COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION

MEDIAONE OF OHIO, INC., MEDIAONE GROUP, INC., AND AT&T CORP. Appellants, v. MAYOR OF THE CITY OF SOMERVILLE Appellee.	CTV 99-5

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

In this appeal, MediaOne of Ohio, Inc. ("Licensee"), MediaOne Group, Inc. ("MediaOne"), and AT&T Corp. (AT&T) (collectively "Appellants") seek expedited relief from the denial by the Mayor of the City of Somerville, Massachusetts ("Mayor") of the transfer of control of Licensee's cable television license for Somerville.[1] Although the Mayor's stated reasons for denying the transfer are carefully couched in terms of the Massachusetts transfer criteria, the true reason for the denial is clear: neither MediaOne nor AT&T was willing to submit to a unilateral amendment of the cable television license for Somerville to require the immediate provision of "telephony and high speed internet services" or to provide for "nondiscriminatory access for nonaffiliated ISPs."[2] Because the Mayor's effort to impose such unilateral amendments is plainly in

[1] Licensee is a wholly owned subsidiary of MediaOne. As described in Section II below, on or about July 13, 1999, MediaOne and AT&T applied to transfer control of the Licensee to AT&T. The Mayor is the Issuing Authority under Massachusetts law. MASS. GEN. LAWS. ch. 166A, § 1.

[2] Letter to William Leahy, Regional Director Government Affairs, AT&T from Dorothy A. Kelly Gay, Mayor, City of Somerville at 2 (November 10, 1999) ("Denial Letter") (Exhibit 1).

violation of Massachusetts law and the terms of the Somerville cable license itself, 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 surprisin g. 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 through investment

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[3] Somerville's action also violates numerous provisions of federal la w 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 Somerville.

[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. 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").*

[5] *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.

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, "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 Communications Act "to preserve the vibrant and competitive free market that presently exists for the Internet and other

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6 *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.

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 has 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]

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[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 (citations omitted).

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

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 "[T]he 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. [14] 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." [15]

When the FCC recently declined to require ILECs to "unbundle" Internet capable packet switches and DSLAMs, [16] 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. [17]

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[14] Letter From FCC Chairman William E. Kennard to Kennet h 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] *Id.*

[16] 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, ¶ 11 (Mar. 31, 1999).

[17] "Consumer Choice Thro ugh 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>.

He implored the members of NATOA to "resist the urge to regulate" and to give the market a chance.[18]

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. [19] In October, 1999, *Broadband Today* reported the insignificant market share held by cable operators in Internet access,[20] the logistical turmoil which mandatory access orders would involve, [21] and

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[18] *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>.

[19] 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.

[20] "[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.

[21] "What was particularly confounding for our participants was the que stion 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.

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. [22] 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. [23]

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, [24] 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. [25] In October 1999, an expert review panel appointed by Metropolitan King County, Washington advised the County that mandatory access requirements

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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.

22 *Id.* at 34.

23 *Id.* at 43, 46.

24 *Broadband Today* at 14-15.

25 *Id.* at 15.

would be premature at this time.[26] On October 19, 1999, the Miami-Dade County Commission voted 10-2 to reject an open-access proposal.[27] On November 3, 1999, voters in Denver, Colorado approved a new 10-year franchise for AT&T that excluded mandatory access requirements for ISPs.[28] 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.[29] In the jurisdictions in which "open access" has been ordered prior to the decision of Somerville's Mayor, cable modem deployment has halted and extensive litigation has ensued.[30]

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.

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

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

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

[29] *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.*

[30] *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).

II. Summary of Proceedings.

MediaOne acquired the Somerville cable television license from Time Warner in August 1999, following the Mayor's June 16, 1999 approval of the transfer. [31] The 10 year renewal License expires on August 19, 2002. [32]

On or about July 13, 1999, MediaOne Group, Inc. and AT&T Corp. filed applications on FCC Form 394 with one hundred and seventy five cities and towns in Massachusetts, including the City of Somerville, 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. [33] 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. [34] Most of the towns and cities (165 of 175 municipalities), including Somerville, participated in the hearings. [35]

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[31] *See* Letter to Bartlett F. Leber, Esq., Vice President and Corporate Counsel MediaOne from Dorothy A. Kelly Gay, Mayor, Somerville, June 16, 1999 ("Time Warner/MediaOne Transfer Letter") (Exhibit 2).

