



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division**

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In the Matter of)
)
AT&T CSC, Inc.,)
AT&T Corp., and)
AT&T Comcast Corporation)
)
Appellants)
)
v.)
)
Board of Selectmen of the)
Town of Westford)
)
Appellee)
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Docket No. CTV 02-5

Date Issued: September 18, 2002

INTERLOCUTORY ORDER ON MOTIONS FOR SUMMARY DECISION

This action comes before the Cable Television Division of the Department of Telecommunications and Energy upon Appellants AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation's appeal of the disposition of the cable license transfer application by Appellee, the Board of Selectmen of the Town of Westford.

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FOR: BOARD OF SELECTMEN OF THE TOWN OF
WESTFORD
Appellee

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I. INTRODUCTION

On March 1, 2002, AT&T Corp., as the Transferor and the ultimate parent company of the licensee AT&T CSC, Inc., (d/b/a “AT&T Broadband”), and AT&T Comcast Corporation (“AT&T Comcast”), as the Transferee, submitted to the Board of Selectmen of the Town of Westford as the Issuing Authority (“Appellee” or “Westford”) an application for approval of a change of control of the Cable Television Renewal License (the “License”) to AT&T Comcast (AT&T CSC, Inc., AT&T Corp., and AT&T Comcast are together referred to as “Appellants” or the “Companies”). Upon receipt of the application, Westford had sixty days within which to hold a public hearing and a further sixty days to render its final vote on the matter.

207 C.M.R. §§ 4.02(2) and 4.03(1); see also 47 U.S.C. § 537. During this 120-day period, Westford was allowed to consider the appropriateness of approving or denying the transfer based on the following criteria: (a) management experience, (b) technical expertise, (c) financial capability, and (d) legal ability to operate a cable system under the existing license. 207 C.M.R. § 4.04(1).

Appellee held its required public hearing on April 10, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit I, Cable Television License Transfer Hearing Transcript (“Exhibit I”)). The public hearing was continued to April 24, 2002, to facilitate follow-up written testimony (id. at 99). A second public hearing was held in conjunction with the Board of Selectmen meeting on June 11, 2002 (see Appellants’ Appendix in Support of Appeal at Exhibit K, Board of Selectmen Hearing Transcript (“Exhibit K”)). Westford voted to deny the License transfer application at this second hearing and issued a written decision to the Cable

Television Division (“Cable Division”) of the Department of Telecommunications and Energy on June 18, 2002, pursuant to 207 C.M.R. § 4.05 (see Appellants’ Appendix in Support of Appeal at Exhibit A, Westford Board of Selectmen Transfer Report dated June 18, 2002 (“Exhibit A”)). Appellee found that AT&T Comcast did not have the requisite management experience, financial capability, technical expertise, or legal ability to operate the cable system under the License (id.).

Pursuant to G.L. c. 166A, § 14, the Companies appealed Westford’s decision (“Appeal”) to the Cable Division on July 18, 2002. Concurrent with the Appeal, Appellants filed a Motion for Summary Decision (“Appellants Motion”) with a supporting memorandum (“Appellants Memorandum”), and a Motion for Expedited Processing of the Appeal, pursuant to 801 C.M.R. § 1.01(7)(h).¹ On August 8, 2002, Westford filed an Opposition to the Motion for Summary Decision (“Appellee Opposition”) and a Cross Motion for Summary Decision (“Appellee Cross Motion”).² On August 19, 2002, Appellants filed an Opposition to the Cross Motion for Summary Decision (“Appellants Opposition”). On August 27, 2002, the Cable Division held a procedural conference and established a tentative procedural schedule.

¹ On July 25, 2002, Westford filed an Opposition to Appellants’ Motion for Expedited Processing and a Motion to Extend the Time to respond to the Motion for Summary Decision. On July 31, 2002, the Cable Division issued an Interlocutory Order granting Appellants’ Motion for Expedited Processing to the extent deemed appropriate, granting Appellee’s Motion to Extend Time to oppose the Motion for Summary Decision, and establishing preliminary ground rules.

² Appellee Opposition and Appellee Cross Motion were filed as one document.

In its Cross Motion for Summary Decision, Appellee agreed that there are no genuine issues of fact and asserted that the Issuing Authority's decision was reasonable as a matter of law (Appellee Cross Motion at 1). Nevertheless, following discussion of the Cable Division's standard of review at the procedural conference, Appellee stated that there are factual issues to be resolved and that summary decision is not appropriate (Procedural Conference Transcript ("Tr.") at 9). We consider this statement to be further opposition to Appellants' Motion for Summary Decision and a withdrawal of its Cross Motion. Thus, we need not address Appellee's Cross Motion.

