COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION

MEDIAONE OF MASSACHUSETTS, INC., MEDIAONE GROUP, INC., and AT&T CORP. Appellants, v. CITY MANAGER OF THE CITY OF CAMBRIDGE Appellee.	CTV 99-4

APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DECISION REGARDING CITY OF CAMBRIDGE LICENSE TRANSFER DENIAL

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 denial by the City Manager of the City of Cambridge, Massachusetts ("City Manager") of the transfer of control of Licensee's cable television license for Cambridge.[1] The City Manager denied the transfer because neither MediaOne nor AT&T was willing to submit to a unilateral amendment of Licensee's cable television license for Cambridge to "provide nondiscriminatory access to its cable modem platform in Cambridge … for unaffiliated providers of Internet and on-line services."[2] Because the City Manager's effort to impose such a unilateral amendment for "forced access" is plainly in violation of Massachusetts law and the terms of the Cambridge cable license itself, and because none of the other asserted reasons for denial of the

[1] Licensee is a wholly owned subsidiary of MediaOne. As described in Section II below, on July 14, 1999, MediaOne and AT&T applied to transfer control of the Licensee to AT&T. The City Manager is the Issuing Authority under MASS. GEN. LAWS ch. 166A, §1.

[2] *See* City Manager Decision Regarding the Cable Television Transfer Request, at 3-4 (Issued Nov. 10, 1999) ("*Denial Decision*") (Exhibit 1).

transfer are valid, the Appellants are entitled to summary decision as a matter of law on each count in this appeal.[3]

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.[4]

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,[5] and

---

[3] Cambridge's action also violates numerous provisions of federal law including, but not limited to, the Communications Act, 47 U.S.C. §§251, 541(b)(3)(D), 541(c), 544(e), 544(f)(1), 546 and 42 U.S.C. §1983. The actions may also constitute deprivations of protected rights in violation of MASS. CONST. Art. XII. 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 Cambridge.

[4] *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. Feb. 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").*

[5] *See, e.g., America On line 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.

through investment in Internet service offered by Hughes using its Direct Broadcast Satellite.[6] 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,[7] 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.[8] 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, ("the Act") "to encourage the provision of new technologies and services to the public."[9] 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 of the Act "to preserve the vibrant and competitive free market that presently exists for the Internet and other

---

6 *See, e.g., America On line, 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.

7 *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.

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

9 47 U.S.C. § 157(a).

interactive computer services, unfettered by Federal or State regulation."[10] The Administration has adopted the same policy.[11]

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.[12]

The FCC reached a similar conclusion when rejecting forced access in connection with the recent transfer of control of TCI to AT&T.[13]

The Chairman of the FCC 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." "The increasing deployment of cable modem service by cable

---

10 47 U.S.C. § 230(b)(2).

11 *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.").

12 *Advanced Services Report* ¶ 48.

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

operators has prompted local phone companies to speed up their rollout of DSL service" and cut their prices. 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 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]

---

[14] 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>.

[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.

[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] "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

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 the risk that a slowdown 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,

---

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 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." *Id*. at 39.

21 *Id.* at 34.

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, the City of Los Angeles Information Technology Agency issued a report rejecting calls for mandatory access requirements. 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.[24] On October 19, 1999, the Miami-Dade County Commission voted 10-2 to reject an open-access proposal.[25] On November 3, 1999, voters in Denver, Colorado approved a new 10-year franchise for AT&T that excluded mandatory access requirements for ISPs.[26] On November 8, 1999, in AOL's and Bell Atlantic's own backyard, the

---

22 *Id.* at 43, 46.

23 *Id.* at 14-15.

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

25 *Open Access Defeated*, COMMUNICATIONSTODAY, Oct. 20, 1999.

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

Richmond, Virginia City Council voted 9-0 to reject forced access.[27] In the few jurisdictions in which "open access" has been ordered prior to the decision of Cambridge's City Manager, cable modem deployment has halted and extensive litigation has ensued.[28]

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

---

[27] *See In the States: Weymouth Reverses Stance, Richmond Posts Shutout*, CABLEFAX DAILY at 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.*

[28] *See, e.g., AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999), appeal pending, No. 99-35609 (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).

II. Summary of Proceedings

MediaOne is the successor in interest to the "Final Cable Television License" originally granted to American Cablesystems Northeast on December 30, 1985. Control of the License was transferred to Continental Cablevision in 1988, then to U S WEST in 1996. Renewal proceedings in advance of the December 29, 2000 expiration have been underway since 1998.[29]

On July 14, 1999, MediaOne and AT&T filed an application on FCC Form 394 with Cambridge seeking consent to the transfer of control of the Licensee to AT&T. Cambridge had 120 days to act upon the application or it would have been deemed granted.[30] The Cambridge application was one of 175 transfer applications filed by MediaOne and AT&T seeking the transfer of MediaOne controlled cable television licensees in Massachusetts to AT&T.[31] By notice to the issuing authorities, the Cable Television Division of the Massachusetts Department of Telecommunications and Energy (the "Cable Division") approved regional hearings under 207 C.M.R § 4.04(1)(a)-(d) on the transfer applications.[32] Issuing authorities were given the right to opt out of the regional hearing process and "hold individual hearings that comply with the Cable Division regulations."[33] On July 21, 1999 Cambridge notified MediaOne that it would opt out of the Cable Division's regional transfer process and conduct its own hearing, which it did on August 19, 1999.

