, 13-14, 15; Exhibit A, at 2, 4).

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." AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford, CTV 02-5, at 12, Interlocutory Order on Motions for Summary Decision (Sept. 18, 2002) ("Westford Interlocutory Order"), citing 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”). Accordingly, it is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the license transfer process. Westford Interlocutory Order at 12, citing Bay Shore Cable TV Assocs. v. Weymouth, CTV A-55, at 3 (1985).

It is undisputed that the License contains no requirement that the licensee upgrade the Belmont system. Thus, in order to impose such a requirement on the licensee, the parties must agree to amend the License. Even a cursory review of the record indicates that Appellee sought to obtain a written commitment that the incoming Transferee would upgrade the system (see e.g., Exhibit F at 31-36, 53-62). We, therefore, find that Belmont attempted to amend the License during the transfer review process in order to obtain a commitment from AT&T Comcast to upgrade the cable system.

With respect to allegations of noncompliance, 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 contained in the license, it is not permissible for an issuing authority to base a denial on past noncompliance with license requirements. Westford Interlocutory Order at 20, 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 specifically states that it did not withhold consent to the License due to alleged noncompliance, our review of the transfer

report leads to the contrary conclusion (Appellee Opposition/Cross Motion at 15; see also Exhibit A at 2, 4). With respect to the management criterion, four of Appellee's five findings concern the alleged failure of AT&T Broadband to comply with the License or applicable laws (Exhibit A at 2). Similarly, the majority of Belmont's findings with respect to the Transferee's technical expertise to operate the system concern issues of alleged noncompliance (id. at 4). In particular, Appellee points to AT&T Broadband's alleged failure to comply with the Federal Communications Commission's Customer Service Standards and to provide adequate equipment in its studio (id. at 2, 4). Appellee's argument that the denial was not based on noncompliance matters but rather that the issues were raised as indicative of the Transferee's qualifications serves as a thin veil of its attempt to use the transfer review process to resolve compliance issues (Appellee Opposition/Cross Motion at 15-16).

In addition, Belmont provides no reasonable basis for its ultimate conclusion that AT&T Comcast lacks the requisite experience; rather it concludes, without reason, that AT&T Broadband is allegedly noncompliant, and that AT&T Comcast will, therefore, be noncompliant (Appellee Opposition/Cross Motion at 10-11, 13-14; Exhibit A at 2, 4). Appellee's conclusion is faulty since its subsidiary findings are limited to the qualifications of AT&T Broadband and do not fully address the qualifications of the Transferee, a product of a merger of two entities (Exhibit A).⁵

⁵ Comcast Corporation is, in fact, only mentioned once in the Transfer Report: "AT&T Comcast has only provided unaudited financial projects based primarily on 'Historical Comcast' and 'Historical AT&T Broadband' figures" (Exhibit A at 3).

Appellee maintains that, according to precedent, AT&T Broadband's experience is at issue because the Transferee stated during the transfer proceeding that the current AT&T Broadband management and staff would remain in place after the transfer (Appellee Opposition/Cross Motion at 10-11, 13-14, citing MediaOne II at 5; see also Exhibit A at 2, 4). However, unlike the prior AT&T/MediaOne matter, AT&T Comcast does not rely solely on the experience of the current licensee to establish that it has the requisite qualifications (see FCC Form 394; see also Appellants' Appendix in Support of Appeal at Exhibit F, Public Hearing Transcript, at 12-13, 17, 25, 29-30, 39) Therefore, while the qualifications of AT&T Broadband are relevant, so too are the qualifications of Comcast Corporation, the second merging entity. Even if Appellee considered Comcast Corporation's qualifications to operate the Belmont system, it failed to provide any reasoned analysis to support its rejection of such evidence. Cf. Smith v. Director of the Division of Employment Security 376 Mass. 563, 382 N.E. 2d 199 (1978) (where no findings are made on the record, appellate body cannot determine whether examiner disbelieved those portions of evidence or believed them but did not consider them determinative).

We determine that Appellee, in attempting to amend the License in order to obtain an upgrade commitment and to resolve compliance issues in the transfer process, acted beyond the scope of review. We also find that Belmont 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 Belmont'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: 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.