II. SCOPE OF PROCEEDING

In their pleadings as well as during the procedural conference, the parties raised the issue of the appropriate role of the Cable Division under Section 14 of G.L. c. 166A in reviewing a decision of a local issuing authority to withhold consent of a license transfer application under Section 7 of G.L. c. 166A.³ In addition to reconciling the provisions of Sections 7 and 14, the Cable Division must consider and reconcile the conflicting precedent on this issue. Compare Rollins Cablevision of Southeast Massachusetts, Inc. v. Board of Selectmen of the Town of Somerset, CTV A-64 (1988) ("Rollins") and MediaOne of Massachusetts, Inc., et al. v. Board of Selectmen of the Town of North Andover, et al.,

³ Section 7 provides that "[n]o 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. Such consent shall be given only after a hearing upon a written application. . . ." Section 14 allows a licensee who is aggrieved by the action of an issuing authority in denying consent to the transfer or assignment of a license or control thereof to appeal the decision to the Cable Division.

CTV 99-2, 99-3, 99-4, 99-5, Order on Motions for Summary Decision/Consolidation (2000) (“MediaOne I”). These state law considerations must also be balanced with the purposes of the federal licensing scheme.

Westford argues that our review is analogous to that undertaken by a court of law and should be limited to a review of whether Westford was arbitrary or unreasonable based solely on the record that was before it (Appellee Opposition at 5; Tr. at 8).⁴ Westford specifically disputes the Cable Division’s authority to conduct a de novo review (Appellee Opposition at 5). The Companies maintain that, should the Cable Division reject their Motion for Summary Decision, they must have the opportunity to present further evidence and testimony to the Cable Division (id. at 11-12; Tr. at 7).

Section 19 of G.L. c. 166A establishes a clear distinction between the procedural requirements applicable to a municipality conducting a Section 7 proceeding and those applicable to the Cable Division in a Section 14 proceeding. Specifically, under Section 19, the public hearing held by an issuing authority in accordance with Section 7 is exempted from the formal procedures of G.L. c. 30A. The Cable Division, however, must conduct its proceedings under Section 14 pursuant to the provisions of Chapter 30A. G.L. c. 166A, § 19. While the Cable Division has most recently ruled that this latter provision requires a de novo

⁴ Appellee argued in its Opposition and at the procedural conference that Exhibits C and J of Appellants’ Appendix in Support of Appeal were not part of the record before it and therefore should not be considered by the Cable Division (Appellee Opposition at 2; Tr. at 27). The only dispute regarding the record before the Cable Division is to these two documents that, even if we were to consider them, would not affect our findings herein.

proceeding, (MediaOne I), earlier precedent supports an appellate review based on an “arbitrary or unreasonable” standard (Rollins).

As Appellee suggests, a de novo proceeding by the Cable Division may be fundamentally unfair to the municipality by providing a cable operator, which has not met its burden of proof, a “second bite of the apple” to make its case (see Tr. at 14). Moreover, if the Cable Division were to conduct a de novo proceeding in every instance on appeal, then the proceedings before municipal issuing authorities might come to be considered dispensable, thus frustrating the intent of the Legislature in enacting Section 7. While the Cable Division has ultimate authority over cable licensing matters, we must neither disregard the municipality’s authority to review a license transfer application in the first instance nor create an opportunity for cable operators to forum-shop. The Legislature has explicitly granted municipalities the authority to approve or reject a request to transfer a license. To construe Section 14 so as to render the Section 7 authority vested in municipalities void would violate a general principle of statutory construction: Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole and to further the intent of the Legislature as evidenced by the entire statutory scheme. See Norman J. Singer, Sutherland Statutory Construction § 46.05 (2000); Baker v. Chisholm, 268 Mass. 1, 6, 167 N.E. 321 (1929); Green v. Wyman-Gordon Co., 422 Mass. 551, 554, 664 N.E.2d 808 (1996). We conclude that the Massachusetts Legislature sought to vest some licensing authority in the municipalities, while reserving ultimate authority for the Cable Division.