---

[29] MediaOne filed its formal reservation of renewal rights under Section 626 of the Communications Act on April 6, 1998. The City conducted a performance review hearing on January 28, 1998, and public ascertainment hearings on May 19, 1999, May 26, 1999, and June 25, 1999.

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

[31] *See* Summary of Proceedings and Magistrate's Report, Charles Beard, Esq., at 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.

[32] *See* Transfer Bulletin 99-3 (June 18, 1999); Transfer Bulletin 99-4 (June 28, 1999).

[33] Transfer Bulletin 99-4 at 2.

The City Manager explained at the outset that the hearing was being "conducted pursuant to the requirements of the regulations of the Massachusetts Cable Television Division at 207 C.M.R. § 4.00."[34] The Appellants presented evidence satisfying the four relevant criteria set forth in 207 C.M.R. §4.04(1), including FCC Form 394, a slide presentation regarding AT&T's qualifications, and oral testimony in response to questions from the City Manager and his representatives.[35]

At the Transfer Hearing, the City Manager and his representatives inquired whether the Licensee would provide unaffiliated Internet Service Providers with access to its Internet service following the transfer to AT&T (i.e. "forced access"). The City also raised certain alleged instances of License non-compliance which had been initially raised in the ongoing renewal process. Appellants explained their position regarding the forced access issue,[36] and explained that following the proposed merger with AT&T the obligations of the Licensee under the Cambridge License would remain unchanged.[37] Appellants also noted that neither the forced access issue nor the alleged non-compliance issues were relevant in the review of a license transfer application under Cable Division regulations.[38]

---

[34] *See* Transcript of Hearing Regarding Change of Control of Cable T.V. License from MediaOne Group, Inc. to AT&T Corp., Aug. 19, 1999 at 4. ("Transfer Hearing Transcript") (Exhibit 2-Excerpts of Transcript).

[35] *Id.* at 7-22. Appellants have separately requested the Cable Division take administrative notice of their FCC Form 394.

[36] *Id.* at 38-42.

[37] The proposed transaction involves the merger of MediaOne into a wholly owned AT&T subsidiary, Meteor Acquisitions, Inc. MediaOne will cease to exist after the merger, however, its subsidiaries which hold the franchises, including Licensee, will continue to exist. Consequently, the Licensee's duty to comply with the License terms is unaffected by the AT&T transaction. FCC Form 394; Transfer Hearing Transcript, at pp. 13, 17, 156 (Exhibit 2).

[38] *Id*. pp. 13, 17, 152-156. *See also MediaOne/AT&T Response to the Cambridge Request for Information, Non-Compliance Issues* (submitted Sept. 10, 1999); Letter to Mr. Robert Healy, City Manager from Bartlett Leber, MediaOne (Nov. 10, 1999)("Leber Letter") (Exhibit 3).

The City Manager set September 10, 1999, as the date for response to pending discovery and for close of the hearing record for public comment.[39]

Coincident with the transfer process, the City Manager and representatives of MediaOne continued their discussions regarding license compliance that had begun with the commencement of the renewal process. On September 7, 1999, representatives of MediaOne met with the City Manager to further discuss issues of license compliance. At the meeting, MediaOne produced a second set of materials documenting its compliance with License terms and conditions.

On October 4, 1999, the Cambridge City Council issued an Order to the City Manager directing that he "carefully examine the license transfer from MediaOne to AT&T, in particular, the issue of whether to impose an open access, non-discrimination requirement…[and] [t]hat the City Manager…send a report of this examination to Cable TV Telecommunications and Electricity Committee…"[40] Ten days later, on October 14, 1999, the Chair of the Cable TV Telecommunications and Electricity Committee scheduled a public meeting for October 21, 1999, "to discuss the issue of open access for the cable license."[41]

On October 21, 1999, prior to convening the scheduled hearing on forced access, the City Manager announced to the press that "AT&T must provide open access to its high speed network for other internet service providers (ISPs) before the city will approve a transfer agreement from

---

[39] *See* Transfer Hearing Transcript at 167 (Exhibit 2). MediaOne responded to discovery by September 10, 1999. On September 23, 1999, the City sent MediaOne and AT&T a request for supplemental discovery. Despite the hearing record having closed on September 10, 1999, MediaOne and AT&T, provided the requested information on October 1, 1999. *See* Letter to Robert Healy, City Manager from Jeffrey Fialky, Counsel, MediaOne, October 1, 1999 ("Much of the information requested is not related to the qualifications of AT&T to assume control of MediaOne, which is the subject of our request for consent. However in an effort to be responsive to the City's inquiry, we have endeavored to provide as much information as reasonably possible.") (Exhibit 4).

