

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

**AT&T CSC, INC.,  
AT&T CORP., and  
AT&T COMCAST CORPORATION**

**Appellants,**

**v.**

**BOARD OF SELECTMEN OF THE  
TOWN OF WESTFORD**

**Appellee.**

**Docket No. CTV 02-5**

**APPELLANTS' MOTION FOR RECONSIDERATION**

Pursuant to 801 C.M.R. §1.01(7)(l), and in light of Appellee's Motion to Reconsider, Appellants AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation hereby move that the Cable Division reconsider its *Interlocutory Order on Motions for Summary Decision*, issued September 18, 2002. In support of this motion, Appellants incorporate by reference the legal and factual arguments raised in the enclosed appeal papers, which Appellants file in support of this motion in lieu of appealing at this time. Specifically, Appellants enclose (1) AT&T CSC, Inc., AT&T Corp. and AT&T Comcast Corporation's Petition for Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision; and (2) Appellants' Memorandum of Law in Support of its Petition for Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision.

### **Relief Requested**

For the reasons set forth in the accompanying (1) AT&T CSC, Inc., AT&T Corp. and AT&T Comcast Corporation's Petition for Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision; and (2) Appellants' Memorandum of Law in Support of its Petition for Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision, Appellants request that the Division reconsider its *Interlocutory Order on Motions for Summary Decision*.

Respectfully submitted,

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Dated: October 2, 2002

LIT 1361186v1

**COMMONWEALTH OF MASSACHUSETTS  
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**Docket No. CTV 02-5**

**AT&T CSC, INC., AT&T CORP., AND AT&T COMCAST CORPORATION'S  
PETITION FOR APPEAL OF CABLE DIVISION'S INTERLOCUTORY ORDER ON  
MOTIONS FOR SUMMARY DECISION**

**Introduction**

Pursuant to G.L. c. 166A, §2 and G.L. c. 30A, §14, AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation (“Appellants”) hereby petition the full body of the Commissioners of the Department of Telecommunications and Energy (the “Department”) for appeal of decisions of law in the Cable Division’s (the “Division”) *Interlocutory Order on Motions for Summary Decision*, issued September 18, 2002 (the “Order”). Specifically, Appellants seek (a) to reverse the Division’s application of summary decision standards on Appellants’ Motion for Summary Decision, and (b) to set aside the Division’s interpretation of G.L. c. 166A §14 as requiring that the Division conduct a second-stage review of AT&T Comcast’s qualifications to operate as the ultimate parent corporation of the entity holding the existing Westford license where the issuing authority failed to consider these qualifications. The *Order* raises significant issues concerning the application of summary judgment standards and the Division’s standard of

review of transfer denials under Massachusetts and federal law that, if left to stand, would set a dangerous precedent inviting issuing authorities to render groundless denials. The Department should therefore exercise its discretion to hear this appeal.

As set forth more fully in the accompanying Memorandum of Law, the Division's *Order* erroneously failed to grant Appellants summary judgment in full given a factual record establishing AT&T Comcast's qualifications that Westford did not place in issue as required by applicable summary decision standards. Westford failed to sustain its burden to identify specific facts that establish the existence of a genuine issue of material fact in order to defeat a motion for summary decision.

Under these circumstances, the Division also erred in announcing that, after finding the issuing authority's denial "arbitrary or unreasonable," it would then review whether AT&T Comcast is qualified to operate the Westford cable system under the existing franchise. Once an issuing authority's transfer denial has been found "arbitrary or unreasonable" as a matter of law in violation of G.L. c. 166A, §7 and based on matters outside the applicable criteria of 207 C.M.R. 4.01(1), as the Division found here, the analysis should end there and the issuing authority should be ordered to approve the transfer. To conduct a second-stage review invites issuing authorities to abuse the transfer process by raising improper reasons for denial to gain time and nuisance value, and it improperly affords the issuing authority a second chance to revisit the operator's qualifications during an evidentiary hearing. Further hearing under G.L. c. 166A, §14 unduly delays the transfer process beyond 120 days and is not required where summary decision has satisfied the statute's requirement of a hearing.

## **Parties**

1. Appellant AT&T CSC, Inc., offering services as AT&T Broadband, is a Delaware corporation with an office in Andover, Massachusetts. It is qualified to do business in Massachusetts.

2. Appellant AT&T Corp. is a New York corporation with offices in New York City and its cable division office in Englewood, Colorado. It is the ultimate parent company of AT&T CSC, Inc. and currently controls the licensee.