Nevertheless, application of an “arbitrary or unreasonable” standard pursuant to Section 7 alone would run counter to both federal and state law. A finding that an issuing authority acted arbitrarily or unreasonably in denying the transfer does not mandate a conclusion that a transferee possesses the management experience, technical expertise, financial capability, and legal ability to operate a cable system under an existing franchise. In order to determine whether a transferee possesses the requisite qualifications, the Cable Division is required to conduct further proceedings pursuant to the provisions of Chapter 30A.

An order remanding a license transfer matter to a municipality is not contemplated by Section 14 and would be inconsistent with the goals of the federal transfer process. See 47 U.S.C. § 537; see also 47 C.F.R. § 76.502. As we stated in ruling on the Motion for Expedited Processing, we must adhere at a minimum to the spirit of the federal scheme that establishes a 120-day period for review of transfer applications. AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford, CTV 02-5, Interlocutory Order on Motion for Expedited Processing, Motion to Extend Time, and Preliminary Ground Rules (2002), citing 47 U.S.C. § 537. State law must compliment, not conflict with, federal law and goals where Congress has left some authority to the state. “A particular state rule will be pre-empted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” Cable Television Assoc. Of New York v. Finneran, 954 F.2d 91, 98 (2nd Cir. 1992), citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); accord Cablevision of Boston Limited Partnership v. Flynn, 710 F.Supp. 23, 26 (D. Mass. 1989). If the Cable Division allowed for remand, with the possibility of further

appeal to the Cable Division, it could extend the transfer process so far beyond the federal 120-day period as to frustrate the federal transfer process entirely.

We have held that, since the Cable Division's Section 14 proceeding is the first proceeding in the transfer review process conducted pursuant to Chapter 30A, the Cable Division must provide parties with the procedural protections required by Chapter 30A and therefore must investigate and evaluate the transfer application *de novo*. MediaOne I at 6. We affirm that finding here. However, in order to give Section 7 its due, we must also conduct a review of the issuing authority's decision under an "arbitrary or unreasonable" standard. Thus, our review in this transfer proceeding must be a two-step process. First, we must ask whether the issuing authority's decision was arbitrary or unreasonable. To this end, we must review the record developed by the municipality and provide an opportunity for both parties to submit evidence as to whether the municipality's actions were reasonable. A finding that the municipality was not arbitrary or unreasonable would complete our review and the issuing authority's decision would stand. A contrary finding would require the Cable Division to proceed to the second step and conduct a *de novo* proceeding to determine whether the transfer should be approved based on the four criteria set out in 207 C.M.R. § 4.04.⁵ The Cable Division concludes that this two-step process, reached after full review of the parties'

⁵ We realize this departs somewhat from the process announced in MediaOne I. Nonetheless, the result is not inapposite. Where we granted summary decision in MediaOne I, no further hearings were required on those issues because they were beyond the scope of the proceeding. For issues determined to be within the scope of proceedings, the need for hearings was obviated by settlement.

arguments on motion and at the procedural conference, appropriately reconciles the provisions of Sections 7 and 14, and ensures the state process does not conflict with the federal licensing scheme.

In this instance, Appellants have submitted a motion for summary decision claiming there is no genuine issue of fact material to the question of whether Westford acted unreasonably (Appellants Motion at 2). According to Appellants, the Cable Division may determine whether Westford's decision was arbitrary or unreasonable based on the pleadings without further evidentiary hearings. Appellants further claim that there are no genuine issues of material fact that AT&T Comcast has satisfied the four-prong test of 207 C.M.R. § 4.04(1) and, that they are thus entitled to a decision as a matter of law. We address each of these claims in turn.

III. STANDARD OF REVIEW FOR SUMMARY DECISION

The Standard Adjudicatory Rules of Practice and Procedure, which govern the conduct of formal proceedings of agencies subject to Chapter 30A, authorize the use of full or partial summary decision in agency decisions. 801 C.M.R. § 1.01(7)(h). The Rules specifically provide that “[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense.” Id. Summary decision may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Mass. Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-786,

405 N.E.2d 151 (1980). Moreover, an evidentiary hearing is never required if the dispute only involves issues of law or policy. Kenneth Culp Davis, Administrative Law Treatise, Volume 1, § 8.4, at 389, citing Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). The Cable Division has stated that summary judgment is “appropriate where it has been demonstrated that no genuine issue [of] material fact exists and where the moving party is entitled to judgment as a matter of law.” Belmont Cable Associates v. Belmont, CATV Docket No. A-65, at 3 (1988), citing Greater South Shore Cablevision, Inc., v. Board of Selectmen of Scituate and Scituate Cablesystems Corporation, CATV Docket No. A-32 (1983).

