



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.,)
AT&T Corp., and)
AT&T Comcast Corporation	Docket No. CTV 02-12)
)
Appellants)
)
v.	Date Issued: November 15, 2002)
)
Town Manager of the)
Town of Barnstable)
)
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 Town Manager of the Town of Barnstable.

APPEARANCES: Cameron F. Kerry, Esq.
Daniel B. Trinkle, Esq.
Sarah B. Herlihy, 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: TOWN MANAGER OF THE TOWN OF
BARNSTABLE
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 Town Manager of the Town of Barnstable as the Issuing Authority (“Appellee” or “Barnstable”) an application for approval of a change of control of the Cable Television Restated and Renewal License (the “License”). Upon receipt of the application, Barnstable 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, Barnstable 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 23, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit F, Cable Television License Transfer Hearing Transcript (“Exhibit F”)). Barnstable 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, Barnstable Town Manager Transfer Report dated June 28, 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 Barnstable'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, Barnstable filed an answer to the appeal as well as its Opposition to the Motion for Summary Decision and a Cross Motion for Summary Decision ("Appellee Opposition/Cross 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

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. On August 12, 2002, Appellee filed a motion, assented to by Appellants, in order to further extend the time to file a response to Appellants' filings. On August 13, 2002, the Cable Division granted the assented motion to extend time.

² Appellee's Opposition to Appellants Motion and Appellee's Cross Motion for Summary Decision were filed as one document.

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, 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 Barnstable'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 allege that Appellee based its denial on allegations of noncompliance (Appellants Motion at 2).

Appellee counters that the Transferee lacks the qualifications necessary to meet the four transfer

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).

criteria (Appellee Opposition/Cross Motion at 8; see Exhibit A). Appellee's argument focuses on the proposition that since the Transferee will rely on the abilities of AT&T Broadband to run the cable system, and since Appellee deems AT&T Broadband noncompliant, the Transferee will also be noncompliant (Appellee Opposition/Cross Motion at 10-11, 13; Exhibit A at 2, 3, 4, 5, 6).

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. 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 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 maintains 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 14.) In fact, the very first reason Appellee provides for rejecting the Transferee's management experience concerns AT&T Broadband's alleged failure to comply with the Federal Communications Commission's ("FCC") Customer Service Standards (Exhibit A at 2). The concern about AT&T Broadband's ability to comply with the FCC's Customer Service Standards, as well as its ability to meet public, educational, and government access commitments in a neighboring town pervades the Transfer Report

(Exhibit A at 2, 3, 5, 6). We find that Appellee's disclaimer that it raises issues of noncompliance explicitly in the context of AT&T Comcast's qualifications under the four criteria and not "as a noncompliance matter" is a thin veil of its desire to resolve compliance issues (Exhibit A at 6; Appellee Opposition/Cross Motion at 14-15).

Moreover, Barnstable provides no reasonable basis for its ultimate conclusion that AT&T Comcast lacks the requisite experience; rather it concludes, without reason, that since AT&T Broadband is allegedly noncompliant, AT&T Comcast will be noncompliant (Appellee Opposition/Cross Motion at 10-11, 13; Exhibit A at 2, 3, 4, 5, 6). 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 (see Exhibit A). Appellee maintains that, according to precedent, AT&T Broadband's management 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, citing MediaOne II, at 5; see also Exhibit A at 2, 3, 4, 5, 6). 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 Form 394; Exhibit F at 15, 18, 19, 21, 29, 39-40, 52, 54). Therefore, while the qualifications of AT&T Broadband are relevant, so too are the qualifications of Comcast Corporation, the second merging entity. In making no findings regarding Comcast Corporation's qualifications, Barnstable demonstrates its true motivation: to withhold consent to the transfer application in order to resolve compliance issues. Even if Appellee considered

Comcast's qualifications to operate the Barnstable 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, therefore, find that Barnstable acted beyond the scope of its review by denying the transfer based on compliance issues. We also find that Barnstable 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. We conclude that there are no genuine issues of material fact, that Barnstable'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.