[40] *See* Amended Order of Cambridge City Council, O-16, Oct. 4, 1999 (Exhibit 5).

[41] *See* Letter to Tim Murnane, MediaOne from Donna P. Lopez, Deputy City Clerk, Oct. 14, 1999 (Exhibit 6).

Media One [sic] to AT&T."[42] The City Manager's Press Release makes clear that his subsequent denial of transfer is all about forced access:

> As sole authority over the licensing of Cable TV in Cambridge, Healy sent a letter to AT&T informing them that open access must occur if they want the transfer from MediaOne to AT&T approved.[43]

The Press Release was widely distributed and carried by wire services.[44] The letter referred to in the Press Release had been issued on October 20, 1999, the day before the scheduled hearing on forced access.[45]

When MediaOne and AT&T appeared for the noticed October 21 hearing, a Councilman sought to abort the hearing:

> Councillor Triantafillou: "I think we ought to just close the hearing. I'm afraid that the work—the decision has already been made."[46]
>
> Vice Mayor Galluccio: "…I don't disagree with your sentiments…I thought it was made clear that we wanted to discuss this issue in more detail before a decision was made. So it was a surprise to me."[47]
>
> Councillor Triantafillou: "I'm surprised at the manner in which the decision was made right before this hearing, and I'm almost – perhaps, Mr. Chair, you would entertain a motion to dissolve the committee, because I'm not sure what point this committee has. …" [48]

---

[42] *See* News Alert, *"Cambridge Calls for 'Open Access' Before Approving Cable Transfer Agreement from Media One to AT&T,"* at 1, Oct. 21, 1999 ("*Press Release*") (Exhibit 7)

[43] *Id*. at 1.

[44] For example, Reuters carried the story, as did CNET News.com. <http://news.cnet.com/news/0-1004-200-921951.html?tag=st.ne.1002.>.

[45] *See* Letter to Scott Morris, AT&T from Robert W. Healy, City Manager, Oct. 20, 1999 (Exhibit 8)

[46] *See* Cable TV Committee Hearing on Open Access License Transfer, at. 8, Oct. 21, 1999 ("Open Access Hearing") (Exhibit 9 – Excerpts of Transcript).

[47] *Id.* at 9.

[48] *Id*. at 69-72.

The City Manager explained to the Council that he had based his decision on contacts with CFA and Charles Nesson, both of whom he acknowledged to be well-known advocates for forced access.[49] Neither of these parties had appeared at or submitted evidence for the Transfer Hearing.

When MediaOne and AT&T refused to accept the unilateral modification to the license, the City Manager denied the transfer.

III. Argument

The transfer denial conflicts with the relevant legal criteria under Massachusetts law, and the terms of the Cambridge cable television license. The Appellants are therefore entitled to summary decision on each of the four counts of the Appeal.

Count 1: *Approval of the Transfer Was Arbitrarily Withheld Because Appellants Refused to Acquiesce in the City Manager's Attempt to Unilaterally Amend the License.*

The bedrock of the City Manager's decision is his third basis for denial: that AT&T has refused to accept forced access to its cable platform in Cambridge.[50] The License contains no term or condition calling for such forced access, and refusing to approve a transfer due to Appellants' unwillingness to agree to such a unilateral license amendment is illegal and improper under Massachusetts law and the terms of the License.

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

---

49 *Id.* at 65. (Mr. Healy explained: "My consultations have been with Dr. Mark Cooper, who is the research director for the Consumer Federation of America, and Professor Charles Nessen of Harvard Law School. Now, obviously they're advocates for open access.").

50 MASS. GEN. LAWS ch. 166A, § 7; *Denial Decision*, at 3-4 (Exhibit 1).

and renew licenses. As the Supreme 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."[51] The limitations on the City Manager's transfer power are inherent in Mass. Gen. Laws ch. 166A, § 7: "No license or control thereof shall be transferred or assigned without the prior written consent of the issuing authority, which consent shall not be arbitrarily or unreasonably withheld."[52] As detailed below, the limits have been extensively explained in expert interpretation by the Division, which is the agency charged with administering and supervising franchising in the Commonwealth. The limitations were constructively known to Cambridge well before the License was issued. They have been codified in regulations under which the license has previously been transferred and amended. Cambridge itself has followed Division procedures in prior transfers—until this case. It is arbitrary and unreasonable for the City Manager to deny consent based upon the forced access issue.

When this License was issued on December 30, 1985, the law was clear: the purpose of license transfer proceedings was the evaluation of 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, and not the consideration of license amendments.[53] As early as 1981, the Commonwealth recognized that an issuing authority would "arbitrarily or

---

[51] *Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission*, 372 Mass. 495, 496, 362 N.E.2d 897, 899 (1977) (footnote omitted).