The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if it would have no burden on an issue if the case were to go to trial. Attorney General v. Bailey, 386 Mass. 367, 371, 436 N.E.2d 139, cert. denied sub nom Bailey v. Bellotti, 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. O’Brion, Russell & Co. v. LeMay, 370 Mass. 243, 245, 346 N.E.2d 861 (1976).

IV. WHETHER APPELLEE'S DECISION TO WITHHOLD CONSENT WAS ARBITRARY AND UNREASONABLE AS A MATTER OF LAW

A. Summary of Positions

1. Appellants

Appellants assert that there are no genuine issues of fact and that they are entitled to summary decision as a matter of law because Westford's decision to withhold consent to the License transfer disregarded the four transfer review criteria and was instead based on considerations beyond the scope of a transfer review (Appellants Motion at 2). Specifically, Appellants assert that Westford withheld its consent as a means of renegotiating the current License to acquire a system upgrade, addressing alleged noncompliance with the current License on the part of AT&T Broadband, and ensuring better service from the Transferee (Appellants Memorandum at 2).

2. Appellee

Appellee asserts that the Transferee lacks the qualifications necessary to meet the four transfer criteria (Appellee Opposition at 2). Appellee's argument focuses on the proposition that the Transferee will rely on the abilities of AT&T Broadband to run the cable system, that such abilities are insufficient under the terms of the License, and that therefore the Transferee's abilities will be insufficient (*id.* at 10; Exhibit A, at 2). Appellee argues that AT&T Broadband's performance is relevant to the four transfer criteria because it is indicative of AT&T Broadband's qualifications to run the cable system and hence AT&T Comcast's qualifications to run the cable system (Appellee Opposition at 14, 15; Exhibit A, at 2, 3, 4).

B. Analysis and Findings

1. System Upgrade

Appellants contend that Westford's denial was pretextual, as Westford sought to leverage its position as Issuing Authority to renegotiate the terms of the License in order to include a requirement that the system be upgraded to 750 megahertz ("MHz") (Appellants Motion at 2). Appellants note that the current License requires the cable system to be maintained only at its current 450 MHz level and that it does not require that the cable system be upgraded (Appellants Memorandum at 20-21). Appellants conclude that since Westford based its denial on considerations beyond the requirements of the License, and therefore beyond the scope of the transfer review, Appellee's decision to withhold consent to the transfer was, as a matter of law, arbitrary and unreasonable (Appellants Motion at 2; Appellants Memorandum at 21-22).

Appellee maintains that AT&T Broadband promised to upgrade its system, but does not reference any License provision, amendment, or other legal document that reflects any contractual obligation of AT&T Broadband to upgrade the system (Exhibit A, at 2, 3, 4). Nevertheless, Appellee claims that it reasonably denied the License because AT&T Broadband's failure to upgrade the Westford system is indicative of AT&T Broadband's lack of the requisite management experience, financial capability, and technical expertise to operate the system (Appellee Opposition at 14; Exhibit A, at 2, 3, 4). With respect to the managerial and technical criteria, Appellee explains that the failure to upgrade is relevant because the Transferee stated it will rely on AT&T Broadband's current management, and since AT&T

Broadband failed to upgrade the cable system, then AT&T Comcast similarly will be unable to upgrade the system (Appellee Opposition at 10, 13; Exhibit A, at 2, 3, 4). With respect to the financial criterion, Appellee contends that the Transferee failed to provide a commitment that any available upgrade-related funds would be used to upgrade Westford (Appellee Opposition at 12; Exhibit A, at 3).

The Cable Division's regulations provide that, in reviewing a license transfer application, an issuing authority "shall not propose amendments to or renegotiate the terms of the existing license. . . ." 207 C.M.R. § 4.04(2). We have held that subsection 4.04(2) "preserves the purpose of the transfer approval process by requiring a meaningful review of the applicant's relevant qualifications and preventing the dilution of the process by the introduction of peripheral issues." MediaOne I at 29. Accordingly, it is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the license transfer process. Bay Shore Cable TV Assocs. v. Weymouth, CTV A-55, at 3 (1985) ("Bay Shore").

We accept as undisputed fact that the current License in Westford does not contain a requirement that the licensee upgrade the system beyond the current level of 450 MHz and that there exists no amendment or other legal document that would revise the current License to reflect any promises made by AT&T Broadband. Appellants alleged these two facts and Appellee did not allege any specific fact that would establish the existence of a genuine issue of material fact. See O'Brion, Russell & Co. v. Le May, 370 Mass. at 245. Therefore, we find that to condition approval of the License transfer on AT&T Comcast's commitment to upgrade

the system is an attempt to renegotiate the current License and is arbitrary and unreasonable as a matter of law.

