COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION

MEDIAONE OF MASSACHUSETTS, INC., MEDIAONE GROUP, INC., AND AT&T CORP. Appellants, v. BOARD OF SELECTMEN OF THE TOWN OF NORTH ANDOVER Appellee.	CTV 99-2

APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DECISION REGARDING TOWN OF NORTH ANDOVER CONDITIONAL LICENSE APPROVAL

In this appeal, MediaOne of Massachusetts, Inc. ("Licensee"), MediaOne Group, Inc. ("MediaOne"), and AT&T Corp. (AT&T) (collectively "Appellants") seek expedited relief from the imposition by the Board of Selectmen of the Town of North Andover, Massachusetts ("Board") of an unlawful condition on its approval of the transfer of control of Licensee's cable television license for North Andover from MediaOne to AT&T.[1] The Board action, in effect, purports to unilaterally amend the Company's cable television license for North Andover by conditioning the Board's approval of the AT&T transfer upon AT&T providing "nondiscriminatory access to its cable modem platform in North Andover for unaffiliated providers of Internet and on-line services." Because the Board's unilateral imposition of a "forced access" condition is plainly in

[1] Licensee is a wholly owned subsidiary of MediaOne. As described in Section II below, on July 13, 1999, MediaOne and AT&T applied to transfer control of the Licensee to AT&T.

violation of Massachusetts law and the terms of the North Andover cable license itself, the Appellants are entitled to summary decision as a matter of law on each count in this appeal.[2]

I. Introduction and Background

Because it may be helpful to the Division to understand the genesis of this dispute, Appellants will present an introduction to the issue, although it is unnecessary to summary disposition of the clear legal issues on appeal.

Almost every level of government has been swept into a trench warfare battle over forced (or "open") access. The dominant dial-up Internet access provider, America On Line (AOL), and the dominant ILECs, such as Bell Atlantic/GTE, have lobbied hard for government orders forcing the deconstruction of high-speed cable modem service in order to make them "open" to third-party ISPs. Both AT&T and MediaOne have demonstrated to the FCC that all web content and all Internet service providers are open and available to cable modem customers, but the campaign has continued relentlessly.[3]

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[2] North Andover's action also violates numerous provisions of federal law including, but not limited to, the Communications Act, 47 U.S.C. §§541(b)(3)(D), 541(c), 544(e), and 544(f)(1). Appellants reserve their right to assert all relevant federal and Massachusetts claims, in addition to the claims asserted in this appeal, in any future proceeding related to North Andover.

[3] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Report, 14 FCC Rcd. 2398 (rel. February 2, 1999) *("Advanced Services Report"); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 3160 (rel. Feb. 18, 1999) (*"TCI-AT&T Transfer Order").*

Such a campaign should not be surprising. With 20 million dial-up Internet access customers, AOL dwarfs all other providers. AOL has allied itself through favorable contracts with high-speed digital subscriber line services (xDSL) offered by Bell Atlantic,[4] and through investment in Internet service offered by Hughes using its Direct Broadcast Satellite.[5] It has much to gain by disabling or delaying the rollout of a competitive high-speed product. Bell Atlantic/GTE and other incumbent local exchange carriers (ILECs) are the beneficiaries of windfall revenues from second residential lines,[6] and have largely dragged their heels on xDSL investment until compelled to do so by broadband deployment by cable systems and competitive local exchange carriers.[7] They stand to lose second line revenues, as well as customers to broadband. Even more important, by delaying or handicapping upgrades through this campaign, they also delay residential telephony competition.

But when these players brought their plea to the Federal Communications Commission, the FCC recognized it for what it was: a request by one facilities-based competitor to handicap another. It has long been a federal policy, now codified in Section 7 of the Communications Act, "to encourage the provision of new technologies and services to the public."[8]

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4 *See, e.g., America Online and Bell Atlantic Form Strategic Partnership to Provide High-Speed Access for the AOL Service*, AOL Press Release, Jan. 13, 1999 (visited Nov. 11, 1999) <http://media.web.aol.com/media/press.cfm>; *Telcos Defend DSL Strategy, Pledging Aggressive Rollouts*, COMMUNICATIONS DAILY, Mar. 18, 1999.