[52] *New England Telephone & Telegraph v. City of Brockton*, 127 N.E.2d 301, 302-303, 332 Mass. 662, 664 (1985) (in an analogous telephony grant of authority over use of streets and ways, the Supreme Judicial Court said, "…the mayor and aldermen, in granting locations [by ordinance] were acting…under a delegation of power from the Legislature and not as agents of the city.").

[53] *See Bay Shore Cable TV Associates v. Town of Weymouth*, Docket No. A-55 (released Nov. 13, 1985) (and prior Commission precedents cited therein) ("*Bay Shore*").

unreasonably" withhold approval if it were to use a license transfer process to amend a cable franchise. For example, in a November, 1981 letter from the Division's General Counsel concerning six Cape Cod licenses, the Division 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.[54]

Consistent advisory opinions followed. For example, 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 denied.[55]

---

[54] *See* Nov. 18, 1981 Letter from General Counsel Kenneth Spigle to S. K. MacNown (Exhibit 10).

[55] *See* Jan. 24, 1983 Letter from General Counsel Kenneth Spigle to Lawrence Pszenny (Exhibit 11). To the same effect is the Mar. 9, 1983 Letter from Counsel Roseanne McMorris to Michael Angelini regarding Worcester, Auburn, Leicester and Spencer (Exhibit 12).

In its November 13, 1985 *Bay Shore* decision, the Agency embraced the policy in a formal adjudicatory proceeding.[56] This well-understood limitation has since been codified in regulations.[57] 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.[58]

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."[59] 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."[60]

This regulatory codification of the Division's long-standing policy was firmly in place at the time Cambridge last consented to transfer control of the License, from Continental to

---

[56] The 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. Docket No. A-55 (released Nov. 13, 1985*). See also* "Bulletin 87-1: Commission Clarification of Certain Transfer Application Issues" at 6 (Nov. 25, 1987), in which 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.

[57] Massachusetts regulations enumerate four — and only four — criteria that a local government may consider in reviewing an application for license transfer and specifically 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." 207 C.M.R. § 4.04(1).

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

[59] 207 C.M.R. § 4.04(2).

[60] *Amendment of 207 C.M.R. §§ 4.01 - 4.06*, ¶ 58.

U S WEST. In approving the 1996 transfer, the City Manager conformed his actions to the requirements of Massachusetts law.[61] Likewise, Special Magistrates appointed to facilitate major commercial transactions have consistently adhered to the rule segregating transfer from amendment proceedings. In approving the U S WEST/Continental transfer, for example, the Special Magistrate explained "the narrowness of the inquiry in a transfer proceeding:"

> 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.[62]

In the case of the AT&T /MediaOne transaction, the Special Magistrate noted that testimony concerning the "open or forced access issue" while "interesting and important," was not relevant to the criteria to be considered under Massachusetts law.[63] Likewise on September 23, 1999, the Cable Division denied a requested waiver seeking to impose the forced access issue into this transfer because the Issuing Authority had failed to show good cause as required by the rules.[64]

The City Manager's disregard for requisite procedure in this case is particularly acute. It is not merely that he did not await the October 21, 1999 hearing required by Council before unilaterally announcing to the press his decision to impose forced access. Nor is it that his decision was based on non-record discussions with lobbyists for forced access. (In

---

61 *See Transfer Report, Approval of the Request for Transfer of Control of the Cable Television Final License*, Issued by City Manager, Robert W. Healy (Aug. 19, 1996) ("*U S WEST Transfer Report*") ("Given that U.S. West has satisfied the criteria set out in 207 C.M.R. § 4.04…the Issuing Authority hereby approves the transfer of control.") (Exhibit 13) (without exhibits).

62 Transfer of Control of Cable Television Licenses from Continental Cablevision to U S WEST, Report of Mass. Cable Television Comm'n Special Magistrate (July 16, 1996) at 14 ("*Continental Cablevision*").

63 Magistrate's Report at 4, 16 and 18.

64 *See* Letter to Keith Mitchell, Chairman, North Andover Board of Selectmen from Alicia C. Mathews, Director,

themselves, these transgressions raise issues of fundamental due process).[65] The City Manager's fundamental transgression was basing his transfer decision on the "forced access" issue in the first place. That decision was inconsistent with the Act, Division orders, Division regulations, and past practice under the very License at issue, all of which confine the transfer criteria to the four factors clearly identified by the Division.[66] In Massachusetts, there is no record on which "forced access" may be imported into the license transfer – and certainly not a record as riddled with impropriety as this.

Appellants are clearly entitled to summary decision on Count 1 of the Appeal.

Cable Division, Sept. 23, 1999 (Exhibit 14).