With respect to Appellants' argument that Westford's denial was pretextual, a review of the hearing transcripts finds numerous instances of AT&T Comcast being asked for a definitive commitment as to when advanced services would be available in Westford (see e.g., Exhibit I, at 35-40; Exhibit K, at 41-44).⁶ Further, the undisputed testimony presented at Westford's Board of Selectmen hearing indicates that the Board's ultimate goal was to obtain a commitment from the Transferee to upgrade the system. AT&T Comcast's representative at the hearing was discussing the Transferee's financial qualifications, when Appellee interrupted:

I don't mean to be rude, but I mean, I'd rather have you cut to the meat and potatoes of it. You're not going to upgrade between now and renewal next spring, let's face it. It's just not going to happen. And how much cash flow you have in the bank, that's all well and good, but I think what the people in town are looking for is improved services.

(Exhibit K, at 39).

Our precedent is clear: efforts by issuing authorities to add to, enhance or otherwise modify existing franchise obligations in the pretext of requiring compliance with the four

⁶ The failure of AT&T Broadband to upgrade and provide advanced services was a major focus at both public hearings (see Exhibit I, at 33, 35-40, 46, 52-53, 54, 55, 64-65, 93; see Exhibit K, at 10, 11, 14, 15, 16, 23, 41-44).

criteria of the transfer standard are prohibited.⁷ MediaOne I at 33. One of the two questions asked in the Financial Qualifications section of Form 394 is whether the Transferee has sufficient operating capital or as AT&T Comcast phrased it before the Board, “operating capital cash flow,” to consummate the transaction and operate the facilities for three months (Exhibit K, at 39). Therefore, whether AT&T Comcast has sufficient operating capital cash flow is not a matter to be flippantly dismissed; rather, a determination of whether the Transferee has sufficient operating capital cash flow is the true “meat and potatoes” of the federal financial qualifications standard. Appellee’s dismissal of this financial information out of hand in order to bring the discussion back to system upgrades demonstrates Westford’s resolve to obtain an upgrade. We therefore find that Westford’s determination that AT&T Broadband’s failure to upgrade the system is indicative of the Transferee’s lack of managerial experience, technical expertise, and financial capability and, thus its application should be denied, is pretextual and prohibited. As such, Appellee’s decision deny the transfer as a pretext for obtaining an upgrade commitment is arbitrary and unreasonable as a matter of law.

Further, as we stated in Bay Shore at 3, “if an issuing authority wants to negotiate the terms of its license or to amend it, it may do so in a proceeding held pursuant to a license renewal or license amendment.” Westford’s License is due to expire in April 2003, and

⁷ Moreover, even if the failure to upgrade were not only indicative but conclusive of AT&T Broadband’s lack of requisite qualifications to operate the system, Appellee does not provide a reasonable basis for its conclusion that AT&T Comcast, as a merged entity that will also draw on the resources of Comcast Corporation, does not satisfy the requisite transfer criteria.

therefore Westford should be engaged in negotiations of a renewal license (Appellants' Appendix in Support of Appeal at Exhibit B, Cable Television Renewal License dated April 8, 1998, at Section 2.2). Discussions of system upgrades are appropriately raised in that context. Westford may not circumvent the renewal process, or attempt to gain leverage in its negotiations, by unreasonably and arbitrarily withholding its consent to transfer.

2. Compliance Issues

Appellants assert that Westford based its denial of the transfer request on AT&T Broadband's alleged noncompliance with the current License and that since compliance issues are outside of the scope of the transfer process, Westford's decision was arbitrary or unreasonable as a matter of law (Appellants Motion at 2). Further, Appellants note that rather than an acquisition from one corporation to another, this transaction involves a merger of two companies, AT&T Broadband and Comcast Corporation, and that Appellee's failure to analyze the qualifications of the second merging company, Comcast Corporation, was arbitrary or unreasonable as a matter of law (Appellants Memorandum at 3, 16).