3. Appellant AT&T Comcast Corporation is a Pennsylvania corporation with offices in Philadelphia, Pennsylvania. It is the transferee seeking to control the licensee.

4. The Board of Selectmen of the Town of Westford is the issuing authority for cable television licenses in the Town of Westford pursuant to G.L. c. 166A, §§ 1 and 4.

## **Background**

5. AT&T Broadband is the existing operator of the cable television system in the Town of Westford pursuant to a Cable Television Renewal License dated April 8, 1998 (the “License”).

6. As of December 19, 2001, AT&T Corp. and Comcast Corporation entered into a merger agreement under which a new AT&T Broadband Corporation with all of the cable television assets of AT&T Corp. will merge with Comcast Corporation to form AT&T Comcast Corporation. This merger is scheduled to occur before the end of 2002.

7. The merger – and the change of control of the licensee – is entirely at the parent-level. AT&T Comcast will become the new controlling parent company of the current licensee, AT&T CSC, Inc. The latter will continue to operate the cable system in Westford under the existing license, and the legal obligations under the existing license will remain unchanged.

8. On March 1, 2002, AT&T Corp., as the parent company of AT&T Broadband, and AT&T Comcast, as transferee, submitted an application to the Board on FCC Form 394 seeking the Board's approval for the transfer of control of the entity holding the cable television franchise in Westford from AT&T Corp. to AT&T Comcast.

9. Westford made supplemental requests for information, to which AT&T Comcast responded with additional information demonstrating its qualifications, and Westford held public hearings on April 10 and June 11, 2002.

10. On June 11, 2002, the Board voted to deny the transfer request, issuing its written decision explaining the reasons for its denial on June 18, 2002.

### **The Appeal to the Cable Division**

11. On July 18, 2002, Appellants filed a Petition with the Division seeking appeal of the transfer denial. Concurrent with the appeal, Appellants filed a Motion for Summary Decision, which set forth "Undisputed Facts" concerning AT&T Comcast's management experience, technical expertise, financial capability and legal ability to operate a cable system under the existing license.

12. Westford filed an "Opposition to the Motion for Summary Decision and Appellee's Cross-Motion for Summary Decision" on August 8, 2002. Westford's Cross-Motion for Summary Decision did not dispute any of the facts contained in Appellants' Motion for Summary Decision. Rather, Westford confirmed that "both parties assert that there is no dispute as to facts." *Appellee's Opposition to Appellant's Motion for Summary Decision and Appellee's Cross Motion for Summary Decision* at 1.

13. Westford objected to Exhibits C (Westford's September 27, 2000 Notice approving AT&T Broadband's acquisition of the Westford cable franchise) and J (AT&T

Comcast's Public Interest Statement) of the Appendix submitted to the Division in support of Appellants' Motion for Summary Decision. Westford does not dispute the facts contained in those exhibits, but complains that they were not part of the record before the Board when it issued its denial. Westford objects to the approval notice because it was not formally submitted to the Board as part of the transfer application. It objects to the Public Interest Statement only on the ground that it was not physically submitted to the Board because it was referenced as an Internet web address in response to one of Westford's supplemental requests for information, rather than being submitted in hard copy.<sup>1</sup>

14. On August 27, 2002, the Division convened a procedural conference, during which the parties discussed with the Division their positions on the cross-motions for summary decision. When pressed by the Division during that procedural conference, counsel for Westford confirmed its position that "We don't say there are any disputes as to fact. The record is the record, and pretty much as we've identified." Transcript of August 27, 2002 procedural conference at 44.

### **The Division's Order**

15. On September 18, 2002, the Division issued its *Interlocutory Order on Motions for Summary Judgment*. In its *Order*, the Division construed unspecified statements by Westford's counsel made during the procedural conference to be a withdrawal of Westford's Cross Motion for Summary Decision. *Order* at 6.

16. The *Order* also established a new, two-stage process for review of transfer denials. In the first stage, which the Division has already concluded, the Division concluded that Westford's denial was "arbitrary and unreasonable" in violation of G.L. c. 166A, §7. *Id.* at 22.

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<sup>1</sup> Westford first objected to the Public Interest Statement in its Cross-Motion for Summary Decision before the Division.

17. The Division announced that it would next conduct a second-stage review to determine de novo the qualifications of the applicant.<sup>2</sup> The Division stated: “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.” *Id.*

18. The Division proceeded to find that, with respect to the “legal ability” prong, “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.” *Id.* at 24. The Division granted Appellants Motion for Summary Decision as to the “legal ability” criterion.