5 *See, e.g., America Online, Inc. Announces Key AOL TV Partnerships*, AOL Press Release, May 11, 1999 (visited Nov. 11, 1999) <http://media.web.aol.com/media/press.cfm>*; AOL Partners With DirecTV For Development of New TV Service*, WARREN'S CABLE TELEVISION MONITOR, May 17, 1999.

6 *See Bell Atlantic Investor's Reference Guide: Mid-Year 1999*, Aug. 10, 1999 at 23 (visited Nov. 11, 1999) <http://www.bell-atl.com/invest/news/IRG99/2_Telecom.pdf>; *Bell Atlantic Profits Rise 14.3 Percent on Data, Wireless, Cuts*, WASHINGTON TELECOM NEWSWIRE, July 21, 1999; Scott Moritz, *Rapid Internet Access Arriving at a Crawl; Bell Atlantic Dragging Feet, Critics Say*, THE RECORD (Bergen County, NJ), Nov. 8, 1999, at B1; *US West Reports Modest Growth*, COMMUNICATIONS TODAY, Jan. 25, 1999.

7 *Advanced Services Report*, n.84. *See also* Moritz, *Rapid Internet Access Arriving at a Crawl.*

8 47 U.S.C. § 157(a).

The federal government has done so by allowing new technologies to grow in an unregulated environment. Congress has expressed a national policy in Section 230 "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[9] The Administration has adopted the same policy.[10]

A string of FCC rulings directly on point has rejected forced access. In its February 2, 1999 Report to Congress, the FCC reported that the emergence of inter-modal, facilities-based competition for the delivery of Advanced Services was best served by cautious observation of these competitive battles, not by a premature imposition of forced access on one of the competitors. The FCC formally concluded that the preconditions for monopoly (and government regulation) are not present.

> We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today, no competitor had a large embedded base of paying residential consumers. The record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio . . . By the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market.[11]

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9 47 U.S.C. § 230(b)(2).

10 *U.S. Government Working Group on Electronic Commerce, First Annual Report* (Nov. 30, 1998) ("*E-Commerce Report*") at 25 ("The Administration . . . support[s] open and vigorous competition as the principal means of developing [broadband] infrastructure . . . and seek[s] to encourage competition among various technologies and industry segments in the development and deployment of advanced services.").

11 *Advanced Services Report* ¶ 48.

The FCC reached a similar conclusion when rejecting forced access in connection with the recent transfer of control of TCI to AT&T.[12]

The Chairman of the FCC has reiterated the basis for this policy. When he rejected the recommendation by the State & Local Government Advisory Committee that the FCC open an investigation on "forced access," he explained to its Chairman that "The increasing deployment of cable modem service by cable operators has prompted local phone companies to speed up their rollout of DSL service" and cut their prices.[13] With "satellite and wireless technologies as promising sources of broadband access . . . [T]hese developments will maximize consumer choice and welfare more effectively and more quickly than government intervention could hope to do."[14]

When the FCC recently declined to require ILECs to "unbundle" Internet capable packet switches and DSLAMs,[15] the Chairman explained its action to the National Association of Telecommunications Officers and Advisors (NATOA).

> Basically, we told the Bell Companies, 'We want you to get into broadband. We want you to deploy and compete.' We told them that we are not going to require them to unbundle their equipment for rolling out broadband – the DSLAM, the packet-switched network -- because I envision a broadband

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12 *TCI-AT&T Transfer Order* at ¶¶ 94-96.

13 Letter From FCC Chairman William E. Kennard to Kenneth S. Fellman, Chairman, Local and State Government Advisory Committee (LSGAC), August 10, 1999 (visited Nov. 11, 1999) <http://www.fcc.gov/commissioners/kennard/states.html>.

14 *Id.*

15 A Digital Subscriber Line Access Multiplexer (DSLAM) is a network device, usually at a telephone company central office, that receives signals from multiple customer Digital Subscriber Line (DSL) connections and puts the signals on a high-speed backbone line using multiplexing techniques. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761 (Mar. 31, 1999) at ¶ 11.

