



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

_____)	
In the Matter of)	
)	Docket No. CTV 01-5
AT&T Broadband)	
)	Date Issued: November 15, 2001
)	
Re: Minimum Duration of)	
Renewal Licenses)	
)	
_____)	

I. INTRODUCTION

On June 21, 2001, AT&T Broadband (“AT&T”) filed a petition with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy requesting an Advisory Opinion as to whether a fifteen-month renewal license was adequate to protect the renewal rights of AT&T and the Town of Concord.¹ On June 26, 2001, the Cable Division issued a Notice of Request for Legal Comment (“Notice”) to all interested persons. The Notice asked interested persons for comment as to whether there must be a minimum duration for renewal licenses in order to preserve the rights of the municipality and the cable operator, and if so, what is that minimum duration. In addition, the Notice asked what, if any, statutory requirements must be met in conjunction with renewing a license.

A wide variety of comprehensive and insightful comments were received. The Cable Division extends its appreciation to those persons who took the time to share their views. Several of the comments pointed to common misinterpretations of the laws establishing the renewal process and areas of ambiguity in the renewal process itself. Thus, the Cable Division determined it was appropriate to issue an Advisory Opinion that provides guidance for the renewal process as well as addresses the minimum duration issue.

¹ The fifteen-month renewal license consisted of a nine-month license with a proposed amendment adding an additional six months to the license term.

II. STANDARD FOR ISSUANCE OF ADVISORY OPINION

An Advisory Opinion issued by the Cable Division constitutes a non-binding opinion provided to ensure uniform understanding of a particular regulation or body of law. G.L. c. 30A, § 8. An Advisory Opinion is appropriate to provide guidance as to the proper interpretation of laws or policies; however, it does not provide for specific factual findings or conclusions of law. In addition, the issuance of an Advisory Opinion by the Cable Division does not preclude interested persons from pursuing the matter through the appropriate adjudication or litigation process. Id.

We specifically note that while AT&T originally requested an Advisory Opinion with respect to negotiations with the Town of Concord, in exercising our discretion to issue an Advisory Opinion, we address the general question concerning whether there should be a minimum duration for renewal licenses in order to preserve the rights of municipalities and cable operators. Each municipality and cable operator has its own unique set of circumstances that might fall outside of the general discussion provided herein.

III. ANALYSIS AND FINDINGS

A. Minimum Duration of Licenses

Cable television has long been regulated under a framework of deliberately structured dualism. Daniel L. Brenner, et al., Cable Television and Other Nonbroadcast Video: Law and Policy, § 2.04 (perm. ed. rev. 2001) (citing Notice of Proposed Rulemaking, 25 FCC.2d 50 (1970)). Under this framework, the federal government regulates certain aspects of the cable industry while local authorities regulate other aspects. Id. In Massachusetts, the Legislature has granted the Cable Division ultimate authority over cable licensing matters, while permitting municipalities to negotiate and grant cable licenses. G.L. c. 166A, §§ 3, 14. Thus, while the municipalities are deemed to be the Issuing Authorities, the Cable Division has oversight of the licensing process.

While state law explicitly sets forth maximum terms of licenses, no such explicit statutory provision addresses minimum terms. See G.L. c. 166A, §§ 3, 13. Similarly, there is no Cable Division precedent on point. Therefore, in determining whether there is a minimum duration required for renewal licenses, we are called to interpret both state and federal law and particularly the license procedure as set forth in the General Laws and the Communications Act of 1934, as amended (the “Communications Act”). G.L. c. 166A et seq.; 47 U.S.C. § 521 et seq. Through the General Laws and the Communications Act, a comprehensive licensing scheme is established, setting forth both the rights and responsibilities of the Issuing Authority and the cable operator. Rights that are particularly relevant to the license renewal process are that Issuing Authorities and the municipalities they represent have the right to a cable system that is “responsive to the needs and interests of the local community,” and cable operators have the right to protection against “unfair denials of renewal.” 47 U.S.C. § 521(2), (5). The determination of whether there should be a minimum term for licenses requires a balancing of these two rights.