19. With respect to the remaining three criteria, the Division ruled that “genuine issues of fact exist,” although the Order did not specify what these issues are. *Id.* On this basis, the Division held that it “must determine whether AT&T Comcast possesses the requisite managerial, technical, and financial qualifications.” *Id.* The Division therefore denied Appellants’ Motion for Summary Decision with respect to these three criteria.

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<sup>2</sup> The *Order* further asked the parties to inform it whether each would agree to stipulate that the record currently before the Division is the record upon which it will base its second-stage review of AT&T Comcast’s qualifications under the four criteria, or whether there is a need for discovery and an evidentiary hearing. With the exception of Westford’s objections to exhibits C and J noted above, the parties have stipulated that the Division may conduct its review based on the current paper record, and that there is no need for discovery or an evidentiary hearing.



## **Issues On Appeal**

This appeal presents two issues:

**1. Whether the Issuing Authority failed to meet its burden in opposing Appellants' Motion for Summary Decision.**

Once a party moving for summary decision establishes a factual basis for judgment, the non-moving party must respond and allege specific facts that would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. Appellants have set forth facts demonstrating their qualifications to operate the Westford cable system under the existing license, but Westford failed to specify a factual dispute as to any of those material facts. Do standards for summary judgment require summary decision in full?

**2. Whether the Division's second-stage review is required by G.L. c.166A, §14.**

The Division ruled as a matter of law that Westford's denial was "arbitrary and unreasonable" and "pretextual" to obtain promises of upgrades, but now will undertake a second review and evidentiary hearing to determine whether AT&T Comcast meets qualifications that Westford failed to review. Is such second-stage review necessary under G.L. c.166A, §14 and consistent with the state and federal 120-day limit on review of transfer applications?

## **Grounds For Appeal**

### **Authority to Appeal from Interlocutory Order of the Division**

1. General Laws, Chapter 166A, §2 provides (in pertinent part):

Appeals of any decision, order or ruling of the director may be brought within 14 days of the issuance of said decision to the fully body of the commissioners of the department. When so requested by any party interested, the department shall rule upon any question of substantive law properly arising in the course of any proceeding before the division within 14 days.

2. The statute specifically permits appeal of “any decision, order or other ruling of the director” and therefore permits this appeal of the Division’s *Interlocutory Order on Motions for Summary Decision*. Indeed, under the statute the Department has ruled on such an appeal of an interlocutory order of the Division partially granting summary decision. *Appeal of Manager of the City of Cambridge of the Cable Television Division’s Order on Motions for Summary Decision/Consolidation*, pursuant to G.L. c. 166A, §2, D.T.E. 00-49, and *Appeal of MediaOne of Massachusetts, Inc., MediaOne Group, Inc. and AT&T Corp. of the Cable Television Division’s Order on Motions for Summary Decision/Consolidation*, pursuant to G.L. c. 166A, §2 (Cambridge), D.T.E. 00-50, *Interlocutory Order on City of Cambridge’s Appeal and MediaOne’s Appeal of Cable Television Division’s Order on Motion for Summary Decision/Consolidation* (May 30, 2000).

### **Application of Summary Decision Standards**

3. “When 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.” 801 C.M.R. §1.01(7)(h). In ruling on a motion for summary decision, the Cable Division applies

summary judgment standards that are well established in Massachusetts. *See MediaOne of Mass., Inc. v. Board of Selectmen of the Town of North Andover*, Docket CTV 99-2, 99-3, 99-4, 99-5, *Order on Motions for Summary Decision/Consolidation* (May 1, 2000) at 10-11 (citing *O’Brion, Russell & Co. v. LeMay*, 370 Mass. 243, 245 (1976)).

4. These standards place a burden on the party opposing summary judgment, once the moving party has established a factual basis for judgment, to come forward with facts that establish a genuine issue of material fact. *Id.*; see *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711-712 (1991) (failure of party opposing summary judgment to “show with admissible evidence the existence of a dispute as to material facts” was fatal). As the Division itself held, the burden shifts to the non-moving party to “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.” *Order* at 11-12.

5. In this case, the *Order* acknowledges, “the Companies provided information concerning Comcast Corporation’s ability to assume the obligations of the license.” *Order* at 24. Despite this showing of its qualifications, Westford failed to identify any “specific facts” to refute AT&T Comcast’s qualifications and thereby establish a “genuine issue of material fact” as to those qualifications. Westford therefore failed to meet its burden and Appellants are entitled to summary decision.