> oasis, where anybody who wants to compete in this broadband marketplace and make the investment to deploy should be able to do so in an unregulated environment or a significantly deregulated environment. Because that is the fastest way we are going to get broadband out to the American public."[16]

He implored the members of NATOA to "resist the urge to regulate" and to give the market a chance.[17]

A series of thorough staff papers added still more detail. *Internet Over Cable* documented how well the FCC's policy of distinguishing competitive technologies from regulated transport services has spurred investment and deployment of competing facilities.[18] In October, 1999, *Broadband Today* reported the insignificant market share held by cable operators in Internet access,[19] the logistical turmoil which mandatory access orders would involve,[20] and

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[16] "CONSUMER CHOICE THROUGH COMPETITION," Remarks by FCC Chairman William E. Kennard at the National Association of Telecommunications Officers and Advisors 19th Annual Conference, Sep. 17, 1999 (visited Nov. 8, 1999) <http://www.fcc.gov/commissioners/kennard/speeches.html>.

[17] *See id.* "I also know that it is more than a notion to say that you are going to write regulations to open the cable pipe. It is easy to say that government should write a regulation, to say that as a broad statement of principle that a cable operator shall not discriminate against unaffiliated Internet service providers on the cable platform. It is quite another thing to write that rule, to make it real and then to enforce it. You have to define what discrimination means. You have to define the terms and conditions of access. You have issues of pricing that inevitably get drawn into these issues of nondiscrimination. You have to coalesce around a pricing model that makes sense so that you can ensure nondiscrimination. And then once you write all these rules, you have to have a means to enforce them in a meaningful way. I have been there. I have been there on the telephone side and it is more than a notion. So, if we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on the cable pipe. That is not good for America." *Id.*

The FCC Chairman also testified to Congress: "There are 30,000 franchising authorities in the United States. If each and every one of them decided on their own standards for [Internet] communications on the cable infrastructure, there would be chaos." Testimony of William E. Kennard, Chairman, Federal Communications Commission, Before the House Subcommittee on Telecommunications, Trade and Consumer Protection, March 17, 1999 (visited Nov. 5, 1999) <http://www.fcc.gov/commissioners/kennard/speeches.html>.

[18] Barbara Esbin, FCC Office of Plans and Policy, OPP Working Paper No. 30, *Internet Over Cable: Defining the Future in Terms of the Past* (Aug. 1998) (*"Internet Over Cable"*) at 63.

[19] "[T]here are approximately 40 million residential Internet subscribers in North America, approximately one million of whom subscribe to broadband Internet services. It is important to remember that residential broadband Internet subscribers constitute less than 3% of the total Internet subscribers in North America. Although the Bureau expresses no view on whether the residential broadband market is a separate market from the residential narrowband market, a comparison of the numbers between the two is instructive to appreciate the relatively small scale of residential

the risk that a slow-down in cable modem investment and roll-out will likely lead to a slowdown in competitive DSL investment and roll-out.[21] The Report confirmed the continuing validity of

> "regulatory restraint to facilitate the rapid deployment of multiple broadband technologies, including cable, DSL, wireless and satellite. Unless and until anti-competitive behavior surfaces, it is preferable to allow market forces to propel cable operators and independent ISPs toward an 'open access' system. Market-based solutions devised by the parties will likely provide a better framework for consumers."[22]

In the past year, over one thousand five hundred local communities have been asked by AOL, ILECs, or other groups advocating "open access" to impose mandatory ISP access on TCI, MediaOne, and other cable operators. Of those communities, only a handful have elected to adopt such requirements. As the FCC has catalogued,[23] the overwhelming majority of communities – including major markets like Seattle, Denver, Dallas, Miami, Los Angeles – have followed the FCC's approach and declined to adopt forced access requirements. For example, on June 18, 1999,

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broadband deployment. Even the most optimistic estimates predict that narrowband will still be the dominant subscribed form of Internet access by 2005. One analyst predicted that by 2005, cable will have 34% (23 million subscribers) of the Internet access market, with DSL at 15% (10 million subscribers), and dial-up narrowband at 51%, or 35.7 million households." Deborah A. Lathen, FCC Cable Services Bureau, Staff Report, *Broadband Today* (Oct. 1999) ("*Broadband Today*") at 32.