The Communications Act provides a mechanism for such a balancing of these two rights by establishing procedural rules and a formal renewal process that may be followed when negotiating a license. 47 U.S.C. § 546. The ascertainment period, also known as commencement of the proceeding, is the first step provided by the formal renewal process. 47 U.S.C. § 546(a)(1). The ascertainment period enables Issuing Authorities to have sufficient time to review the cable operator's past and present performance and to identify future cable-related community needs and interests. The legislative history of the Communications Act points to a concern that cable systems be tailored to meet the needs of each individual community. Housatonic Cable Vision Co. v. Dep't Of Public Utility Control, 622 F.Supp. 798, 807 (D. Conn. 1985). In Massachusetts, Issuing Authorities have demonstrated a diverse array of needs specific to their communities. Some communities are concerned with maintaining an institutional network for use in their municipal buildings. Other communities want to ensure that their public schools have cable access, while other communities have focused on a need to have enhanced public, educational, and governmental access facilities. The ascertainment period allows Issuing Authorities to determine those needs that are most important for their community. By providing an ascertainment period in the formal renewal process, Congress protects the right of each municipality to have a cable system that is responsive to its needs. Id.

The formal renewal process provides protection for the cable operator as well. Congress sought "to establish a process which protects cable operator[s] against an unfair denial of renewal by the franchising authority." 47 U.S.C. § 521(5); TCI of South Carolina, Inc. v. Bennettsville, South Carolina, 331 PLI/Pat 217, 307 (D.S.C. 1990) (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 72). Congress wanted to ensure that any investment not "be jeopardized at franchise expiration without actions on the part of the operator justifying such loss of business." Id. Protecting cable operators from unfair denials was deemed necessary to encourage investment by the cable operator at the time of the initial franchise and during the franchise term. Id. A cable operator could not be expected to invest capital in a municipality without the ability to earn a return on its investment. Further, the legislative history of the Communications Act shows a concern that the "ability to earn a fair return" was an important consideration when considering proposals for cable service. Union CATV, Inc. v. City of Sturgis, Kentucky, 107 F.3d 434, 440 (6th Cir. 1997). Therefore, the protection provided by the formal renewal process ensures that a cable operator whose past performance and proposal for future performance meet the standard established by the Communications Act will be granted a renewal license. Id.

The protections provided by Congress through the formal renewal process are not automatic, rather, they must be invoked by each party. The cable operator invokes these protections by submitting a written renewal request to the Issuing Authority requesting that ascertainment begin. 47 U.S.C. § 546(a). Such written renewal request must be submitted 36 to 30 months prior to the license expiration. Id. The Issuing Authority invokes the protections by commencing ascertainment within six months after receiving the written renewal

request. Id. The Issuing Authority may also invoke the protections provided by the formal renewal process by beginning ascertainment during the 36 to 30 month window regardless of whether or not the cable operator has invoked the protections by submitting the appropriate written renewal request. Id. While Issuing Authorities are not required by statute to present formal notification, the cable operator should be notified that ascertainment has commenced within the appropriate time frame.

When both parties take the required steps to invoke the formal renewal process, either by commencing ascertainment or submitting a written renewal request, protection is provided to both the Issuing Authority and the cable operator. The Issuing Authority is given the means to ensure the cable operator's compliance with the current license, and where a completed ascertainment shows that the cable operator fails to meet the standards set forth in Massachusetts and federal law, the Issuing Authority is provided with the tools necessary to begin the denial process. The cable operator is given the procedural process to protect the expectation of renewal.

A party waives its rights to the formal process if it fails to invoke its rights prior to the 30th month before license expiration. Cox Cable Communications, Inc. v. United States, et al., 699 F.Supp. 917, 922-923 (D.C. Ga. 1988). It follows that where a license is for a period of time of 30 months or less, it is not possible for either the Issuing Authority or the cable operator to invoke the rights provided by the formal renewal process. In this circumstance, both the Issuing Authority and the cable operator relinquish rights and protections granted under the formal renewal process.² Id. While one or both of the parties may be willing to waive their rights, neither the Cable Division nor the other party may require a party to give up these rights.