[32] Consequently, the Licensee is in the Cable Act 30-36 month renewal window. The Licensee filed its Section 626 notice with the City on September 2, 1999 , however, no renewal proceedings have taken place.

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

[34] 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).

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

Representatives of Somerville participated directly in the August 31, 1999 Malden regional hearing.[36] At that hearing, following Appellants' presentation of testimony and evidence concerning the qualifications of AT&T relevant to the transfer criteria under Massachusetts law, Somerville representatives and other participants inquired about AT&T's position on forced access.[37] The Hearing Officer reiterated the Special Magistrate's position that the "Massachusetts legal framework did not, in his estimation, permit consideration of open access by the issuing authorities" in considering the transfer.[38] Subsequently, on September 10, 1999, the Mayor filed a petition with the FCC requesting the FCC to provide an "Advisory Opinion" that a "local issuing authority" has the "jurisdiction and power…to impose a requirement of 'open access'" in a license transfer proceeding.[39] The FCC has not acted on the petition.

At the August 31 Malden hearin g, a Request For Information was recorded to which MediaOne responded on September 28, 1999.[40] In MediaOne's response it was noted that most of the information requested was not relevant to AT&T's qualifications to assume control of the License. On September 10, 1999 the City consultant issued a request for supplemental information to which MediaOne responded on September 29, 1999.[41] These requests sought only limited

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36 *See* Denial Letter at 1 (Exhibit 1).

37 *See, e.g.*, Malden Regional Hearing Regarding Change in Control of Cable T.V. Licenses from MediaOne Group, Inc. to AT&T Corp., August 31, 1999 at 35-37 (Paul Trane, Somerville consultant); at 58-61 (Peter Epstein); at 153-155 (Bell Atlantic) and at 156-162 (AOL) (Malden Hearing Transcript).

38 *Id*. at 155.

39 *See Petition for Commission Proceeding and Advisory Opinion*, City of Somerville (September 10, 1999) ("FCC Petition") (Exhibit 3). In seeking this ruling the Mayor expressed the City's intense interest in intervening concerning the forced access issue: "…jurisdiction over the question of "open access" for non-captive and/or non-affiliate ISP's is critical." *Id*. at 1.

40 *See* AT&T/MediaOne's Response To Questions Contained In The Record, September 28, 1999 ("September 28 Response").

41 *See* Response to the City of Somerville's Request for Information, September 30, 1999 ("September 30 Response") (Exhibit 4).

information concerning AT&T's managerial experience and technical expertise, to which the Appellants responded fully.[42] No follow up questions or concerns were expressed by the Mayor or the City's consultants regarding these issues following MediaOne's submissions.

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 satisfied the legal requirements applicable in Massachusetts to the transfer of cable licenses.[43] 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.[44]

On November 10, 1999, the Mayor denied the transfer of the Somerville license to AT&T, purportedly based on AT&T's lack of management experience, technical expertise and legal qualifications. With respect to AT&T's management and technical qualifications, the Mayor asserted that (i) "AT&T has no direct management of a cable television system in the Commonwealth of Massachusetts or elsewhere" and (ii) the reliance by AT&T upon MediaOne's management personnel that will remain following the transaction was misplaced because "MediaOne has itself not demonstrated management experience or technical expertise."[45] In this

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[42] For example, of 12 questions overall in the "Questions Contained in the Record" of the Malden hearing, the only management question related to allegations of franchise non-compliance by TCI in Aurora, Colorado. *See* September 28 Response at 4, Question 9. The response explained the background of the allegations and reported that an agreement had been reached to complete the contested rebuild approximately six months ahead of schedule. *Id.* Similarly, in response to a City inquiry regarding Y2K issues, MediaOne described its substantial efforts in this area. *Id.* at 4, Question 6, Exhibit F. The September 28 Response confirmed again that all license obligations of MediaOne licensees would remain intact following the transfer to AT&T. *Id.* at 1, Question 2. The City's supplemental request contained no questions concerning management or technical qualifications. *See* Exhibit 4.

[43] 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.