[20] "What was particularly confounding for our participants was the question of where 'open access' should occur. One industry analyst said that 'open access' is decoupling transport from the rest of the Internet, so that cable does not become the 'choke' point. Local government representatives proposed that a local peering arrangement should be made throughout a local high-speed meeting point.

Aside from the technical obstacle of implementation, some of the analysts noted that one of the greatest logistical obstacles to the deployment of distribution systems is the shortage of engineers and the limited infrastructure necessary to physically create and deploy these systems. It was clear that at the time of the Monitoring Sessions, none of the participants had a definitive idea as to how to account for the critical logistical requirements for wide-scale cable broadband deployment."

Broadband Today at 39.

[21] *Id.* at 34.

[22] *Id.* at 43, 46.

the City of Los Angeles Information Technology Agency issued a report rejecting calls for mandatory access requirements.[24] In October 1999, an expert review panel appointed by Metropolitan King County, Washington advised the County that mandatory access requirements would be premature at this time.[25] On October 19, 1999, the Miami-Dade County Commission voted 10-2 to reject an open-access proposal.[26] On November 3, 1999, voters in Denver, Colorado approved a new 10-year franchise for AT&T that excluded mandatory access requirements for ISPs.[27] On November 8, 1999, in AOL's and Bell Atlantic's own back yard, the Richmond, Virginia City Council voted 9-0 to reject forced access.[28] In the jurisdictions in which "open access" has been ordered prior to the decision of North Andover's Board, cable modem deployment has halted and extensive litigation has ensued.[29]

Against this backdrop, it should come as no surprise that forced access was raised in a number of the Massachusetts hearings to consider the AT&T/MediaOne change of control application. However, the Cable Division need not address the underlying policy of a forced access

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[23] *Id.* at 14-15.

[24] *Id.* at 15.

[25] *Forced Access Requirements Found Premature by King County Expert Review Panel*, PR NEWSWIRE, Oct. 29, 1999.

[26] *Open Access Defeated*, COMMUNICATIONS TODAY, Oct. 20, 1999.

[27] *Voters OK Denver Franchise*, MULTICHANNEL NEWS ONLINE (visited Nov. 3, 1999) <http://www.multichannelnews.com/daily/24d.shtml>.

[28] *See In the States: Weymouth Reverses Stance, Richmond Posts Shutout*, CABLEFAX DAILY p. 1, Nov. 10, 1999. Weymouth, Massachusetts, another participating community in this transfer process, initially included a forced access condition in approving the transfer to AT&T, but reversed itself on November 8, 1999 and unconditionally approved the transfer. *Id.*

[29] *See, e.g., AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Oreg. 1999) (fully briefed, argued to the Ninth Circuit on Nov. 1, 1999 and awaiting expedited decision); *TCI TKR of South Florida, Inc. v. Broward County, FL*, No. 99-6945 (S.D. Fla. filed July 27, 1999).

regime, because under Massachusetts regulations, they have no place in a Massachusetts License transfer proceeding.

II. **Summary of Proceedings.**

On July 13, 1999, MediaOne Group, Inc. and AT&T Corp. filed applications on FCC Form 394 with 175 cities and towns in Massachusetts, including the Town of North Andover, seeking consent to the transfer of control of MediaOne Group controlled cable television licensees to AT&T. The communities had 120 days to act upon the applications or they would have been deemed granted.[30] Following the filing of the applications, the Cable Television Division of the Massachusetts Department of Telecommunications and Energy (the "Cable Division") appointed a Special Magistrate to conduct eleven regional hearings in August and September, 1999 concerning the applications and to prepare a report for participating communities analyzing the hearing record and making non-binding recommendations regarding whether to approve the transfer applications.[31] Most of the towns and cities (165 of 175 municipalities), including North Andover, participated in the hearings.[32]

On September 24, 1999 the Magistrate's Report was issued recommending that the transfer applications be granted because the hearing record established that AT&T had satisfied the

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30 *See* 47 U.S.C. § 537, 47 C.F.R. § 76.502; 207 C.M.R. § 4.02.