In its Opposition, Appellee states unequivocally that "the Issuing Authority did not deny the Transfer Request because of its allegations of Renewal License noncompliance" (Appellee Opposition at 14). Rather, Appellee maintains that, according to precedent, AT&T Broadband's management experience is squarely at issue because the Transferee stated during the transfer proceeding that the current AT&T Broadband management and staff would remain in place after the transfer (*id.* at 13, citing MediaOne of Massachusetts, Inc., et al. v. City Manager of the City of Cambridge, CTV 99-4, Interlocutory Order on Scope of the

Proceeding (2000) (“MediaOne II”); see also Exhibit A, at 2, 3, 4). Appellee analogizes this matter to the AT&T/MediaOne proceeding where we determined that since AT&T Corp. argued it possessed the requisite management experience to operate a cable system solely by virtue of its planned retention of MediaOne management, the management experience of MediaOne was at issue (id., citing MediaOne II at 5). Here, AT&T Comcast maintains that it possesses the requisite management experience, and in support cites the combined management experience of AT&T Broadband and Comcast Corporation (Appellants Motion at 16). Unlike the prior AT&T/MediaOne matter, AT&T Comcast does not rely solely on the management experience of the current licensee to satisfy the management criteria standard. Therefore, while the management experience of AT&T Broadband is relevant, so too is the management experience of Comcast Corporation.

Appellants provided numerous documents that addressed the management experience of both AT&T Broadband and Comcast Corporation (see e.g., Exhibit 10 of Federal Communications Commission (“FCC”) Form 394; Exhibit I, at 12-13, 41-42; Appellants’ Appendix in Support of Appeal at Exhibit F, Letter Response from AT&T Comcast dated April 19, 2002 (“Exhibit F”); Appellants’ Appendix in Support of Appeal at Exhibit G, Second letter response from AT&T Comcast dated April 19, 2002 (“Exhibit G”); Appellants’ Appendix in Support of Appeal at Exhibit H, Letter response from AT&T Comcast dated June 11, 2002 (“Exhibit H”)). Appellants also stated that AT&T Broadband and Comcast Corporation would have an equal portion of Board members on AT&T Comcast’s Board of Directors (Attachment to Section I, Question 2 of FCC Form 394). With respect to Comcast

Corporation's highest level of management, Appellants provided additional information as to the management experience of Brian L. Roberts and Ralph J. Roberts (id.; see also Exhibit 10 of FCC Form 394; Exhibit G; Exhibit I at 12-13). Appellants also provided references by way of letters as well as the names of individuals at municipalities served by Comcast Corporation that could be contacted by Westford (Exhibits F and H).

However, in its Transfer Report, Appellee does not discuss any qualifications regarding Comcast Corporation and references only anecdotal information based on its relationship with its current cable operator, AT&T Broadband.⁸ The failure to analyze Comcast Corporation's current management under Chief Executive Officer Brian L. Roberts is even more curious given Appellee's finding that AT&T Comcast "will be essentially managed" by Brian L. Roberts and the current Chairman of the Board of AT&T Corp., C. Michael Armstrong (Appellee Opposition at 9). In addition, by reviewing only AT&T Broadband's qualifications, Westford provides no reasonable basis for its ultimate conclusion that AT&T Comcast lacks the requisite management experience; rather it concludes, without reason, that since AT&T Broadband is noncompliant, AT&T Comcast will also be noncompliant.

⁸ Comcast Corporation is only mentioned twice in the Transfer Report: 1) "AT&T Comcast has only provided unaudited financial projections based primarily on 'Historical Comcast' and 'Historical AT&T Broadband figures,'" and 2) "FTC and other federal regulatory agencies have not approved the AT&T Broadband-Comcast transfer" (Exhibit A, at 3, 4).

During the transfer process, Appellee should have considered all of the information presented in order to determine whether it was sufficient to establish that the Transferee had the requisite management experience, technical expertise, financial capability, and legal ability. The essence of being arbitrary is to analyze only the evidence that supports a desired conclusion. See Black's Law Dictionary 104 (6th ed. 1990) (defining "arbitrary" as "willful and unreasoning action, without consideration and regard for facts and circumstances presented"). Since Westford reviewed and analyzed only information supporting its desire to deny the License transfer application, its decision was arbitrary and unreasonable. Even if Westford reviewed the Comcast Corporation data and rejected it, a statement of reasons for such conclusion was not provided. While Westford is not an agency under Chapter 30A, we analogize the statement of reasons required from an issuing authority under 207 C.M.R. § 4.05 to the statement of reasons required from an administrative agency under Chapter 30A. The purposes are the same: it allows the appellate body to properly exercise its appellate function. Cf. Smith v. Director of the Division of Employment Security, 376 Mass. 563, 382 N.E.2d 199 (1978) (where no findings are made on the record, appellate body cannot determine whether examiner disbelieved those portions of evidence or believed them but did not consider them determinative). Because Appellee determined that AT&T Comcast lacked the requisite qualifications and yet failed to provide any reasoned analysis of the information regarding one of the two merging companies, the decision to deny the transfer is, as a matter of law, arbitrary and unreasonable.