### **The Division’s Second-Stage Review Process**

6. Section 617 of the Cable Television Consumer Protection & Competition Act of 1992, 47 U.S.C. §537, and 207 C.M.R. §4.02(2) both set a 120-day deadline for an issuing authority to act on a Form 394 application for transfer of control. The Cable Division adopted its

regulations codifying its criteria for transfer and incorporating the Section 617 requirements into state law as a means to prevent issuing authorities from abusing the transfer process by prolonging it as a means to gain leverage in license negotiations. The Division has stated: “[I]n response to commenters’ concerns that issuing authorities rarely act on transfer applications promptly and as an acknowledgement that federal law controls this issue, the Commission adopts regulations which bind issuing authorities to act within 120 days.” *In re Amendment of 207 C.M.R. 4.01-4.06*, Docket No. R-24, *Report and Order* at 11, ¶38 (November 27, 1995). If the application is not acted upon within 120 days of its submission, it is “deemed granted.” 47 U.S.C. §537.

7. Here, the Division held that Westford’s denial was “pretextual” to obtain system upgrades and “arbitrary and unreasonable” in violation of G.L. c. 166A, §7. *Order* at 22. A summary decision where there is no genuine dispute of material facts satisfies the requirements of an adjudicatory hearing, so no further hearing is required to satisfy G.L. c. 166A, §14. A second-stage review of AT&T Comcast’s qualifications invites issuing authorities to abuse the transfer process by raising improper reasons for denial in order to gain time to negotiate and improperly affords an issuing authority that has unlawfully denied a transfer request a second chance to revisit the operator’s qualifications during an evidentiary hearing. The second-stage review process frustrates the purpose of Section 617 and 207 C.M.R. §4.02(2) by unduly prolonging the transfer process well beyond 120 days, and is thus inconsistent with federal and state law.

### **Relief Requested**

For these reasons, as set forth more fully in the accompanying Appellants' Memorandum of Law in Support of Petition for Appeal, Appellants request that the Department issue an order:

- (a) granting Appellants' Motion for Summary Decision in full;
- (b) reversing the Division's ruling that it must conduct a second-stage review of AT&T Comcast's qualifications; and
- (c) remanding to Westford with instructions to approve Appellants' transfer application within 10 days.

Respectfully submitted,

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Dated: October 2, 2002

LIT 1359923v1

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**Docket No. CTV 02-5**

**APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS  
PETITION FOR APPEAL OF CABLE DIVISION'S INTERLOCUTORY ORDER ON  
MOTIONS FOR SUMMARY DECISION**

Appellants AT&T CSC, Inc., AT&T Corp., and AT&T Comcast Corporation ("Appellants") submit this Memorandum of Law in support of their Petition to the full body of the Commissioners of the Department of Telecommunications and Energy (the "Department") for Appeal of decisions of law in the Cable Division's (the "Division") *Interlocutory Order on Motions for Summary Decision*, issued September 18, 2002 (the "*Order*").

The Appellants brought their appeal to the Division pursuant to G.L. c.166A, §14 ("Section 14") on the grounds that consent by the Board of Selectmen of the Town of Westford ("Westford") to the transfer of control of AT&T CSC, Inc. from AT&T Corp. to AT&T Comcast was arbitrary or unreasonably withheld in violation of G.L. c. 166A, §7 ("Section 7"). The Division granted the Appellants' Motion for Summary Decision in part, holding as a matter of law that Westford was "arbitrary and unreasonable" in rejecting the transfer application in

violation of Section 7. Yet the Division did not end the case there, instead interpreting Section 14 to require the Division's de novo review of AT&T Comcast's qualifications to act as the ultimate parent corporation of AT&T CSC, Inc., the operator of the cable television system in Westford under the existing license.

The Division erred with respect to two issues of law. First, the Division misapplied summary decision standards to Westford's failure to identify a disputed fact on the four applicable transfer criteria in response to Appellants' Motion for Summary Decision. Second, the Division's interpretation of Section 14<sup>3</sup> as requiring a de novo review of AT&T Comcast's qualifications where the Division already has found the issuing authority's decision arbitrary and unreasonable as a matter of law is incorrect under the circumstances. Instead of reinforcing review of transfer requests at the municipal level as the Division intended, this remedy for violation of Section 7<sup>4</sup> devalues such review by freeing issuing authorities from accountability for their decisions and inviting arbitrary transfer denials merely to gain time and leverage on issues outside the transfer process. It also frustrates federal and state law by unduly prolonging the transfer process beyond the 120-day timetable for review of transfer applications and offering Westford a "second bite at the apple" to address AT&T Comcast's qualifications after rejecting the transfer application unlawfully.