31 Transfer Bulletin 99-4 (June 28, 1999). *See also* Transfer Bulletin 99-3 (June 18, 1999) (Cable Division explaining Massachusetts transfer approval process and acknowledging that the sixty (60) day mandatory hearing provision under *207 C.M.R. §4.03* would be met under the regional hearing model).

32 *See* Summary of Proceedings and Magistrate's Report, Charles Beard, Esq., at p. 1 (Sept. 24, 1999) (the "Magistrate's Report"). Licensee has separately requested, pursuant to *801 C.M.R. 1.01(10)*, that the Cable Division take administrative notice of the Magistrate's Report dated September 24, 1999.

legal requirements applicable in Massachusetts to the transfer of cable licenses.[33] The Magistrate's Report noted that the hearings included discussions concerning the "open or forced access issue" that, while "interesting and important," were not relevant to the criteria to be considered under Massachusetts law.[34]

On November 8, 1999, the North Andover Board of Selectmen approved the transfer of the License to AT&T; but it conditioned that approval upon AT&T providing "nondiscriminatory access to its cable modem platform in North Andover for unaffiliated providers of Internet and on-line services," (i.e. "forced access").[35] The transfer condition conflicts with the Special Magistrate's recommendation, the relevant legal criteria under Massachusetts law, and the terms of the North Andover cable television license.

III. **Argument**

The Appellants are entitled to summary decision on each of the two counts of the Appeal.

A. Count 1: Massachusetts Law Expressly Prohibits the Unilateral Imposition of New License Requirements As A Condition Of Approving The License Transfer

Massachusetts regulations enumerate four — and only four — criteria that a local government may consider in reviewing an application for license transfer and specifically

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[33] The relevant criteria, whether the transferee has the legal, financial, technical and management ability to step into the shoes of the transferor, are addressed below.

[34] *Magistrate's Report* at pp. 4, 16 and 18.

[35] *See* Exhibit 1, Letter to William P. Leahy, AT&T from North Andover Board of Selectmen, Nov. 10, 1999 (the "North Andover Letter").

prohibits attempts to amend or renegotiate terms of the license during the transfer process. Specifically, an issuing authority shall consider *only* the transferee's:

(a) management experience,

(b) technical expertise,

(c) financial capability, and

(d) legal ability

to operate a cable system under the existing license.[36] The Cable Division has held that under the statute and its regulations, the issuing authority must strictly limit its transfer review to whether the transferee will be able to perform the terms of the existing license and "step into the shoes" of the transferor.[37]

The Cable Division's rules further state that "[a]s part of an issuing authority's review of an application for a transfer or assignment of a license or control thereof, an issuing authority shall not propose amendments to or renegotiate the terms of the existing license or any license renewal proposal."[38] The Cable Division emphasized that "the transfer review process is not the proceeding in which to amend the original terms of the license. Indeed, different regulations apply when negotiating a license or amending a license."[39]

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36 207 C.M.R. § 4.04(1).

37 *In re Amendment of 207 C.M.R. §§ 4.01 - 4.06*, Docket No. R-24, Report & Order, ¶ 58 (Nov. 27, 1995).

38 207 C.M.R. § 4.04(2) (emphasis added).

39 *Amendment of 207 C.M.R. §§ 4.01 - 4.06* ¶ 58.

For more than fifteen years, the Commonwealth has recognized that an issuing authority would "arbitrarily or unreasonably" withhold approval[40] if it were to use a license transfer process to amend a cable franchise. In a November, 1981 letter from the Cable Division's General Counsel concerning six Cape Cod licenses, the Agency stated that "appropriate subjects for consideration" in transfer proceedings included:

(1) Financial qualifications of the assignee;
(2) Management expertise of the assignee;
(3) Character qualifications of the assignee; and
(4) Technical expertise of the assignee.