3. Improved Services

Appellants also allege that during the transfer process, Westford expressed overall dissatisfaction with the “status quo” of AT&T Broadband’s performance and, on this basis, withheld consent for the transfer (Appellants Memorandum at 24, 25, 26). Appellants maintain that Westford demanded that AT&T Comcast change operations and do “better” than AT&T Broadband (*id.* at 25). Appellants argue that such a demand was outside the scope of the four transfer criteria and Appellee’s decision as such was arbitrary or unreasonable (Appellants Motion at 2). In opposition, Appellee maintains that “issues of license noncompliance, in fact, may be discussed at the transfer public hearing,” and the denial was not based on AT&T Broadband’s performance under the License (Appellee Opposition at 14).

In support of its position that the “status quo” is not proper grounds upon which to withhold consent for a license transfer, Appellants state that a transferee needs only to be able to “step into the shoes of the transferor” (Appellants Memorandum at 12, citing Bay Shore at 3; accord In Re Amendment of 207 C.M.R. 4.01 – 4.06, CATV R-24, at 17, 18, Report and Order (Nov. 27, 1995) (“R-24”). However, the holding of Bay Shore is not so simplistic. The Bay Shore decision, now codified in 207 C.M.R. § 4.04, stands for the proposition that “[i]t is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the transfer process.” Bay Shore at 3, citing CATV Commission Advisory, March 9, 1983. The requirement that a transferee needs only to be able to “step into the shoes” of the transferor is meant to ensure that an issuing authority not condition the transfer of a license by alterations thereto because, assuming the transferor is in full compliance

with the license, the fit of those shoes constitutes conformity with the license. In addition, the transfer process reflects a protective intent by ensuring that a transferee — who by definition was not a party to the license at the time it was executed — is nonetheless fully qualified to fulfill the existing license obligations. MediaOne II at 4; see also Bay Shore at 3; R-24, at 17-18. However, when the transferor is in breach of the license, its shoes no longer represent a measurement of the requisite managerial experience, financial capability, technical expertise, and legal ability to operate the cable system. See 207 C.M.R. § 4.04. A transferee must be able to step into the shoes of a compliant operator, as those were the shoes cobbled by the issuing authority in granting the license. In other words, in order to obtain approval for a license transfer, a transferee may be required to demonstrate that it has the requisite ability to assume the obligations of the existing license. Thus, evidence of documented noncompliance may be relevant in the context of a license transfer to the extent that it is used to determine the requirements contained in the license. However, it is not permissible for an issuing authority to base a denial on past noncompliance with license requirements. MediaOne II at 5.

Appellants identify two questions from Appellee that illustrate this point: “[g]iven the well-publicized difficulties that AT&T Broadband is having at the present time answering its telephones, what explicit assurances can you give us . . . that these inadequacies will be resolved by AT&T Comcast?” and “[w]hat explicit assurances will AT&T Comcast provide to the Town to substantiate its claim that it can operate the Westford cable system in a professional and effective manner and, in effect, improve upon the performance of AT&T?” (Appellants Memorandum at 25, citing Exhibit I, at 65-66). It is permissible for Appellee to ask these types

of questions in order to determine whether AT&T Comcast possesses the necessary qualifications to comply with the actual License requirements and not merely the qualifications necessary to provide the same level of service as the current operator. Since it is appropriate for an issuing authority to judge a transferee against the existing license rather than the transferor's performance, we cannot find Westford's action arbitrary or unreasonable in this regard.⁹ We therefore deny Appellants' motion on this ground.

V. WHETHER APPELLANTS HAVE SATISFIED 207 C.M.R. § 4.04, AS A MATTER OF LAW

Having found that Westford was arbitrary and unreasonable in rejecting the transfer application, we must now determine whether, as a matter of law, AT&T Comcast satisfies the four-prong test of 207 C.M.R. § 4.04. In its Motion, Appellants argue that there are no genuine issues of material fact, that they presented sufficient evidence to meet their burden of proof in establishing AT&T Comcast's qualifications to operate the Westford system and, that they are entitled to summary decision as a matter of law (Appellants Motion at 2).