In addition, ascertainment is only effective if the length of the license is adequate to provide the Issuing Authority with sufficient data to evaluate the cable operator's compliance with the license as well as the appropriate statutes and regulations. The Communications Act refers to the Issuing Authority's review of the cable operator's compliance under the franchise during "the *then current* franchise term."³ 47 U.S.C. § 546(a)(1)(B) (emphasis added). Under this compliance requirement, for example, where the parties properly execute a 30 day renewal license, the Issuing Authority's burden of establishing reasonable grounds for license denial becomes even more difficult to satisfy since the cable operator's compliance with statutory

² There might be particular circumstances where it benefits both the cable operator and the municipality to execute a license that is for 30 months or less, for example, where several municipalities want to negotiate renewal licenses simultaneously and need to be on the same time line in order to do so.

³ The municipality may retain contract law remedies under the previous license; however, any denial of a license renewal may not be based on noncompliance with the previous license.

requirements may only be measured during that 30 day period.⁴

Several of the commentors expressed concern that any restrictions on the term of renewals would reduce the Issuing Authority's negotiating power and would produce an unfair advantage for the cable operators. We do not find this to be the case. In general, there is no benefit to a cable operator to execute a license that is for less than the maximum fifteen year or ten year term. By executing a license for the maximum allowed term, cable operators ensure that the maximum amount of time is allowed to recover expenses. Therefore, any license for less than the maximum term may pose a disadvantage to the cable operator. Further, any license executed for less than the maximum duration may require frequent and ongoing negotiations between the Issuing Authority and the cable operator. This may produce a disadvantage to cable operators since they must allocate resources to negotiations rather than focusing on the business of providing cable service.

Commentors also noted that executing licenses for less than the maximum permitted duration provides leverage for the Issuing Authority as a means of avoiding entering into a contract that may later prove inadequate to meet the needs of the community. Federal law provides ascertainment to be used for this purpose. Ascertainment allows the Issuing Authority to determine the community's future cable-related needs. The appropriate use of the ascertainment process by the Issuing Authority should result in an enhanced license for the municipality. In addition, there are other creative and effective means available to Issuing Authorities desiring to obtain appropriate services. For example, a recent license was negotiated between a Massachusetts Issuing Authority and a cable operator and executed for a term of five years. The license contains a clause that allows the license to be automatically extended to ten years if certain service requirements are met by the cable operator within a set period of time. By executing such a license, the Issuing Authority is able to ensure that the municipality's future cable-related needs and interests are met while the cable operator is provided with the stability necessary to increase capital expenditures in the community.

The Cable Division determines that while no minimum duration is required, a minimum term that is greater than 30 months is necessary to ensure the rights of both parties are preserved. We further determine that one or both of the parties may waive these rights for community-specific reasons. However, it is reasonable for a party to refuse to waive its rights under the formal renewal process, and therefore not execute a license that is 30 months or less in duration. The Cable Division finds that when one party refuses to execute such a license, the other party must negotiate under the premise of a resulting license that exceeds 30 months

⁴ We note that if the parties properly execute an amendment to an existing license, compliance may be measured during the full term of the existing franchise; however, any license amendment may not increase the current license so as to exceed the statutory limits of ten and fifteen years. G.L. c. 166A, §§ 3, 13.

in length. Providing for a license that has a term greater than 30 months in these circumstances ensures an appropriate period for initiation of the formal renewal process and allows both parties to preserve their rights under the formal process.

B. Statutory Requirements

There have been misinterpretations of the time frames provided by the license renewal process. Some cable operators and Issuing Authorities have initiated the steps provided by the formal renewal process at a late date when it is impossible to complete the steps prior to license expiration. For example, federal law provides that the Issuing Authority has four months following submission of the proposal to decide whether to renew the franchise or issue a preliminary denial. Where the cable operator does not submit a proposal until several weeks prior to the license expiration, the Issuing Authority is not provided with adequate time to review the proposal and determine the appropriateness of the proposal in meeting the municipality's future cable-related needs. Therefore, the Cable Division reiterates that the Communications Act and Massachusetts laws and regulations set forth responsibilities that must be met to ensure protection of the rights granted to the parties. Issuing Authorities and cable operators have the responsibility of ensuring that their actions comply with federal and state law.