That advisory letter went on to address the impropriety of seeking to amend or renegotiate a license in the course of transfer proceedings:

> In my opinion, amendments to the existing licenses and renegotiation of terms of the existing license are not proper subjects of these hearings. If the issuing authorities wish to renegotiate the terms of the licenses or to amend the licenses, that should be done in a proceeding to amend the licenses as set forth in the Commission's regulations on license amendment, 207 CMR §§5.00 and 8.00.[41]

Consistent advisory opinions followed. A January 24, 1983 letter to the Chairman of the Ipswich Board of Selectmen explained:

> the transfer proceeding is the Selectmen's opportunity to inquire about the character, fitness, financial support, and management expertise of the proposed transferee. The issue before the Board is, essentially, whether the transferee would be able to perform the obligations of the existing license as well as the present licensee. If the Board concludes that it would be able to do so, the transfer is granted; if not, the transfer may be

[40] MASS. GEN. LAWS ch. 166A, § 7 (1999) ("Massachusetts Code").

[41] *See* November 18, 1981 Letter from General Counsel Kenneth Spigle to S. K. MacNown, a copy of which is attached hereto as Exhibit 2.

denied.[42]

Likewise, in 1983, the Division's Counsel wrote the following about the transfer of licenses in Worcester, Auburn, Leicester and Spencer.

> In its consideration of a request for transfer it is appropriate for an issuing authority to examine the applicant's qualifications to hold the license, i.e. financial capability, management and technical expertise, character, experience in the cable industry and performance in other communities. It is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the transfer process. If an issuing authority wants to renegotiate the terms of its license or to amend it, it may do so in a proceeding held pursuant to a license renewal or a license amendment.[43]

In 1985, *Bay Shore Cable TV Associates v. Town of Weymouth, See 207 C.MR. §§ 5.00 and 8.00,* addressed the policy in an adjudicatory proceeding.[44] The Cable Division rejected an attempt by the Town of Weymouth to require a license transferee to adopt new billing practices as a condition of transfer approval. The Cable Division recognized that the Town was attempting to impose new, unilateral terms on an existing contract, and therefore rejected the Town's condition on transfer regardless of its purportedly "minor" effect.[45]

One of the distinctive characteristics of the Commonwealth is its three-tiered regulation of cable, in which the Cable Division (now the Department) sets forth the procedures by which all Cities and Towns must grant, amend, transfer and renew licenses. As the Supreme

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[42] *See* January 24, 1983 Letter from General Counsel Kenneth Spigle to Lawrence Pszenny, a copy of which is attached hereto as Exhibit 3.

[43] *See* March 9, 1983 Letter from Counsel Roseanne McMorris to Michael Angelini, a copy of which is attached hereto as Exhibit 4.

[44] Docket No. A-55 (released Nov. 13, 1985).

[45] *See id.*

Judicial Court has explained, "The authority to license the operators of such systems was confirmed in the cities and towns as 'issuing authorities," with oversight and ultimate control of the licensing function in the newly-created Commission."[46] Every license in the Commonwealth has long been subject to the regulation limiting the transfer process to an evaluation of the managerial, technical, financial and legal capabilities of the transferee to operate under the terms of the existing license. In fact, the North Andover License at issue specifically states that the Cable Division rules apply.[47]

The Division has consistently adhered to the rule segregating transfer from amendment proceedings,[48] as have Special Magistrates appointed to facilitate major commercial transactions. In *Transfer of Control of Cable Television Licenses from Continental Cablevision to US West*,[49] the Special Magistrate appointed by the Cable Division evaluated the license transfers under the four criteria identified in 207 C.M.R. § 4.04 and concluded that the transfers should be approved.[50] In discussing the criteria to be considered for license transfers, the Special Magistrate stated:

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46 *Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission*, 372 Mass. 495, 496, 362 N.E.2d 897, 899 (1977) (footnote omitted). The third tier is the federal level where the FCC rules, Communications Act and Constitution provide additional requirements with respect to cable franchising.

