



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 02-14
AT&T Corp., and)
AT&T Comcast Corporation)
Appellants)
v.) Date Issued: November 21, 2002
Board of Selectmen of the)
Town of Lakeville)
Appellee)

)

ORDER ON MOTIONS FOR SUMMARY DECISION

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 Board of Selectmen of the Town of Lakeville.

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FOR: MEDIAONE OF MASSACHUSETTS, INC.,

AT&T CORP., and AT&T COMCAST

CORPORATION

Appellants

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FOR: BOARD OF SELECTMEN OF THE
TOWN OF LAKEVILLE
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 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 Board of Selectmen of the Town of Lakeville as the Issuing Authority (“Appellee” or “Lakeville”) an application for approval of a change of control of the Cable Television Renewal License (the “License”). Upon receipt of the application, Lakeville 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, Lakeville 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 commenced its required public hearing on April 29, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit D and E, Cable Television License Transfer Hearing Transcripts (“Exhibit D” and “Exhibit E”)). Lakeville voted to deny the License transfer application and issued a written decision on June 27, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit A, Board of Selectmen of the Town of Lakeville Transfer Report

(“Exhibit A”). Appellee found that AT&T Comcast did not have the requisite management experience to operate the cable system under the License (*id.*).

Pursuant to G.L. c. 166A, § 14, Appellants appealed Lakeville’s decision to the Cable Division on July 29, 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 21, 2002, Lakeville filed an answer to the appeal as well as an Opposition to Appellants Motion and a Cross Motion for Summary Decision (“Appellee Opposition/Motion”).² On August 26, 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 6, 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.

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

The Transferee, whose qualifications are at issue in this proceeding, is AT&T Comcast, the product of the merger of two entities, AT&T Broadband, after its spin-off from AT&T Corp., and Comcast Corporation. The standard against which these qualifications must be reviewed is promulgated at 207 C.M.R. § 4.04(1).³ We have stated that a transferee must be able to “step into the shoes” of the transferor. Bay Shore Cable TV Assoc. v. Weymouth, CTV A-55, at 3 (1985). However, when a transferor is in breach of a license, its shoes no longer represent an accurate measure of the requisite qualifications. Thus, an issuing authority must evaluate the transferee’s qualifications with respect to the actual license requirements and not merely against the performance of the current operator. Since Lakeville employed the compliance mechanisms contained in the License to conduct independent breach proceedings and establish past breach of License obligations on the part of AT&T Broadband, Lakeville sought to consider the qualifications of the two merging entities with respect to the License requirements rather than base its determination solely on AT&T Broadband’s performance

³ Appellee 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 (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).

under the License (Appellants Memorandum at 20; Exhibit D at 42; Exhibit E at 10; see generally Exhibits D and E).⁴

As such, Lakeville explored relevant areas of inquiry in order to analyze the qualifications of both AT&T Broadband and Comcast Corporation (Exhibit D at 22, 24, 29, 35-37, 42,44; Exhibit E at 13, 15). For example, Appellee sought information as to the financial wherewithal of each merging entity (Exhibit D at 29). Lakeville also noted its concern with AT&T Broadband's customer service and questioned Comcast Corporation's customer service record (id. at 35-36). Lakeville raised concerns regarding the problem of two major companies merging services and support and specifically asked what Comcast Corporation's approach would be with respect to consolidating services and support (id. at 24). Appellee also asked questions germane to the issue of determining whether the Transferee would be able to step into the shoes of a compliant cable operator (see e.g., id. at 39-42). Specifically, Appellee noted that given AT&T Broadband's noncompliance with respect to customer service, there is a requirement of the Transferee to demonstrate that AT&T Comcast would be able to comply with the License's customer service requirements (id. at 39).

Hence, Lakeville followed an appropriate line of questioning in order to evaluate the management experience of the two merging entities and ultimately the Transferee, AT&T Comcast. However, the Transfer Report submitted by Appellee lacks any reasoned

⁴ AT&T Broadband's current compliance status is in question (Appellants Memorandum at 20; Exhibit D at 45-46; Exhibit E at 10-12). We are confident that Lakeville's continued implementation of its established procedures will ultimately resolve any compliance issues.

analysis of the evidence or record developed during the transfer hearings. Rather, Appellee, in its Transfer Report, merely rejects the management experience of AT&T Broadband based on the established noncompliance and determines that since AT&T Broadband is noncompliant, so too will be AT&T Comcast (Exhibit A at 2). Appellee makes no findings regarding Comcast Corporation, and in fact, does not mention the second merging company in the Transfer Report (id.).