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

[45] Denial Letter at 1-2 (Exhibit 1).

regard, the Mayor asserted that "MediaOne has clearly and publicly stated that it has no intention to upgrade its Somerville cable television system to include telephony and high speed internet services in the foreseeable future."[46] With respect to AT&T's legal qualifications, the Mayor relied on the pending City of Portland case[47] to assert that:

> AT&T's failure to provide non-discriminatory access for non-affiliated ISP's poses a barrier to the operation of a free and competitive market for high speed data services. It is so serious as to potentially rise to the level of an actionable anti-trust violation. The City cannot condone, and certainly cannot be a party to, such anti-competitive behavior.[48]

As noted above, MediaOne acquired the Somerville License just three months ago in August 1999 following the Mayor's June 16, 1999 decision that MediaOne satisfied the relevant transfer criteria.[49] The Mayor's review in that process included a thorough "license compliance review" by the City's consultant.[50] However, the City and MediaOne are now also engaged in the renewal process (the renewal window opened on August 19, 1999) during which important issues such as the system upgrade and new services will undoubtedly play a central role. Consistent with its representations throughout this proceeding, MediaOne and AT&T fully intend to negotiate in good faith concerning these issues. These matters will be resolved in the proper setting, the renewal process, not based upon leverage in the transfer process.

The denial conflicts with the Special Magistrate's recommendation, the relevant legal criteria under Massachusetts law, and the terms of the Somerville cable television license.

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46 *Id* at 2.

47 *See supra* n. 30.

48 Denial Letter at 2 (Exhibit 1).

49 *See* Time Warner/MediaOne Transfer Letter at 1 (Exhibit 2).

III. Argument

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

A. Count 1: The Transfer Was Arbitrarily Denied Because It Was Based Upon Matters Not Relevant To The License Transfer Process

Although presented in the guise of managerial, technical and legal qualifications issues, the Denial Letter makes it apparent that the Mayor's decision is based upon other irrelevant matters under Massachusetts law. The Mayor asserted that AT&T could not rely on MediaOne's managerial and technical qualifications because of MediaOne's decision "that it had no intention to upgrade its Somerville cable television system to include telephony and high speed internet services in the foreseeable future." [51] This decision, the Mayor asserts, demonstrates that "MediaOne itself has not demonstrated management experience and technical expertise that has been beneficial to Somerville cable subscribers." [52] The Mayor also asserted that AT&T does not possess the legal qualifications to operate the system because AT&T has refused to submit to forced access. [53] Neither the License nor any other provision of law contains any requirement that MediaOne upgrade its plant, provide new services or submit to forced access in Somerville or elsewhere, and denying the transfer based upon Appellants' refusal to

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50 *Id.*

51 *Id.*

52 *Id.* The Mayor also asserts that AT&T lacks management experience because it has not "directly" managed cable systems. This aspect of the decision is discussed in Section III(c) below.

53 Denial Letter at 2 (Exhibit 1).

accede to such requirements is illegal and improper under Massachusetts law and the terms of the License.[54]

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 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." [55] The limitations on the Mayor's transfer power are inherent in the Mass. Gen. Laws ch. 166A, Section 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."[56] 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 Somerville before the License was issued. They have been codified in regulations under which the license has previously been transferred. Somerville itself followed the Division's regulations in a transfer earlier this year. It is arbitrary and unreasonable for the Mayor to deny consent based upon the upgrade and forced access issues.

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[54] As stated above, MediaOne and AT&T intend to negotiate in good faith during the ongoing renewal process concerning issues appropriate for that setting. *See supra* at 12.

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

[56] *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.").

When this License was issued on August 19, 1992, 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. [57] As early as 1981, the Commonwealth recognized that an issuing authority would "arbitrarily or unreasonably" withhold approval if it were to use the 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. [58]

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

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[57] *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*").

[58] *See* Nov. 18, 1981 Letter from General Counsel Kenneth Spigle to S. K. MacNown (Exhibit 5).

> 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. [59]

In its November 13, 1985 *Bay Shore* decision, the Agency embraced the policy in a formal adjudicatory proceeding. [60] This well-understood limitation has since been codified in regulations. [61] 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. [62]

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." [63] The Cable Division emphasized that "the transfer review process is

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[59] *See* Jan. 24, 1983 Letter from General Counsel Kenneth Spigle to Lawrence Pszenny (Exhibit 6). To the same effect is the Mar. 9, 1983 Letter from Counsel Roseanne McMorris to Michael Angelini regarding Worcester, Auburn, Leicester and Spencer (Exhibit 7).

[60] 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.

[61] 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).

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

[63] 207 C.M.R. § 4.04(2).

