

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION**

MEDIAONE OF MASSACHUSETTS, INC.,
MEDIAONE GROUP, INC., AND AT&T
CORP.

CTV 99-6

Appellants,

v.

MAYOR OF THE CITY OF NEWTON

Appellee.

**APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
DECISION REGARDING CITY OF NEWTON 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 Mayor of the City of Newton, Massachusetts ("Mayor") of the transfer of control of Licensee's cable television license for Newton.¹ The Mayor's denial states that it is based upon AT&T's lack of cable television management and technical expertise. This conclusion is plainly contrary to the evidence that was adduced during the regional hearings and cannot stand. The weight of this evidence alone entitles Appellants to summary decision. However, the record also clearly demonstrates that the denial is pretextual. It is in fact based upon Appellants' refusal to provide a monetary settlement for alleged matters of License non-compliance and to submit to a forced access obligation in return for transfer approval.² Because the Mayor's effort to use the

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 of Government Affairs, AT&T from David B. Cohen, Mayor, City

license transfer process as leverage to settle unrelated License compliance issues and to amend the License plainly violates Massachusetts law and the terms of the Newton cable license itself, Appellants are entitled to summary decision as a matter of law on each count in this appeal. ³

II. Summary of Proceedings.

MediaOne acquired the Newton cable television license from Continental Cablevision in 1996, following the City's July 30, 1996 approval of the transfer. ⁴ Renewal discussions are expected to commence in anticipation of the March 1, 2001 expiration date. ⁵

On or about July 13, 1999, MediaOne Group, Inc. and AT&T Corp. filed applications on FCC Form 394 with 175 cities and towns in Massachusetts, including the City of Newton, 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. ⁶ 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

of Newton, November 9, 1999 (Denial Letter) (Exhibit 1). Letter to Bartlett F. Leber, Vice President & Corporate Counsel MediaOne from Daniel M. Funk, City Solicitor, November 19, 1999 (City's November 19 Letter) (Exhibit 2).

³ Newton's action also violates provisions of federal law including, but not limited to, the Communications Act, 47 U.S.C. §§ 537, 541(b)(3)(D), 541(c), 544(e), 544(f)(1), 546. 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 Newton.

⁴ See Letter to John Patrone, Commissioner, Mass. Cable Television Commission from Thomas B. Concannon, Jr. Mayor, City of Newton, July 30, 1996 ("U S WEST/Continental Transfer Letter") (Exhibit 3).

⁵ MediaOne submitted its Section 626 renewal notice to the City on March 23, 1998.

⁶ See 47 U.S.C. § 537, 47 C.F.R. § 76.502 ; 207 C.M.R. § 4.02.

and making non-binding recommendations regarding whether to approve the transfer applications.⁷ Most of the towns and cities (165 of 175 municipalities), including Newton, participated in the hearings.⁸

Representatives of Newton participated directly in the August 10, 1999 Newton regional hearing.⁹ At that hearing, following Appellants' presentation of testimony and evidence concerning the qualifications of AT&T relevant to the transfer criteria under Massachusetts law, Newton representatives noted that renewal negotiations were about to begin with MediaOne and inquired about whether the transfer would affect the renewal process, including any License violations found following the transfer.¹⁰ MediaOne confirmed that the renewal process is not impacted by the transfer process and that the Licensee would remain responsible for all License compliance issues.¹¹

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.¹² The Magistrate's Report noted that the hearings included discussions concerning the "open or forced access issue"

⁷ 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).

⁸ *See* Summary of Proceedings and Magistrate's Report, Charles Beard, Esq., at 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.

⁹ *See* Newton Regional Hearing Regarding Change in Control of Cable T.V. Licenses from MediaOne Group, Inc. to AT&T Corp., August 10, 1999 at 36-42, 51 (Newton Hearing Transcript) (Exhibit 4).

¹⁰ *Id.* at 41 (Ms. Linda Walden, Telecommunications Coordinator for City of Newton) (Exhibit 4).

¹¹ *Id.* at 41-42 (Exhibit 4).