47 Town of North Andover Renewal Cable Television License Issued to Continental Cablevision, Inc., § 2.2 (Issued Feb. 12, 1994) ("North Andover License").

48 In "Bulletin 87-1: Commission Clarification of Certain Transfer Application Issues" (Nov. 25, 1987), at page 6, the Division reaffirmed the validity of the *Bay Shore* decision, both with respect to the limited scope of the issuing authority's inquiry, and with respect to the fact that transfer processes were not the proper forum for proposing license amendments.

49 Report of Mass. Cable Television Comm'n Special Magistrate (July 16, 1996) ("*Continental Cablevision*").

50 *Id.*

> These conclusions reflect the narrowness of the inquiry in a transfer proceeding as well as the strength of the material presented. Important issues about customer service, public access and the appropriate relationship between Issuing Authorities and cable operators have been raised in these hearings. These issues simply cannot be adequately resolved in a license transfer proceeding with such a narrow scope. They must be saved for another day.[51]

In this case, the Special Magistrate recognized the attempts by issuing authorities to impose new conditions during license transfer proceedings, but emphasized the restricted focus of the law and did not permit their consideration. The Board itself specifically acknowledged that it was limited to the four transfer criteria when on September 13, 1999, after all eleven transfer hearings had been held, it filed a request with the Cable Division for a waiver under 207 C.M.R. §2.04 to allow the Board to consider imposing a forced access condition as part of the transfer review process.[52] On September 23, 1999, the Cable Division denied the waiver because the Board had failed to show good cause as required by the rules.[53] The Cable Division explained that the waiver request was not submitted in a "reasonably timely manner" in that the Board had been on notice since June 18, 1999 regarding the "standard of review [the issuing authorities] would be required to apply."[54] All eleven regional hearings were held in reliance on this standard of review and the Cable Division noted that the timing of the waiver request "raises fundamental issues of fairness that move beyond considerations of mere procedural or technical compliance with our rules . . . The Town is essentially asking us to

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51 *Continental Cablevision* at 14.

52 *See* Sept. 13, 1999 Letter to Alicia C. Matthews, Director, Cable Division from North Andover Board of Selectmen, a copy of which is attached hereto as Exhibit 5.

53 *See* Sept. 23, 1999 Letter to Keith Mitchell, Chairman, North Andover Board of Selectmen from Alicia C. Matthews, Director, Cable Division, a copy of which is attached hereto as Exhibit 6.

54 *Id.* at p. 2.

change the rules at the end of the game."[55] The Board did not appeal the Cable Division ruling denying the waiver and that ruling is final under Massachusetts law.[56]

In this case, the Special Magistrate's Report noted that the hearings included discussions concerning the "open or forced access issue" that, while "interesting and important," were not relevant to the criteria to be considered under Massachusetts law.[57]

It is clear from the Cable Division's rules and decisions that a condition forcing the Licensee or AT&T to provide access to all ISPs cannot lawfully be considered or imposed during the transfer process. The forced access condition imposed by the Board in no way relates to AT&T's qualifications to operate the cable system under the existing North Andover License.

Even the Board seemed to understand that the condition it was imposing was beyond the scope of its authority. The North Andover Letter itself ends with a severability clause to preserve what is not found to be "illegal or unenforceable." Subsequent press reports quote North Andover Selectman John Leeman stating "We felt it was the right thing to do, even if a state agency tells me I can't do it."[58]

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55 *Id.*

56 *See* MASS. GEN. LAWS ch. 166A, §2. ("Appeals of any decision, order, or ruling of the director [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 DTE). To date the Board has not appealed the waiver denial decision, nor could it now that the statutory appeal period has passed and the waiver denial is final.

57 Magistrate's Report at pp. 4, 16 and 18.

58 *North Andover Vote Challenges AT&T*, Boston Globe, p. 1 Northwest Weekly Section, Nov. 14, 1999.