[65] In Massachusetts courts "have treated the procedural due protections of the Massachusetts and United States Constitutions identically." *Massand v. Medical Prof. Mutual Ins. Co*., 651 N.E.2d 403, 405 (Mass. 1995), and are therefore subject to the accepted standards of procedural due process which mandate notice and the opportunity to be heard before a matter is finally determined. *E.g.*, *Three Rivers Cablevision v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980). (Cable Franchises are a property interest protected by due process); *Eastern Telecom Corp. v. Borough of East Conemaugh*, 872 F.2d 30 (3d Cir.), *cert. denied*, 493 U.S. 811 (1989)(franchising authority must extend procedural due process to cable operator); *Continental Cablevision, Inc. v. Irwin*, No. 91-11256-N, slip op. (D. Mass. July 15, 1991)(cable operator must be provided with opportunity to depose witnesses against it). *Cf.* 207 C.M.R. §3.03(4); *Cf.* 207 C.M.R. § 3.03(4); *In re Licensing Regulations*, CATV Commission Docket No. R-3, December 27, 1978 ("Assessment of applicant qualifications shall be limited to the information provided in the applications on file, any amendments to such applications, the issuing authority report on license specifications, oral testimony govern during the hearing and other relevant information included in the hearing record.").

[66] The City Manager has sought to disguise the transgression by dressing it in the garb of a "public interest finding." Even if the "public interest" were a fifth criterion to consider at transfer, it must be construed to be defined and bounded by the legal, financial, managerial, and technical qualifications codified by the Division. Otherwise, the "public interest" would swallow all contracts, laws, rules, and standards of review, and would nullify the contractual certainty intended by Department rules and by federal law.

B. Count 2: The City Manager's Denial Based on "Absence of Benefit" Was an Arbitrary and Unreasonable Action Made under a Superceded Standard

The City Manager's decision was also based on what he saw as AT&T's failure to "make a case that the transfer, especially given its $58 Billion price tag, would benefit Cambridge cable television subscribers."[67] He expressly discounted the prospect of local telephony competition as irrelevant in these words: "This may well be so. However …"[68] The City Manager does not take issue with the benefit; he merely arbitrarily decides that a "benefit" must include changes to the License obligations governing cable services.

The supposed lack of benefit arises from a superseded transfer standard promulgated in the early 1970's. The language of the original rule[69] led to confusion among municipalities, which sometimes assumed, incorrectly, that "some 'additional benefit' must be extracted from the cable operator in exchange for the consent to the transfer application.[70] Having already defined the standard in *BayShore*, the Division removed the last vestige of the "benefit" when the regulations were recodified in 1995. Thus, it has no role in the transfer decision.

---

67 *Denial Decision* at 4 (Exhibit 1).

68 *Id.*

69 The rule included the following provision: "If approval is granted, the [written public] statement [of the Issuing Authority] shall set forth in detail the specific benefits to the residents of the city or town expected to result from the transfer or assignment." *See* 207 C.M.R. § 4.06 in its prior version, before its amendment in Docket No. R-24.

70 "Some communities have misinterpreted this language to mean the community must obtain some 'additional' benefit in exchange for its consent to a request for transfer." *See In re Amendment of 207 C.M.R. §§4.01 - 4.06*, Notice of Proposed Rulemaking, CATV Comm'n Docket No. R-24 (August 16, 1995) at 9 (*emphasis added*). In striking this confusing language from the regulations in Docket No. R-24, the Agency further explained that "[o]ften, issuing authorities are unsure of how to interpret these words or interpret them to mean that some 'additional benefit' must be extracted from the cable operator in exchange for the consent to the transfer application." *See In re Amendment of 207 C.M.R. §§ 4.01 - 4.06*, Report and Order, CATV Comm'n Docket No. R-24 (November 27, 1995), para. 54.

In addition, the supposed lack of benefit is merely another attempt to seek amendment to the License.[71] As Division Counsel wrote even before this License was issued:

> 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. *See* 207 C.M.R. § 5.00 and 8.00.[72]

The Commonwealth's regulations 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; and opportunity for public comment. The issuing authority and licensee must create a written report explaining "the purpose for which the requested amendment is being made."[73] Those procedures were not even attempted here. The entire process by which Licenses are issued, transferred, and renewed would be thwarted if the issuing authority or the Licensee could unilaterally amend their terms. The City Manager has professed to unilaterally amend the License in the guise of a "public interest" finding, nullifying each applicable regulation and the settled contract rights embodied in the License.

Although the transfer regulations do not permit a generalized evaluation of "public benefits," AT&T has nonetheless demonstrated overwhelmingly the public benefit and interest that will arise from the transfer. As described in detail in the FCC Form 394, the

---

[71] *Denial Decision* at 4 (Exhibit 1).

[72] *See* Mar. 9, 1983 Letter from Counsel Roseanne McMorris to Michael Angelini regarding Worcester, Auburn, Leicester and Spencer (Exhibit 12).