¹² 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.

that while “interesting and important” were not relevant to the criteria to be considered under Massachusetts law.¹³

On October 28, 1999, the Mayor wrote to AT&T expressing the following concerns regarding the transfer: (i) the lack of cable television management experience and technical expertise “of AT&T itself”; and (ii) compliance issues related to the current License.¹⁴ With respect to the compliance issues, the Mayor alleged that (i) MediaOne had not complied with an Institutional Network requirement; (ii) that the repositioning of the local access channels had caused the City damages; and (iii) that there was a “lack of response and access to management at the local level.”¹⁵ The Mayor also stated his view that “non-discriminatory access to the MediaOne/AT&T cable modem platform for unaffiliated providers of Internet and on-line services is essential” and requested a written response from AT&T concerning its position on forced access.¹⁶

Following a meeting with the Mayor on November 4, 1999 to discuss these issues, AT&T responded to the Compliance Letter on November 8, 1999, explaining that the retention of MediaOne management together with AT&T’s management and technical expertise, including the experience serving 11 million TCI customers, would ensure that the Licensee would retain its management and technical qualifications.¹⁷ The November 8 Response reaffirmed AT&T’s commitment to “remain a community partner, and to ensure that senior management is available to

¹³ *Id.* at 4, 16 and 18.

¹⁴ Letter to William Leahy, Regional Director of Government Affairs, AT&T from David B. Cohen, Mayor, City of Newton, October 28, 1999 at 1-2 (Compliance Letter) (Exhibit 5).

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ Letter to David B. Cohen, Mayor, City of Newton from Michael J. Morrissey, AT&T, November 8, 1999 (November 8 Response) (Exhibit 6).

work with [the Mayor] relative to any concerns that may arise.”¹⁸ The November 8 Response also acknowledged that the repositioning of the public access channel, although technically required, may have caused inconvenience and offered a grant to promote the channel in accordance therewith.¹⁹ With respect to the Institutional Network, the technical problems experienced by the City arose from the use of the original I-Net for high speed data, something not required by the 1991 License because such uses were not anticipated at the time the I-Net was designed and built. AT&T noted that nevertheless, MediaOne had resolved the technical problems that were within its ability to rectify in light of the design characteristics of the 1991 I-Net.²⁰ To the extent that a redesigned I-Net would be required for the City’s current needs, it was observed that “construction of an I-Net is a usual component of franchise renewal discussions.”²¹ In anticipation of the outcome of those renewal negotiations, the November 8 Response offered a grant towards “institutional technology.”²²

On November 9, 1999, the Mayor denied the transfer of the Newton license to AT&T, stating that his decision was based on AT&T’s lack of management experience and technical expertise. The Mayor stated: “... AT&T indicated that it would retain the present MediaOne personnel. However, I understand that the regulatory criteria for transfer pertain to

¹⁸ *Id.*

¹⁹ *Id.* at 2. MediaOne repositioned the access channel to correct signal quality problems associated with the original channel position.

²⁰ In fact, the City has used the I-Net regularly throughout the License term, and since 1995 for high speed data and other demanding applications. In addition, the City uses an I-Net provided by RCN. RCN also delivers cable television, high speed Internet access and other services in Newton.

²¹ November 8 Response at 2.

²² *Id.* The November 8 Response also addressed the forced access issue and explained certain commitments that AT&T would make concerning its Internet access service. *Id.* at 2-3.

AT&T's cable television management experience (as Transferee) not MediaOne's (as Transferor).”²³

The Mayor also challenged AT&T's reliance upon MediaOne's management personnel based upon two allegations of License noncompliance by MediaOne, and the repositioning of the local access channel. With respect to License non-compliance, the Mayor alleged that MediaOne failed (i) to comply with customer service requirements because local management was not sufficiently responsive; and (ii) to comply with the Institutional Network requirement.²⁴ The Mayor asserted that these alleged shortcomings represent “ongoing technical and managerial failure on the part of MediaOne. If AT&T is intending to rely solely upon MediaOne's expertise in these areas, I continue to be concerned about AT&T's proposed managerial plan.”²⁵ The Denial Letter stated that “although not a basis of denial, I have serious concerns about the open access issue.”²⁶

On November 10, 1999, MediaOne wrote to the Mayor urging an extension of the 120 day transfer review process to allow additional discussions to resolve outstanding issues.²⁷ The Mayor did not formally agree to the extension and on November 19, 1999, MediaOne received a letter from the City proposing “a resolution to the denial of the license transfer to AT&T.”²⁸ The City's November 19 Letter claimed \$738,400 in monetary damages that the City had suffered from

²³ Denial Letter at 1 (Exhibit 1).