These rulings of law should be reversed because they lack a "reasonable basis . . . in federal law and in the Cable Division's own statute, regulations, and precedent." *Appeal of Manager of the City of Cambridge of the Cable Television Division's Order on Motions for*

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<sup>3</sup> G.L. c. 166A, § 14 provides (in pertinent part): "The division shall hold a hearing upon each such appeal, requiring due notice to be given to all interested parties."

<sup>4</sup> G.L. c. 166A, §7 provides (in pertinent part): "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."

*Summary Decision/Consolidation, pursuant to G.L. c. 166A, §2, D.T.E. 00-49, Interlocutory Order on City of Cambridge's Appeal and MediaOne's Appeal of Cable Television Division's Order on Motion for Summary Decision/Consolidation at 11 (May 30, 2000) ("Cambridge Appeal").*

## **BACKGROUND**

This appeal arises from Westford's denial of the Appellants' request for transfer of control of the entity holding the cable television franchise in Westford from AT&T Corp. to AT&T Comcast. As of December 19, 2001, AT&T Corp. and Comcast Corporation entered into a merger agreement under which a new AT&T Broadband Corporation with all of the cable television assets of AT&T Corp. will merge with Comcast Corporation to form AT&T Comcast Corporation. This merger is scheduled to occur before the end of 2002.

The merger – and the change of control of the licensee – is entirely at the parent-level. AT&T Comcast will become the new controlling parent company of the current licensee, AT&T CSC, Inc. The latter will continue to operate the cable system in Westford under the existing license, and the legal obligations under the existing license will remain unchanged.

On March 1, 2002, AT&T Corp., as the parent company of AT&T Broadband, and AT&T Comcast, as transferee, submitted an application to Westford on FCC Form 394 seeking Westford's approval for the transfer. Westford made supplemental requests for information, to which AT&T Comcast responded with additional information demonstrating its qualifications, and Westford held public hearings on April 10 and June 11, 2002. These filings established AT&T Comcast's qualifications to operate the Westford cable system.

On June 11, 2002, the Board voted to deny the transfer request, issuing its written decision explaining the reasons for its denial on June 18, 2002.



### **The Appeal to the Cable Division**

Under Massachusetts General Laws, Chapter 166A, §7, an issuing authority may not “arbitrarily or unreasonably” withhold its consent to a requested transfer. Massachusetts regulations permit an issuing authority reviewing a request for transfer of control of a cable franchise to 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).

On July 18, 2002, Appellants filed a Petition with the Division seeking appeal of the transfer denial. Concurrent with the appeal, Appellants filed a Motion for Summary Decision, which set forth “Undisputed Facts” concerning AT&T Comcast’s management experience, technical expertise, financial capability and legal ability to operate a cable system under the existing license, and argued that Westford’s denial was arbitrary and unreasonable as a matter of law because it was based on considerations outside the four permissible criteria, such as demands for upgrades to the system and issues of alleged noncompliance with the license.

Westford filed an “Opposition to the Motion for Summary Decision and Appellee’s Cross-Motion for Summary Decision” on August 8, 2002. Westford’s Cross-Motion for Summary Decision did not dispute any of the facts contained in Appellants’ Motion for Summary Decision. Rather, Westford confirmed “both parties assert that there is no dispute as to facts.” *Appellee’s Opposition to Appellant’s Motion for Summary Decision and Appellee’s Cross Motion for Summary Decision* at 1.

Along with their Motion for Summary Decision, Appellants submitted an Appendix containing information presented to Westford. Westford objected to Exhibits C (Westford’s September 27, 2000 Notice approving AT&T Broadband’s acquisition of the Westford cable

franchise) and J (AT&T Comcast's Public Interest Statement) of the Appendix submitted to the Division in support of Appellants' Motion for Summary Decision. Westford does not dispute the facts contained in those exhibits, but complains that they were not part of the record before the Board when it issued its denial. Westford objects to the approval notice because it was not formally submitted to the Board as part of the transfer application. It objects to the Public Interest Statement only on the ground that it was not physically submitted to the Board because it was referenced as an Internet web address in response to one of Westford's supplemental requests for information, rather than being submitted in hard copy.<sup>5</sup>

On August 27, 2002, the Division convened a procedural conference, during which the parties discussed with the Division their positions on the cross-motions for summary decision. When pressed by the Division during that procedural conference, counsel for Westford confirmed its position that "We don't say there are any disputes as to fact. The record is the record, and pretty much as we've identified." Transcript of August 27, 2002 procedural conference at 44.