Transfer Hearing Transcript, and associated submissions, AT&T will bring a host of benefits to Cambridge and other MediaOne communities. AT&T is a world leader in the provision of communications services, including voice, data and video telecommunications services to business, governments and individuals.[74] AT&T developed many of the most significant technological innovations that are in use today such as the telephone modem, cellular telephones, lasers and optical digital processors.[75] In addition to its exceptional technical capabilities, AT&T has been recognized as a leader in the area of customer service. It has won the Malcolm Baldridge National Quality Award three times.[76] The company has approximately 80 million customers, over $53 billion dollars in annual revenues, and the highest credit rating of any cable operator in the United States.[77]

At the Transfer Hearing, AT&T testified that it has three objectives for the merger (i) to continue to provide excellent customer service to subscribers in Cambridge; (ii) to upgrade its cable system facilities in order to provide new services including competitive local telephone service; and (iii) to provide high quality broadband access to the Internet.[78] AT&T stressed its commitment to retain local management, to support community programs, and confirmed that the Licensee would honor its License obligations.[79] AT&T has clearly demonstrated it has the

---

73 *See* 207 C.M.R. § 3.07.

74 FCC Form 394.

75 Transfer Hearing Transcript, at 15, AT&T Slide Presentation "Some AT&T Firsts." (Exhibit 2).

76 *Id.*

77 *Id.*

78 *Id.* at 13-15.

79 *Id.* at 15-17, 58-64; *see also* FCC Form 394.

resources, capabilities and commitment to achieve its objectives, which will significantly benefit the City and the citizens of Cambridge.

Because the City Manager's reliance on special public benefits are inconsistent with the law, and because the hearing record clearly demonstrates the benefits of this transaction, Appellants are entitled to summary decision on Count 2 of the Appeal.

C. Count 3: The City Manager's Denial Based on Lack of Managerial Qualifications Was an Arbitrary and Unreasonable Action That Cannot Be Sustained as a Matter of Law or Fact

The City Manager's second stated basis for denial was that "AT&T itself does not have the cable television management experience to assume control of the Cambridge cable system."[80] He also concluded that the City need not look at the qualifications of MediaOne's management that would survive the merger, because MediaOne was not the "transferee."[81] This cannot survive as a matter of law or fact.

In the proposed transaction, AT&T is the product of a merger with TCI, an experienced multiple system operator (MSO) previously found qualified to operate Licenses in the Commonwealth, and in some 1400 cable communities around the country.[82] AT&T is itself the nation's largest MSO, qualified to operate cable systems in 45 States and serving 16 million customers.[83] The FCC has found AT&T qualified to operate cable systems.[84]

---

80 *Denial Decision* at 3 (Exhibit 1).

81 As described below, *infra* note 85, following the merger all MediaOne licensee's will continue to exist subject to the ultimate control of AT&T.

82 *See, e.g., Renewal License for the Town of Swansea, MA*, granted October 1996 by the Swansea Board of Selectmen to Heritage Cablevision of Southeast Massachusetts, Inc. Heritage was a subsidiary of TCI and the renewal was granted following a public hearing where TCI's qualifications to hold a cable license in the Town were confirmed.

83 In 1999, TCI serves cable communities in 45 states, including Washington, D.C. and Puerto Rico. Television Factbook, 1999 Ed., Vol 67, Warren Pub. Inc., Wash. DC, 1999, at 1867. Transfer Hearing Transcript, at 16 (Exhibit 2).

84 *See TCI-AT&T Transfer Order* at 9 (the merger serves the "public interest, convenience and necessity").

In the Cambridge transfer proceeding, AT&T demonstrated that it was fully qualified to manage the MediaOne cable system in Cambridge based upon its own expertise, the embedded expertise in TCI management, and the MediaOne management structure that would be retained following the merger.[85] MediaOne testified in detail regarding the managerial and technical capabilities of local MediaOne management.[86] This management strength was specifically demonstrated in the recent rebuild of 87 percent of the company's Massachusetts' plant to 750 MHz, and the roll out of innovative and competitive new services in Cambridge including, "cable television, high speed internet access and now local telephony over [the] broadband infrastructure."[87] This continuity of MediaOne management in Cambridge and Massachusetts, together with the depth of management necessary to run 1400 TCI cable systems nationally satisfies the management qualifications criteria under Massachusetts law. In this regard, virtually all other issuing authorities in Massachusetts considering this transaction (over 170 communities) —including those which have attempted to interpose the "forced access" issue—have found AT&T to be qualified in all relevant respects.[88]

In identical circumstances, the same City Manager has found no management qualification issue with corporate mergers, when consenting to the transfer of control from Continental Cablevision to U S WEST. As explained in the 1996 Magistrate's findings on the U S WEST/MediaOne transaction, which Cambridge included in its 1996 transfer approval, "to the extent that Continental's management is competent . . . [U S WEST] will also have the

---

85 Transfer Hearing Transcript at 15, 19-22, 87 (Exhibit 2).

86 *Id*. at 19-22.

87 *Id.* at 20-21.