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ Letter to Mayor David B. Cohen from Bartlett F. Leber, MediaOne, November 10, 1999 (Exhibit 7).

²⁸ Letter to Bartlett F. Leber, MediaOne from Daniel M. Funk, November 19, 1999 at 1 (City's November 19 Letter) (Exhibit 2).

the alleged failure by MediaOne “to provide [the City] with a reliable and working I-Net.”²⁹ The letter then explained that the “Mayor is prepared to approve the transfer of the license to AT&T upon: (1) receipt of payment to the City of Newton in the amount of \$738,400;” (2) the removal of I-Net equipment; and (3) the grant of “‘most favored nations’ status with respect to the open access issue.”³⁰

As noted above, MediaOne acquired the Newton License just three years ago following the City’s July 30, 1996 letter approving MediaOne (through its predecessor U S WEST) under the relevant transfer criteria.³¹ In that transfer proceeding, Newton participated in the regional hearing process where the Special Magistrate concluded, after nine regional hearings in Massachusetts, that U S WEST had the managerial, technical and other qualifications to operate the Newton cable system, largely by virtue of its plan to rely on existing Continental management personnel.³² MediaOne has since upgraded the Newton system so that it has doubled its channel capacity, and offers competitive telephone service as well as high speed Internet access. As a member of the Newton Cable Board testified at the Newton regional hearing, “MediaOne already has advanced services. We have one of the most advanced systems in the country in place in Newton.”³³ The City and MediaOne are now also engaged in the renewal process (the renewal

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ See U S WEST/Continental Transfer Letter (Exhibit 3).

³² See 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 8 (“*Continental Cablevision*”) (“Because U.S. West is acquiring Continental’s management experience to add to its own cable television experience...it is apparent that the Combined Entity will have the management experience necessary to meet the obligations of the...license agreements...If their performance does not measure up to their commitments, the Issuing Authority can...address its concerns within the context of the license renewal process.”).

³³ Newton Hearing Transcript at 36.

window opened on March 1, 1998). To the extent there is any basis for the City's professed concerns with compliance--a point that Appellants contest—it is to be explored in the renewal, not the transfer process.

The record in this proceeding makes it clear that the denial, taken at face value, conflicts with the overwhelming weight of the evidence, the Special Magistrate's recommendation, the relevant legal criteria under Massachusetts law, and the terms of the Newton cable television license. It is also clear that the true basis for the denial of the transfer was MediaOne's and AT&T's refusal to pay a monetary settlement for alleged License non-compliance and because of the Appellants' refusal to submit to a forced access requirement.

III. Argument

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

A. Count 1: *The Mayor's Denial Based on AT&T's Lack of Management Experience and Technical Expertise was an Arbitrary and Unreasonable Action That Cannot Be Sustained as a Matter of Law or Fact*

The Mayor stated that the denial was based on "concerns regarding AT&T's lack of cable television management experience and technical expertise."³⁴ The record is clear that AT&T is qualified in these respects by virtue of its own management and technical expertise, that of its subsidiary TCI, the largest cable television operator in the United States serving some 16 million subscribers, and that of the local management from MediaOne, which will be retained following the merger. For this reason, the Mayor's

³⁴ Denial Letter at 1 (Exhibit 1).

denial is unfounded and cannot be sustained. Indeed, the Special Magistrate appointed to conduct the hearings and provide a recommendation concluded that:

I was charged with the duty of helping cities and towns to assess whether AT&T has the legal ability, the management experience, the technical expertise, and the financial capability to fulfill all of the obligations under the MediaOne franchises...I believe that all of these questions should be answered in the affirmative.³⁵

The Mayor's concern appears to be that AT&T's cable television qualifications are derived through a subsidiary rather than directly at the AT&T parent level. However, Massachusetts law does not require a proposed transferee to have such "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.³⁶ As such, AT&T is the nation's largest MSO, qualified to operate cable systems in 45 States and serving 16 million customers.³⁷ Beyond the experience of TCI, AT&T has the managerial and technical qualifications in its own right to assume control of MediaOne, as AT&T demonstrated in the FCC Form 394 application and during the course of the 11 regional hearings in Massachusetts.

³⁵ Magistrate's Report at 18.

³⁶ 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.

³⁷ 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.