With respect to its legal qualifications, Appellants state that AT&T Comcast is duly incorporated and that the Licensee, AT&T CSC, Inc., will remain the legal licensee and qualified to do business in Massachusetts (Appellants Memorandum at 5). Appellants also certified in the FCC Form 394 filing that they would be bound by the terms of the existing license. FCC Form 394, Section V, Part II(c). Appellee does not contest these facts.

⁹ Of course, if Westford's discussion of compliance issues served as the basis for denial rather than determining the requirements under the license, such decision would be arbitrary and unreasonable.

Nevertheless, Appellee contends that AT&T Comcast is without sufficient legal ability to operate the cable system because (1) the federal regulatory approvals required for the merger have not been issued; and (2) the Company exists only as a paper filing with no track record, rendering it a “functionally nonexistent entity” (Appellee Opposition at 13-14).

Appellee’s proposition that the denial is appropriate because federal regulatory approvals have not yet been issued disregards the fact that the federal and issuing authority reviews of license transfers follow concurrent but yet nonparallel schedules. Federal law requires the issuing authority review to be completed within 120 days of the FCC Form 394 filing, while placing no similar time restriction on the federal reviews. More important, the possibility that the federal reviewing authorities might not approve the transaction does not present a genuine issue for an issuing authority. There would be no adverse consequences for the issuing authority who had approved a license transfer application and later learned that the federal government did not approve the underlying corporate transaction. The merger would not occur, and control of the license would not be transferred.

Appellee’s alleged concern that AT&T Comcast is only a paper company also lacks merit. Under this rationale, no entity created as a result of a merger of two other entities would ever receive approval to assume control of a license. The fact that AOL Time Warner was only a “paper company” did not prevent the issuing authorities who held licenses with Time Warner from reviewing the new entity’s legal qualifications. Thus, we conclude that Appellee has raised no genuine issue of fact material to the question of the Transferee’s legal ability.

The legal qualifications standard requires that the transferee provide evidence of its ability to conform to the law and to assume the obligations of the existing license. See Black's Law Dictionary 892 (6th ed. 1990) (defining “legal” as “conforming to the law; competent or adequate to fulfill the requirements of the law”). The FCC requires that an entity be able to do business legally. See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-264, FCC 95-21, at ¶ 55 (1995). The uncontested information provided by Appellants establishes legal ability under these standards. We therefore conclude that there is no genuine issue of material fact and, as a matter of law, AT&T Comcast has established that it possesses the requisite legal ability to operate the system under the current license.

With respect to the remaining three criteria, genuine issues of fact exist. As we discussed above, the Companies provided information concerning Comcast Corporation’s ability to assume the obligations of the license; such information was largely ignored by the Issuing Authority. Thus, the Cable Division must determine whether AT&T Comcast possesses the requisite managerial, technical, and financial qualifications. Therefore, we deny Appellants’ Motion with respect to these three criteria.

VI. NEXT PROCEEDINGS

During the procedural conference, the parties established a tentative procedural schedule, contingent on the date of issuance of this Order as well as the findings herein (Tr. at 75-76). We have determined that the Cable Division must make factual findings

pursuant to a Chapter 30A proceeding where the burden of proof is on the Appellant to establish that AT&T Comcast satisfies these three prongs. Appellants have stated that the record before the Issuing Authority (and before the Cable Division as contained in Appellants' Appendix in Support of Appeal) was sufficient to establish that AT&T Comcast satisfied the four criteria (id. at 21). Given this, the Cable Division questions the need of discovery and evidentiary hearings as originally contemplated during the procedural conference. Parties are directed to inform the Cable Division by September 26, 2002, as to whether they agree to stipulate that the record developed by the Issuing Authority and before the Cable Division as contained in the Appendix to Appellants' pleading is the record on which the Cable Division will base its decision.¹⁰ 801 C.M.R. § 1.01(10)(b). If the parties do not so stipulate, the parties must inform the Cable Division of what additional evidence they seek to admit or exclude. An estimate of the time required for discovery and a schedule for witness availability must be submitted by September 26, 2002.

¹⁰ The parties are not required to stipulate by affidavit to the documents. See 801 C.M.R. § 1.01(10)(b).

VII. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: Appellants' Motion for Summary Decision is hereby GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED: The parties must comply with the directives contained herein.

By Order of the
Department of Telecommunications and Energy
Cable Television Division

/s/ Alicia C. Matthews
Alicia C. Matthews
Director