### **The Division's Order**

On September 18, 2002, the Division issued its *Interlocutory Order on Motions for Summary Judgment*. In its *Order*, the Division construed unspecified statements by Westford's counsel made during the procedural conference to be a withdrawal of Westford's Cross Motion for Summary Decision. *Order* at 3.

The *Order* also established a new, two-stage process for review of transfer denials. In the first stage, which the Division has already concluded, the Division concluded that Westford's denial was "arbitrary and unreasonable" in violation of G.L. c. 166A, §7. *Id.* at 21. The

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<sup>5</sup> Westford first objected to the Public Interest Statement in its Cross-Motion for Summary Decision before the Division. It did not request that the document be submitted in hard copy form before issuing its denial.

Division announced that it would next conduct a second-stage review to determine de novo AT&T Comcast's qualifications. The Division stated: "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." *Id.*

The Division proceeded to find that, with respect to the "legal ability" prong, "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." *Id.* at 24. The Division granted Appellants Motion for Summary Decision as to the "legal ability" criterion.

With respect to the remaining three criteria, the Division ruled that "genuine issues of fact exist," although the Order did not specify what these issues are. *Id.* On this basis, the Division held that it "must determine whether AT&T Comcast possesses the requisite managerial, technical, and financial qualifications." *Id.* The Division therefore denied Appellants' Motion for Summary Decision with respect to these three criteria.

## **ARGUMENT**

### **I. THE DIVISION INCORRECTLY APPLIED SUMMARY DECISION STANDARDS BY FINDING ISSUES OF FACT WHERE WESTFORD FAILED TO SPECIFY ANY.**

Under established summary judgment standards and Division regulations and precedent, the Appellants are entitled to summary decision as a matter of law. "When 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." 801 C.M.R. §1.01(7)(h). In ruling on a motion for summary decision, the Cable Division applies established Massachusetts summary judgment

law. See *MediaOne of Mass., Inc. v. Board of Selectmen of the Town of North Andover*, Docket Nos. CTV 99-2, 99-3, 99-4, 99-5, *Order on Motions for Summary Decision/Consolidation* (May 1, 2000) at 10-11 (citing summary judgment standards from *O’Brion, Russell & Co. v. LeMay*, 370 Mass. 243, 245 (1976)).

The leading statement of Massachusetts summary judgment standards is *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991). In that case, the Supreme Judicial Court declared that “[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses,” and the failure of the party opposing summary judgment to “show with admissible evidence the existence of a dispute as to material facts” was fatal to its position. *Id.* at 712-713. In this case, the Division recognized “the Companies provided information concerning Comcast Corporation’s ability to assume the obligations of the license.” *Order* at 23. Once Appellants established this factual basis for judgment, the burden shifted to Westford to “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.” *Order* at 9. Despite a factual record that established a factual basis to find AT&T Comcast’s qualifications, however, the Division did not hold Westford to this burden.<sup>6</sup>

It is Westford’s burden and not the Division’s to identify the specific facts in dispute. Nonetheless, although the Division stated, “With respect to the remaining three criteria [management experience, technical expertise and financial capability] genuine issues of fact exist,” the Division never specifies what these factual issues are. *Order* at 24. In contrast, in the

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<sup>6</sup> In civil practice, a party moving for summary judgment must submit a statement of facts it contends are undisputed. The opposing party in turn must provide “a concise statement of any additional facts as to which the opposing party contends there is a genuine issue to be tried” and, if it fails to do so, the facts stated by the moving party shall be deemed to have been admitted ....” Superior Court Rule 9A(b)(5).

*Cambridge Appeal*, the Division was able to identify specific issues in dispute. *See Cambridge Appeal, supra*, at 17-18.

Here, the Division acknowledges Westford “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” and, although “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.” *Id.* at 14 n.7, 23. With respect to the criterion of management experience, the *Order* catalogues the “numerous documents that addressed the management experience of both AT&T Broadband and Comcast Corporation.” *Id.* at 16. Yet Westford’s Transfer Report “does not discuss any qualifications regarding Comcast Corporation” and Westford “provides no reasonable basis for its ultimate conclusion that AT&T Comcast lacks the requisite management experience.” *Id.* at 17.