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." [64]

This regulatory codification of the Division's long-standing policy was firmly in place at the time Somerville last consented to transfer of the License, from Time Warner to MediaOne just five months ago. In approving the June 1999 transfer, the Mayor conformed her actions to the requirements of Massachusetts law. [65] 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. [66]

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. [67] Likewise on September 23, 1999, the Cable Division denied a requested waiver seeking to interject the forced access issue into this transfer because the Issuing Authority had failed to show good cause as required

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

65 *See* Time Warner/MediaOne Transfer Letter (Transfer granted based on findings including MediaOne agreement to comply with Renewal License terms and MediaOne's representations that it "possesses the managerial, legal, technical and financial qualifications to assume all current Renewal License obligations.") (Exhibit 2).

66 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*").

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

by the rules.[68] 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."[69] 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 change the rules at the end of the game."[70] To date, the FCC has also declined the Mayor's effort to extent the scope of the transfer review to include forced access.[71]

The denial of the transfer premised upon the Mayor's desire to receive an upgrade, new services in Somerville, or to impose forced access on the Appellants, none of which are required by the License or other applicable law, in no way relates to AT&T's or MediaOne's qualifications to operate the cable system under the existing Somerville license.[72] Denying a transfer on this basis is inconsistent with the governing statute, Division orders,

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[68] *See* Letter to Keith Mitchell, Chairman, North Andover Board of Selectmen from Alicia C. Mathews, Director, Cable Division, Sept. 23, 1999 (Exhibit 8).

[69] *Id.* at 2.

[70] *Id.*

[71] *See supra*, note 39.

[72] Moreover, the management decision concerning when to initiate a rebuild and to deploy new services is not, in any event, a proper basis upon which to deny a transfer. As 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 are involved, not the transfer of control process which is the subject of the regional hearings.

See Continental Cablevision at 8.

With regard to the Mayor's position that MediaOne itself lacks managerial and technical qualifications upon which AT&T can rely because of the management decision not to upgrade and deploy

Division regulations, the License terms, 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.

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

B. Count 2: The Denial is an Attempt to Unlawfully Amend the License.

The Cable Division should overturn the Mayor's denial because it is an unlawful attempt to amend the License. Nothing in the License requires the Licensee to upgrade the system, to provide telephone or Internet service, or to submit to forced access by Internet service providers. Nor does the Somerville license have any provision that would confer upon the Mayor the right to unilaterally amend the terms of the License to require an upgrade, new services or forced access, or to amend or insert any license term, during the course of a transfer proceeding or otherwise. To the contrary, Section 15.1 of the License unambiguously states that the License is "the entire agreement between the parties … and cannot be changed orally but only by an instrument in writing executed by the parties." [73] Significantly, the License specifically anticipates changes in cable technology that might take place during the License term and provides the Licensee sole discretion to implement such technology. [74] The License contemplates no unilateral right of amendment by the City with respect to such developments.

Even if the License were to have professed otherwise, 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

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new services, as discussed below, if the Mayor has issues with particular management decisions, the appropriate place to take issue with them is through amendment and renewal, but not through transfer.

[73] *Id.* § 15.1.

[74] *Id.* § 5.11.

written public notice; a hearing; opportunity for public comment. [75] The issuing authority and licensee must create a written report explaining "the purpose for which the requested amendment is being made." [76] 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. [77] 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. [78]

The Mayor's action is particularly inappropriate in this case because the renewal window for the negotiation of terms and conditions for the renewal franchise commenced on August 19, 1999. As previously discussed, Massachusetts law recognizes that the renewal process provides the appropriate forum (as an alternative to amendment) to negotiate new obligations with cable licensees.

The Mayor's denial based upon the failure of MediaOne and AT&T to perform obligations that do not appear in the License or elsewhere in law, makes a mockery of each applicable regulation and of the settled contract rights embodied in the License. MediaOne's

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75 *See* 207 C.M.R. § 3.07.

76 *See id.*

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

78 *Id.*

decision on these issues at this time is within its rights under the License and cannot form the basis for concluding that MediaOne lacks managerial and technical expertise.

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

C. Count 3: The Mayor's Denial Based on AT&T's Lack of "Direct" Management Experience was an Arbitrary and Unreasonable Action That Cannot Be Sustained as a Matter of Law or Fact

The Mayor's decision that AT&T does not possess the management experience to assume control of the Licensee was premised, in part, upon the fact that "AT&T has no direct management of a cable television system in the Commonwealth of Massachusetts or elsewhere."[79] Massachusetts law does not require a proposed transferee to have "direct" cable television management experience. Innumerable transfer decisions in Massachusetts, as well as the Special Magistrate's Report in this proceeding, have premised a finding of managerial qualifications upon the retention of qualified management of the licensee to be acquired. The Mayor's creation of a new "direct" management standard cannot be sustained.