There are several specific actions that are required by federal and state law when renewing a license. The ascertainment procedures as outlined above must be undertaken during the appropriate time frames if the parties desire to invoke their rights provided by the formal renewal process. 47 U.S.C. § 546(a). Upon completion of ascertainment, the Issuing Authority must notify the cable operator in writing of such completion. 207 C.M.R. § 3.05(4).

Regardless of whether the formal renewal process or an informal renewal process is followed, Massachusetts law requires that cable operators file a Form 100 with the Issuing Authority and the Cable Division. G.L. c. 166A, §§ 4, 13. The Form 100 is submitted by the cable operator either on its own initiative or upon request by the Issuing Authority.⁵ 47 U.S.C. § 546(b)(1); G.L. c. 166A, §§ 4, 13; 207 C.M.R. § 3.05(2). The purpose of the Form 100 is to provide the licensing authority with as broad a base of information as possible with which to make its renewal decision. Since federal law grants municipalities the right to a cable system that is responsive to their community's needs, the Form 100 allows an Issuing Authority to determine whether the cable operator actually complies with this standard. A cable operator that fails to provide the community with an accurately completed Form 100 prevents the Issuing Authority from making an informed and appropriate decision.

⁵ While not a statutory requirement, some Issuing Authorities find it useful to issue a request for proposal outlining their community's specific needs since it provides the parties with a set list of the municipality's specific requirements and concerns prior to the cable operator's completion of the Form 100.

Under the formal renewal process, the submission of the Form 100 also starts the clock running on negotiations. Within four months after submission of the Form 100, the Issuing Authority must either renew the license or issue a preliminary denial. 47 U.S.C. § 546(c)(1). If the Issuing Authority chooses to renew a license, the Issuing Authority must issue a written public statement that details the reasons for granting the license. 47 U.S.C. § 546(c)(3); 207 C.M.R. § 3.06(1). The written public statement must be issued concurrent with the granting of the license, and a copy must be sent to the Cable Division. Id.; 207 C.M.R. § 3.06(2). A preliminary denial must also be in writing and must include the basis for the denial.⁶ 207 C.M.R. § 3.05(5).

State and federal law requires that residents of the community be given adequate opportunity to participate in the licensing process. 47 U.S.C. § 546; G.L. c. 166A, § 6. In Massachusetts, the Issuing Authority must hold a public hearing and provide appropriate notice of such hearing prior to any renewal or denial of a license. 207 C.M.R. § 3.05(3). The public hearing typically takes place after the cable operator has submitted a Form 100 since the hearing provides an opportunity for the public to review the Form 100, to obtain information about the licensing process, and to advocate for their interests during the licensing process. The hearing also provides an opportunity for the cable operator to respond to community concerns and have a dialog with the public regarding its future cable services. The public hearing also ensures that all interested persons have an opportunity to make the Issuing Authority or Cable Advisory Committee aware of specific issues that need to be addressed during the negotiations. Issuing Authorities act on behalf of the community as a whole and therefore have the responsibility to act in the community's best interests. Both parties have the responsibility to complete the licensing process in a timely manner and prior to the expiration of the current license.

IV. CONCLUSION AND ORDER

The Cable Division determines that while no minimum duration is required, a minimum term that is greater than 30 months is necessary when one or both of the parties wish to preserve their rights under the formal renewal process. We further determine that one or both of the parties may waive these rights. However, it is reasonable for a party to refuse to waive its rights under the formal renewal process and therefore, not execute a license that is 30 months or less in duration. The Cable Division finds that when one party refuses to waive its rights, the other party must yield. The yielding party must negotiate under the premise of a resulting license that exceeds 30 months in length.

In addition, the Cable Division finds that there are certain statutory requirements that

⁶ Once a preliminary denial has been issued, there are numerous statutory requirements that must be met by both parties; these requirements are beyond the scope of this Advisory Opinion.

must be met whenever a license is renewed. Both the Issuing Authority and the cable operator are responsible for being aware of and complying with these requirements. Most importantly, the cable operator must file a Form 100 with the Issuing Authority and the Cable Division, and the Issuing Authority must hold a public hearing. In addition, an Issuing Authority granting a license must file a written statement outlining the reasons for the grant; such statement must be submitted to the cable operator and the Cable Division. The Cable Division further finds that these requirements must be met regardless of the duration of the renewal license.

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

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