88 The Magistrate's Report specifically found that AT&T had the requisite managerial expertise in recommending the approval of the transfer. *Magistrate's Report* at 8.

requisite management expertise...."[89] City Manager Healy, on that record, concluded that "…U.S. West has satisfied the criteria set out in 207 C.M.R. § 4.04."[90]

This proposed transaction between MediaOne and AT&T, as a matter of law, is for transfer of control, not for transfer of the franchise. The parent company MediaOne will merge and will survive in the merged corporation controlled by AT&T. The subsidiary Licensee will remain as a corporate entity and Licensee. Effectively, the transaction will combine AT&T/TCI with MediaOne management.[91]

Given the City Manager's prior reliance on existing management in a similar transaction, as well as AT&T's record evidence of managerial qualifications, it is frivolous and not sustainable to claim that AT&T lacks managerial qualifications to operate under the License.

If the City Manager has issues with particular management decisions, the appropriate place to take issue with them is through amendment and renewal, but not through transfer.[92] As the explained in the Special Magistrate's 1996 Report regarding the U S WEST/ Continental transfer:

> I stress that there is a difference between the "capacity" or "ability" to operate a cable system, on the one hand, and the record of performance on the other. The performance issues raised by [Issuing Authorities] should properly be considered as part of the license renewal process in which both

---

89 Continental Cablevision at 6.

90 *See* U S WEST Transfer Report at 3, *supra* note 61 (Exhibit 13).

91 While not necessary to establish the management qualifications of AT&T in this proceeding, it is also frivolous for the City Manager to assert that AT&T does not have the management qualifications, independent of MediaOne management, to operate the cable system in Cambridge. As previously described, AT&T has demonstrated for over a century that it has the managerial, technical, financial and other qualifications and resources to provide state of the art communications services on an international basis. The company's long record of achievement has earned it an international reputation for superior management, customer service and technical expertise. Likewise, MediaOne has not lost its managerial qualifications since the City Manager approved them in connection with the transfer from American Cablesystems to MediaOne.

92 *See, e.g., Bay Shore;* Letters cited in notes 54-55, *supra; Amendment of 207 CMR § 4.01-4.06, ¶ 58.*

are involved, not the transfer of control process which is the subject of the regional hearings.[93]

Finally, the City Manager's denial is clearly a pretext to squeeze "open access" into acceptable criteria. The City Manager's own October 21 Press Release explained that the transfer would be granted only if AT&T agreed to the forced access condition, and "if other matters under negotiation are successfully resolved."[94] Management expertise cannot be "resolved" by negotiation. The City Manager's decision is simply a disguised means to impose forced access through the transfer process. It cannot be sustained, and must be reversed.

Appellants are clearly entitled to summary decision on Count 3 of the Appeal.

D. Count 4: The City Manager's Denial Based on No Likelihood of Adherence to the License Was an Arbitrary and Unreasonable Action That Cannot be Sustained as a Matter of Law or Fact

The City Manager's first asserted basis for denial was that AT&T "is not likely to adhere to the terms and conditions of the Final License, as required."[95] This conclusion is sheer speculation that was premised on a series of alleged events of non-compliance by MediaOne, which were generated earlier in the summer in a renewal hearing under Section 626 of the Cable Act.[96]

Prior to the filing of the transfer application on July 14, 1999, the review of License compliance issues was acknowledged by City representatives as relevant only to the

---

93 1996 Magistrate's Report at 8. The Magistrates' Report was included in the City Manager's U S West Transfer Report.

94 *Press Release* at 2 (Exhibit 7).

95 *Denial Decision* at 3 (Exhibit 1).

96 *See City of Cambridge Public Ascertainment Hearing Regarding Renewal of the MediaOne Cable Television Provider License*, June 25, 1999 ("Renewal Hearing") (Exhibit 15 – Excerpt of Transcript).

renewal process. At the June 25 Renewal Hearing, Peter Epstein, a consultant conducting the hearing for the City, stated to MediaOne:

> But again what we are doing, as we announced, is looking at your performance under the license, and that is a 626 issue. I mean, there is nothing hidden here, there is no hidden agenda, and the fact is that there is a year and a half left of the license.[97]

Following the filing of the transfer application, the City decided to seize on the transfer process to leverage a different resolution to the alleged non-compliance. The Chair of the Cable TV Committee made this point at the August 19 Transfer Hearing:

> This is a tremendous opportunity Mr. Manager. Between the renewal contract and this transfer, I haven't seen so many nice suits in this room in a long time, and that to me means Mr. Manager…there's a lot of money at stake here…So I know that you will look at this holistically…to try to tie these issues together. [98]

Later at the August 19 Transfer Hearing, and for the first time, Mr. Epstein followed suit. He changed his opinion regarding the relevance of the License compliance issues, and entered a number of alleged non-compliance issues into the transfer record over MediaOne's objection that the issues were only relevant to the renewal proceeding.[99] They eventually found their way into the City Manager's denial as makeweight for a decision that has no lawful basis in transfer law.

This kind of makeweight cannot be a basis for denial. Prior non-compliance by MediaOne, if any, cannot be a factual issue in dispute because MediaOne has warranted to the City that "a community's approval of the transfer does not waive any rights it may have to raise

---

97 *Id.* at 194.