Indeed, in granting AT&T's application to acquire TCI, the FCC found that AT&T had the requisite qualifications to operate cable systems.³⁸

In the Newton transfer proceeding (Newton and the other ten regional hearings), AT&T demonstrated that it was fully qualified to manage the MediaOne cable system in Newton based upon its own expertise, the embedded expertise in TCI management, and the MediaOne management structure that would be retained following the merger.³⁹ MediaOne testified in detail regarding the managerial and technical capabilities of local MediaOne management.⁴⁰ This continuity of MediaOne management in Newton 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.⁴¹ A member of Newton's Cable Board testified at the Newton regional hearing “MediaOne already has advanced services. We have one of the most advanced systems in the country in place in Newton.”⁴²

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

³⁸ See *TCI-AT&T Transfer Order* at 9 (the merger serves the “public interest, convenience and necessity”).

³⁹ Newton Hearing Transcript at 9-16; FCC Form 394 (Exhibit 4).

⁴⁰ Newton Hearing Transcript at 27-33 (Exhibit 4). See, e.g., Greenfield Transcript at 39-53; New Bedford Transcript at 27-31; Barnstable Transcript at 29-38.

⁴¹ *Magistrate's Report* at 8 (specifically finding that AT&T had the requisite managerial expertise in recommending the approval of the transfer).

MediaOne's assets, liabilities and personnel. The subsidiary Licensee will remain as a corporate entity and the Newton Licensee. Effectively, the transaction will combine AT&T/TCI with MediaOne management.⁴³ It is frivolous and not sustainable to claim that AT&T lacks managerial qualifications to operate under the License.

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

B. Count 2: The Transfer Was Arbitrarily Denied Because It Was A Pretext To Receive A Cash Payment And A Forced Access License Amendment

Although presented in the guise of managerial and technical qualifications issues, the Denial Letter, together with the City's November 19 Letter, make it apparent that the Mayor's decision is based upon other irrelevant matters under Massachusetts law. The Mayor's reliance on alleged non-compliance issues in questioning MediaOne's managerial and technical qualifications is belied by the frank proposition in the November 19 letter to approve the transfer in exchange for \$738,400 and a most favored nation ("MFN") provision regarding forced access.⁴⁴ If MediaOne personnel were truly unqualified managerially and technically, as asserted in the Denial Letter, the payment of this sum together with a MFN provision would not cure such deficiencies. The Mayor's reliance on MediaOne's alleged lack of managerial and technical qualifications is a pretext. Denying the transfer based upon Appellants' refusal to settle

⁴² Newton Hearing Transcript at 36 (Exhibit 4).

⁴³ 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 Newton. As previously described, in addition to its TCI resources, 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.

⁴⁴ As the Cable Division is well aware, the forced/open access issue has been debated throughout the transfer proceedings in Massachusetts, as well as in courts and agencies throughout the country. A more detailed discussion describing the debate can be found in Docket No. CTV 99-2 in the "Appellants' Memorandum in Support of Motion For Summary Decision Regarding City of North Andover License Transfer Denial," CTV 99-2 filed on Nov. 23, 1999, at 2-9.

compliance issues or agree to a forced access MFN license amendment in the transfer process is illegal and improper under Massachusetts law and the terms of the License.⁴⁵ The City's November 19 Letter makes it clear that the denial is based on the City's desire for a cash-for-transfer payment and a forced access license amendment.

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."⁴⁶ 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."⁴⁷ 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 Newton before the License was issued and have been codified in regulations under which the license has previously been transferred. The Newton License is explicitly subject to the rules of the Cable

⁴⁵ MediaOne and AT&T intend to negotiate in good faith during the ongoing renewal process concerning issues appropriate for that setting.

⁴⁶ *Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission*, 372 Mass. 495, 496, 362 N.E.2d 897, 899 (1977) (footnote omitted).

⁴⁷ *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.").

Division⁴⁸ and Newton itself has followed Division procedures in prior transfers—until this case. It is arbitrary and unreasonable for the Mayor to deny consent based upon MediaOne’s refusal to settle alleged License compliance issues or to amend the License in the transfer process.

When this License was issued on August 9, 1990, 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 resolution of license compliance issues or the consideration of franchise amendments.⁴⁹ As early as 1981, the Commonwealth recognized that an issuing authority would “arbitrarily or unreasonably” withhold approval if it were to use a license transfer process to amend a cable franchise or to inject other issues into the process. 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

⁴⁸ Newton Cable Television Renewal License at § 15.6.