The Board is clearly attempting to raise an issue outside the scope of the license transfer criteria that cannot adequately be resolved in this narrowly-focused proceeding. It is making this attempt despite a clear, uncontested ruling from the Cable Division that it is not permitted to do so. The requirement that the Licensee open its network to unaffiliated entities as a condition to transfer approval is outside of the criteria under which Licenses may be transferred, in violation of Massachusetts law, and the Cable Division rules. The Cable Division must rule that condition four of the North Andover Letter imposing forced access is illegal and unenforceable and of no force or effect, and that the transfer of the License from MediaOne to AT&T is approved without such condition.[59] Appellants are clearly entitled to summary decision on Count One of the Appeal.

B. Count 2: The Board Has Attempted to Unlawfully Amend the License.

The Cable Division should consider the Board's Letter an unlawful amendment to the License. Nothing in the License requires forced access by Internet service providers to the cable system. Nor does the North Andover license have any provision that would confer upon the Board the right to unilaterally amend the terms of the License to require forced access, or to amend or insert any license term, during the course of a transfer proceeding or otherwise. Section 8.1 of the License unambiguously states that the License is "the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically incorporated herein, and cannot be changed orally but only by instrument in writing executed by the parties."[60] Significantly, the License specifically anticipates the development of Internet services during the License term.

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[59] The North Andover Letter contains two other conditions relating to rates and License compliance issues that while also unlawful are not contested by Appellants in this appeal.

[60] North Andover License, § 8.1.

Section 3.26 provides a review process in the third, fifth and seventh year of the License term whereby, on request of the Issuing Authority, Licensee would report on the availability of such services and the feasibility of providing such services to subscribers.[61] The License contemplates no unilateral right of amendment by the Board with respect to such services.

Even if the License were to have professed otherwise, the Commonwealth's regulations (incorporated by reference in the License) prescribe the procedure that must be followed for amending cable licenses. There must be agreement between "an issuing authority and a licensee;" the issuing authority must provide written public notice; a hearing; opportunity for public comment.[62] The issuing authority and licensee must create a written report explaining "the purpose for which the requested amendment is being made."[63] Those procedures have not been followed here.

The entire process by which Licenses are negotiated, issued, transferred, and renewed would be thwarted if the terms could be unilaterally amended by the issuing authority. The Division has long recognized the necessity of bilateral agreement before a license is amended. For example, when the Federal Copyright Royalty Tribunal drastically increased royalties in late 1982, the Cable Division issued emergency rules (Docket No. R-11) allowing amendments to take effect without the need for the usual 30-day notice and possible hearings.[64]

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61 *Id.* §3.26(c).

62 *See 207 C.M.R. § 3.07. See also* License §2.2.

63 *See id.*

64 *In re License Amendment Regulations*, Notice of Emergency Rulemaking, Docket No. R-11 (Dec. 17, 1982) ¶ 6; 207 C.M.R. § 5.08(2) (1982).

Yet even then, it made clear that the copyright-related amendments could take effect "as soon as agreement is reached between the issuing authority and the cable operator"—but not before.[65]

The Board has professed to unilaterally amend the License, making a mockery of each applicable regulation and of the settled contract rights embodied in the License. Because the License cannot be unilaterally amended as the Board has purported to do, the Cable Division must rule that condition four relating to forced access is illegal and unenforceable and of no force or effect, and that the transfer of the License from MediaOne to AT&T is approved without such condition. Appellants are clearly entitled to summary decision on Count Two of the Appeal.

CONCLUSION

Appellants have demonstrated that "there is no genuine issue of fact relating to all or part of a claim or defense and [they are] entitled to prevail as a matter of law."[66] For the forgoing reasons, the Cable Division should summarily reject the attempt by the Board to

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65 *Id.*

66 *See* 801 C.M.R. § 1.01 (7)(h). *See, e.g., Ridge Cablevision Corp. v. Braintree*, CATV Docket No. A-33 (April 14, 1983), ¶ 3; *Belmont Cable Associates v. Belmont*, CATV Docket No. A-65 (August 18, 1988), p. 3, § III and authorities cited therein.

interject forced access as a condition of the approval of license transfers from MediaOne to AT&T by declaring the condition illegal and unenforceable.

Respectfully submitted,

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