In short, Westford failed to put any facts at issue on any of the criteria the Division has established for review of transfer applications. An issuing authority does not present a genuine issue of material fact by ignoring facts and information. Given the absence of evidence going to any of the applicable criteria, the Division found Westford’s denial was “pretextual.” *Order* at 14. In other words, Westford denied the transfer request based not on the *facts* (and therefore does not dispute them), but based on unlawful reasons unrelated to the factual showing of AT&T Comcast’s qualifications submitted for summary decision. Westford’s denial presents precisely the type of “factually unsupported claims or defenses” that the summary judgment rule was designed to isolate and dispose of. *Kourouvacilis*, 410 Mass. at 713.

Westford has never disputed the facts. Its cross-motion for summary judgment states unequivocally “there are ‘no genuine issues of fact’” and “both parties assert that there is no dispute as to facts.” *Appellee’s Opposition to Appellants’ Motion for Summary Decision and Appellee’s Cross-Motion for Summary Decision* at 1. When pressed for its position during the Procedural Conference, counsel for Westford confirmed this position.<sup>7</sup> Although the *Order* construed general comments by Westford’s counsel at a procedural conference that there are unspecified “factual issues to be resolved”<sup>8</sup> as withdrawal of Westford’s Cross-Motion for Summary Judgment, *Order* at 3, Westford has clarified that it did not withdraw its motion. *Appellee’s Motion to Reconsider* at 6.

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<sup>7</sup> The transcript reflects at pages 43-44:

MS. MATTHEWS: Let me just say, if  
17 there's issues of fact, then there can't be a  
18 summary decision.  
19 MR. SMOOT: Right.  
20 MS. MATTHEWS: If you're trying to tell  
21 me now that there are issues of fact, then I'm not  
22 sure where you're going with your motion for summary  
23 decision, because if there are issues of fact,  
24 then --  
00044  
1 MR. SMOOT: We don't say there are any  
2 disputes as to fact. The record is the record, and  
3 pretty much as we've identified.  
4 It sounds to me, from what counsel is  
5 saying, that we don't need to have a trial for  
6 anything, other than if we stipulate as to the  
7 documents that are submitted in the record.

<sup>8</sup> Westford’s main issue with the facts at the procedural conference concerned not the truth of the factual information appellants placed before the Division, but what the factual record before the issuing authority was for purposes of Westford’s position that the Division is limited to “record review.”

Westford objected on this basis to Exhibits C and J in the Appendix. It argues that Exhibit C (Westford’s own notice approving the transfer of the cable franchise to AT&T Broadband) is not relevant and was not before the issuing authority. It argues that Exhibit J (Public Interest Statement) was not before the issuing authority because it was referenced as an Internet web address in a response to one of Westford’s supplemental requests for information, rather than being submitted in hard copy form. Because the Division correctly held that its review on appeal is not “record review” because of its obligation to conduct a hearing pursuant to G.L. c. 30A, the admissibility of Exhibits C and J does not turn on whether they were part of the “record” before the issuing authority (although the Appellants contend they were), but on whether they are relevant and admissible pursuant to G.L. c.30A, §11 (allowing “the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs”). The Division can consider any admissible evidence on summary decision. *Id.*

The parties do not dispute the underlying *facts* that AT&T Comcast submitted in support of its application, only the *conclusions* that can be drawn from these facts. The Division ruled that it must evaluate those facts de novo. Given the undisputed underlying facts in this case, the Division as the “ultimate” licensing authority can make the decision as a matter of law whether AT&T Comcast’s qualifications are sufficient meet the criteria under the Division’s regulations or not. No factfinding is required.

**II. THE DIVISION MISINTERPRETED SECTION 14 TO REQUIRE A DE NOVO REVIEW OF AT&T COMCAST’S QUALIFICATIONS EVEN WHERE THE DIVISION FOUND AS A MATTER OF LAW THAT WESTFORD DENIED CONSENT IN VIOLATION OF SECTION 7.**

The Division erroneously interpreted Section 14 when it announced that, although the denial was arbitrary and unreasonable as a matter of law, it must “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.” *Order* at 7. The Division’s conclusion on summary decision establishes that Westford’s denial violated Section 7 and satisfies the Section 14 and Chapter 30A hearing requirements. Nothing in either statute requires the Division to conduct a de novo hearing on criteria the issuing authority ignored; to do so is inconsistent with federal law and Division regulations and undermines the integrity of decisionmaking in the transfer process. Moreover, it is illogical that an unlawful denial should trigger further review, when the Division does not step in to conduct its own review of qualifications either where an issuing authority fails altogether to act on a transfer request where the issuing authority has failed to respond to an appeal from its denial.<sup>9</sup>

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<sup>9</sup> 47 U.S.C. §537.