⁴⁹ 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*”).

proceeding to amend the licenses as set forth in the Commission's regulations on license amendment, 207 CMR 5.00.⁵⁰

In its November 13, 1985 *Bay Shore* decision, the Agency embraced the policy in a formal adjudicatory proceeding.⁵¹ This well-understood limitation has since been codified in regulations.⁵² 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.⁵³

⁵⁰ See Nov. 18, 1981 Letter from General Counsel Kenneth Spigle to S. K. MacNown (Exhibit 8). 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.

See Jan. 24, 1983 Letter from General Counsel Kenneth Spigle to Lawrence Pszeny (Exhibit 9). To the same effect is the Mar. 9, 1983 Letter from Counsel Roseanne McMorris to Michael Angelini regarding Worcester, Auburn, Leicester and Spencer (Exhibit 10).

⁵¹ 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 reaffirmed that an issuing authority review only the applicant's qualifications to hold the license under the recognized criteria. 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 negotiating license terms.

⁵² 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).

⁵³ *In re Amendment of 207 C.M.R. §§ 4.01 - 4.06*, Docket No. R-24, Report & Order, ¶ 58 (Nov. 27, 1995).

This regulatory codification of the Division's long-standing policy was firmly in place at the time Newton last consented to transfer of the License, from Continental to MediaOne (through U S WEST) just three years ago. In approving the July 1996 transfer, the City conformed its actions to the requirements of Massachusetts law. Likewise, Special Magistrates appointed to facilitate major commercial transactions have consistently adhered to the rule segregating transfer proceedings from amendments and resolution of customer service, public access and related compliance issues. 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.⁵⁴

Moreover, the management decisions of concern to the Mayor (implementation of the I-Net, the repositioning of public access channels and customer service issues) are 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.⁵⁵

⁵⁴ See *Continental Cablevision* at 14.

⁵⁵ See *id.*

With regard to the Mayor's position that MediaOne itself lacks managerial and technical qualifications upon which AT&T can rely because of local management decisions relating to customer service, the I-Net and the local access channel position, the appropriate place to take issue with these decisions is through the ongoing renewal process, but not through transfer. As previously noted, in the case of the AT&T /MediaOne transaction, the Special Magistrate concluded that AT&T was qualified in all relevant respects.⁵⁶

With respect to the Mayor's effort to unilaterally amend the License, nothing in the License requires the Licensee to provide a forced access MFN clause. Nor does the Newton license have any provision that would confer upon the Mayor the right to unilaterally amend the terms of the License to require an MFN clause or to amend or insert any license term, during the course of a transfer proceeding or otherwise. 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."⁵⁷

Even if the License had 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 written public notice; a hearing; and opportunity for public comment.⁵⁸ The issuing authority and licensee must create a written report explaining "the purpose for which the requested amendment is being made."⁵⁹ Those procedures have not been followed here. The entire process

⁵⁶ See *supra* at note 35.

⁵⁷ Newton Cable Television Renewal License § 15.1.

⁵⁸ See 207 C.M.R. § 3.07.

⁵⁹ See *id.*

by which Licenses are negotiated, issued, transferred, and renewed would be thwarted if the terms could be unilaterally amended by the issuing authority.

The denial of the transfer premised upon the Mayor's desire to receive a monetary payment to settle alleged License compliance issues and to receive a forced access MFN license amendment in no way relates to AT&T's or MediaOne's qualifications to operate the cable system under the existing Newton license. The Mayor's denial premised on managerial and technical qualifications, is a pretext to pressure Appellants into a cash payment and a forced access amendment to the License. Denying a transfer on this basis makes a mockery of the governing statute, Division orders, 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.⁶⁰

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

CONCLUSION

Appellants have demonstrated that "there is no genuine issue of fact relating to all or part of a claim or defense and [they are] entitled to prevail as a matter of law."⁶¹ For the forgoing reasons, the Cable Division should summarily reverse the Mayor's denial and grant the transfer from MediaOne to AT&T.

⁶⁰ 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 March 1, 1998. 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.

⁶¹ See 801 C.M.R. § 1.01(7)(h). See, e.g., *Ridge Cablevision Corp. v. Braintree*, CATV Docket No. A-33 (April 14, 1983), ¶ 3; *Belmont Cable Associates v. Belmont*, CATV Docket No. A-65 (August 18, 1988), at 3, § III and authorities cited therein.

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