98 Transfer Hearing Transcript at 32 (Exhibit 2).

non-compliance issues. As a result, the compliance issues alleged by the City of Cambridge will survive the transfer of the cable television license."[100] Because MediaOne has protected the City's right to pursue all allegations of non-compliance, such allegations cannot be factual issues in this transfer.

In addition, prior compliance by MediaOne cannot be a legal issue, because it does not relate to the transferee's qualifications.[101] AT&T has committed in the Form 394 applications,[102] in the Transfer Hearing,[103] and elsewhere in writing,[104] to honor the terms of the License. There is no evidence in the slightest that it will not. In addition, as noted by the Special Magistrate, the terms of the merger agreement and Delaware law provide that AT&T will step into the shoes of MediaOne: "By contract and by operation of law, AT&T will assume all of the obligations of MediaOne."[105] Moreover, under the terms of the License, allegations of prior non-compliance are unrelated to transfer of control. The License does not even permit denial of *transfers of control* on this basis.[106]

---

99 "The companies don't necessarily agree that under state and federal law that the transfer is necessarily the appropriate forum, but would rather believe that it would be under the renewal forum that those issues would be addressed." *Id.* at 156-65.

100 Leber Letter (Exhibit 3); *see also Response to Cambridge Request for Information*, "Non-compliance Issues," (Sept. 10, 1999).

101 *Rollins Cablevision of Southeast Massachusetts v. Town of Somerset*, Docket A-64 (Mass CATV Comm'n, June 10, 1988).

102 FCC Form 394.

103 Transfer Hearing Transcript at 13, 17, 156 (Exhibit 2).

104 *See supra* note 100.

105 *See* Magistrate's Report at 5-6. (Citing 2.1(c) of the Asset Purchase Agreement (FCC Form 394, Exhibit 2) and Del. Gen Stat. § 259(a)).

106 The License states that "inquiry" may be made into the matters relative to a transferee-of-control's likelihood of adhering to the terms and conditions of the License. License 2.2(d). MediaOne's response—assuring that all claims will survive—satisfies such inquiry as a matter of law. The only provision of the License which purports to allow denial if "the License will not be adhered to" is a separate provision dealing with transfer of the License itself, not transfer of

Under Massachusetts law, 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.[107] Indeed, both Mr. Epstein and the City Manager himself recognized that transfer proceedings are separate from renewal negotiations under Massachusetts and federal law.[108] Here, the Appellants have satisfied this requirement and there is no reasonable question regarding the likelihood that AT&T will "adhere" to the terms of the License.

Federal law concerning the renewal process is consistent. The allegations of non-compliance arose in the course of that process—and expressly only for that process.[109] Issuing authorities may not "end run "the renewal process by adopting unilateral orders helping themselves to denial, "forced access," or any other issue in play in renewal. The unilateral approach has been rejected as inconsistent with the franchise procedures required by the Communications Act. For example, a 1993 Massachusetts case rejected as inconsistent with the federal renewal process a set of unilateral city bylaws that sought to dictate terms of renewal.[110] Similarly, in a Birmingham, Alabama case, a district court invalidated an ordinance setting a priori standards of renewal, stating that "such ordinance is unenforceable because its enactment

---

control. License, § 2.2 (h). The AT&T/MediaOne transaction involves only transfer of control.

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

108 Open Access Hearing at 77 ("The license transfer is clearly separate from the consideration of the renewal of the existing license with whatever the entity may be when the current license expires") (Exhibit 9). *See also supra* note 62.

109 *See also supra* notes 97 and 108 (Exhibits 9 and 15).

110 *Time Warner Entertainment Co., L.P. v. Briggs*, 1993 U.S. Dist. LEXIS 1196 (D. Mass. 1993) (provisions of unilateral ordinance defining terms of renewal held unenforceable).

is in irreconcilable conflict with the procedural requirements of section 626 of the Cable Act."[111] Likewise, the City Manager's unilateral decision to decide renewal issues in the course of transfer is inconsistent with Massachusetts law.

Appellants are clearly entitled to summary decision on Count 4 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."[112] For the forgoing reasons, the Cable Division should summarily reverse the attempt by the City Manager to interject forced access, however disguised, into license transfers from MediaOne to AT&T.

Respectfully submitted,

AT&T CORP.

By: _____

Michael Morrissey
Katherine P. White
AT&T Corp.
99 Bedford Street
Boston, MA 02111
617-574-3162

MEDIAONE GROUP, INC.
MEDIAONE OF MASSACHUSETTS, INC.

By: _____

Bartlett F. Leber
Jeff Fialky
MediaOne Group, Inc.
6 Campanelli Drive
Andover, MA 01810
978-683-5500

By: _____

Paul Glist
James F. Ireland
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, NW.,
Suite 200
Washington, D.C. 20006
202-659-9750

---

111 *Birmingham Cable Comm. Inc. v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. 1989) (city ordered "to comply with each and every substantive and procedural requirement in sections 622 and 626 of the Cable Act").

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

By: _____

Kenneth Ira Spigle
246 Walnut Street
Newton, MA 02460
617-964-7000

November 29, 1999