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. [80] AT&T is itself

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[79] Denial Letter at 1 (Exhibit 1). As addressed above, the other basis of the Mayor's conclusion on this issue, that MediaOne lacks management and technical qualifications upon which AT&T can rely, is based upon irrelevant matters under Massachusetts law and is factually and legally wrong.

[80] *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.

the nation's largest MSO, qualified to operate cable systems in 45 States and serving 16 million customers.[81] The FCC has found AT&T qualified to operate cable systems. [82]

In the Somerville transfer proceeding (Malden and the other ten regional hearings), AT&T demonstrated that it was fully qualified to manage the MediaOne cable system in Somerville based upon its own expertise, the embedded expertise in TCI management, and the MediaOne management structure that would be retained following the merger. [83] MediaOne testified in detail regarding the managerial and technical capabilities of local MediaOne management.[84] This continuity of MediaOne management in Somerville 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. [85]

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 into a newly formed merger corporation controlled by AT&T and consisting of MediaOne's assets, liabilities and personnel. The subsidiary Licensee will remain as a corporate

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81 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.

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

83 Malden Hearing Transcript at 8-22; FCC Form 394.

84 Malden Hearing Transcript at 13. *See, e.g.*, Greenfield Transcript at 39-53; New Bedford Transcript at 27-31; Barnstable Transcript at 29-38.

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

entity and the Somerville Licensee. Effectively, the transaction will combine AT&T/TCI with MediaOne management.[86]

Just five months ago on June 16, 1999, the Mayor specifically approved MediaOne's managerial and technical qualifications in the Time Warner/MediaOne transfer. The Mayor's stated concerns regarding MediaOne's managerial and technical qualifications in this proceeding, based on her desire for an upgrade and new services not required by the License and a matter for renewal discussions, do not affect those qualifications. It is frivolous and not sustainable to claim that AT&T lacks the managerial qualifications to operate under the License.

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

D. Count 4. The Mayor's Denial Based on Lack of Legal Qualifications Was an Arbitrary and Unreasonable Action That Cannot Be Sustained As a Matter of Law or Fact

The Mayor's conclusion that AT&T lacks legal qualifications because it has refused to submit to forced access is not only irrelevant to the transfer process as previously discussed, but is simply wrong as a matter of law. The Denial Letter states that AT&T lacks legal qualifications because its "failure to provide non-discriminatory access for non-affiliated ISP's poses a barrier to the operation of a free and competitive market for high speed data

[86] While not necessary to establish the management qualifications of AT&T in this proceeding, it is also frivolous for the Mayor to suggest that AT&T does not have the management qualifications, independent of MediaOne management, to operate the cable system in Somerville. 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 Mayor approved them five months ago in connection with the transfer from Time Warner to MediaOne.

services…[which] potentially rise[s] to the level of an actionable anti-trust violation." These conclusions are entirely speculative and have no basis whatsoever in law or fact.

In fact, there is no finding or evidence anywhere that AT&T has violated the antitrust laws by deploying competitive high speed Internet access in any market. The fact that AT&T does not even offer such services in Somerville clearly illustrates the arbitrariness of the Mayor's denial on this basis. Ironically, although MediaOne does not yet offer such service in Somerville, when it does it will be the third in the market. As the Mayor herself observes, Somerville residents already receive a choice of high speed Internet access service from Bell Atlantic and RCN.[87] AT&T's provision of such services would simply make Somerville a more competitive market, not an anti-competitive one.

As previously discussed, the Special Magistrate and the Cable Division rejected efforts of issuing authorities to interject forced access into the MediaOne/AT&T transfer proceeding. Somerville itself sought, but has not received, an FCC ruling to the contrary. MediaOne is not required and does not even offer high speed access in the market, although two other major providers provide such services. To concoct a denial purportedly based on AT&T's supposed lack of legal qualifications when actually premised on forced access under these circumstances is preposterous. The Mayor's denial on this basis is arbitrary and unreasonable and cannot be sustained.

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

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[87] *See* Letter to Bartlett F. Leber, MediaOne from Dorothy A. Kelly Gay, Mayor Somerville, at 1, September 20, 1999 (Exhibit 9).

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." [88] For the forgoing reasons, the Cable Division should summarily reverse the attempt by the Mayor to interject forced access, and other irrelevant issues, into the transfer process and grant the transfer from MediaOne to AT&T.

Respectfully submitted,

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[88] *See* 801 C.M.R. § 1.01(7). *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.

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