Upon denying a license transfer application, an issuing authority is required to provide to the Cable Division a “detailed statement of the reasons for the denial.” 207 C.M.R. § 4.05. Where an issuing authority fails to provide reasoned analysis, the Cable Division cannot speculate as to the thought process. 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). Thus, while it appears that Lakeville understood the underlying transaction and asked pertinent questions during the transfer hearings, we have no means of evaluating why Lakeville rejected Comcast Corporation’s qualifications.

Rather than provide the requisite analysis of the second merging entity, Appellee found that there was no functional management structure on which it could evaluate the Transferee (Exhibit A at 2). Specifically, Appellee found that the AT&T Comcast exists only as a paper filing with no track record to analyze its management experience (id.). Appellants counter that because the transaction involves a merger rather than an acquisition, there can be no historical

records (Appellants Memorandum at 13-14). Furthermore, Appellants contend that Appellee refused to consider forward looking presentations that set forth the management structure based on historical information of the two merging entities, AT&T Broadband and Comcast Corporation (id.).

Appellee's determination that it was unable to evaluate the Transferee not only disregards the very essence of the underlying transaction but also directly contradicts Appellee's stated understanding of the merger transaction at the transfer hearings (Exhibit D at 24, 29; Exhibit E at 13). Under Appellee's rationale provided in its Transfer Report, 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 (Appellants Memorandum at 14). 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 merged entity to have any historical qualifications other than its individual histories. Therefore, it was appropriate for the Transferee to submit information based on a combination of historical information for the two merging entities, and Appellee was required to consider this information as it pertained to the qualifications of both of the merging entities and, most importantly, to make findings thereon. Appellee followed appropriate lines of inquiry during the transfer hearings in order to evaluate the two merging entities, and yet, Appellee failed to provide an analysis of such information in its Transfer Report and instead simply stated that

because AT&T Comcast lacked a history of its own, Appellee was unable to evaluate it (Exhibit A at 2).

In its Cross Motion, Appellee contends that there are no genuine issues of material fact (Appellee Opposition/Motion at 1). Moreover, Appellee makes no attempt to establish a dispute as to any of the managerial qualifications, issues of fact, alleged in Appellants Motion. Ultimately, the plain language of the Transfer Report, together with Appellee's concession that there are no issues of fact relevant to the Transferee's managerial experience, mandates the conclusion that Appellee withheld consent to the License transfer based on AT&T Broadband's noncompliance (Exhibit A at 2; Appellee Opposition/Motion at 1). The Cable Division has held that it is not permissible for an issuing authority to base a denial on past noncompliance with license requirements. 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), citing MediaOne II, at 5. While Appellee explicitly maintains that it did not withhold consent to the License due to any compliance issues (Appellee Opposition/Motion at 11), Appellee specifically articulates past noncompliance on the part of AT&T Broadband as its basis for the decision to withhold consent to the License transfer (Exhibit A at 2). Two of Appellee's four reasons for denial specifically cite AT&T Broadband's failure to comply with Federal Communications Commission's Customer Service Obligations and the License, while Appellee's third stated reason simply points to services not being delivered in an "efficient or competent manner" (id.). Appellee further asserts that because the current AT&T Broadband management and staff will remain in place, AT&T Comcast will also be noncompliant (id.).

Because it is impermissible to base a denial on a transferor's past noncompliance, we must find that Appellee acted arbitrarily and unreasonably in withholding consent to the License transfer.

Therefore, we find that Lakeville failed to provide any reasoned analysis to support its rejection of Comcast Corporation's qualifications, and thus, its ultimate decision to reject AT&T Comcast is deemed arbitrary. We also find that Lakeville acted beyond the scope of its review by denying the License transfer based on compliance issues. We conclude that there are no genuine issues of material fact, that Lakeville's decision to withhold consent to the License transfer is 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.