**A. No Further Hearing Is Required Once The Division Sustains The Appeal as A Matter of Law.**

The express statutory grounds for appeal from the denial of a transfer application are that the denial violates the requirement of G.L. c. 166A §7 that “consent shall not be arbitrarily or unreasonably withheld.” Whether consent was unreasonably or arbitrarily withheld is therefore the ultimate issue. Here, just as “a finding that the municipality was not arbitrary and unreasonable would complete [the Division’s] review and the issuing authority’s decision would stand,”<sup>10</sup> the Division’s conclusion that the Westford denial failed this ultimate standard conclusively sustains the Appellants’ grounds for appeal and entitles them to relief.

The Division correctly observed that Section 14 requires a hearing on an appeal. But this procedural requirement does not warrant an additional substantive step in the Division’s review.<sup>11</sup> It is settled law – acknowledged and applied by the Division – that where undisputed facts permit summary decision, hearing requirements under Section 14 and Chapter 30A are satisfied. *See Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd.*, 9 Mass.App. Ct. 775, 785-786, 789 (1980) (holding that summary disposition procedures satisfy statutory hearing requirements); *Belmont Cable Assocs. 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 Corp.*, CATV Docket No. A-32 (1983)). Because the Division ruled in

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<sup>10</sup> *Order* at 7.

<sup>11</sup> The Division’s two-stage review was intended to “give Section 7 its due,” but also to preserve de novo review. *Order* at 7. To do so does not necessarily require two stages. The ultimate question in an appeal from a transfer denial is whether the denial was arbitrary and unreasonable looking at the record in light of the facts. This question may be answered as a matter of fact (as when qualifications are challenged) or as a matter of law (as when the grounds for denial are outside the scope of the applicable transfer criteria). Because Section 14 requires an adjudicatory hearing and Section 7 does not, the Division must decide this ultimate issue de novo. On the record presented on summary decision in this case, the Division found the denial arbitrary and unreasonable as a matter of law. In another case, as the Division noted, the opposite finding would require judgment in the issuing authority’s favor. *Id.* at 7. In yet other cases, the issue might have to be decided as a matter of fact, requiring the Division to proceed with a hearing de novo.



Appellants' favor on the substantive grounds for appeal under Section 7, no further process is required in this case.<sup>12</sup>

Accordingly, a finding that the denial was "arbitrary or unreasonable" in violation of Section 7 should end the analysis, and the Division should order the issuing authority to approve the transfer. *Cf. Continental Cablevision v. Board of Selectmen of the Town of Randolph*, Docket No. A-75, *Order* at 1 (November 15, 1996) (entering order approving transfer of license where issuing authority disobeyed Commission's order to approve transfer).

**B. To Conduct A Further Hearing to Do What The Issuing Authority Abdicated Lacks A Reasonable Basis in Applicable Law.**

The Division did not rest its decision on the finding that Westford acted arbitrarily or unreasonably. Instead, it reasoned that such a finding "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." *Order* at 6. From Section 14's hearing requirement, the Division incorrectly extrapolated that it must decide whether the applicant meets the requisite qualifications, not just whether the issuing authority's decision complied with Section 7. While it is logically correct that a finding of a violation of Section 7 does not necessarily import a conclusion that an applicant meets the necessary qualifications, it does not follow that the Division must conduct a hearing on these qualifications.

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<sup>12</sup> The Division was correct that a remand to the issuing authority to redo its decision is inconsistent with federal and state law because it would prolong local review of the applicant's qualifications beyond the 120-day period required by law. *Order* at 6. Although in *Rollins Cablevision of Southeast Mass., Inc. v. Board of Selectmen of the Town of Somerset*, No. A-64, *Decision* at 9 (June 10, 1988) the Cable Commission remanded after finding that the issuing authority's decision was arbitrary and unreasonable in violation of Section 7, *Rollins* precedes the enactment of Section 617 of the Cable Television Consumer Protection & Competition Act of 1992 and the incorporation of federal law into Cable Division regulations. For the additional reasons discussed in Part II, the appropriate remedy is therefore to order the issuing authority to grant the application in this case.

The Division has “ultimate authority” over cable licensing matters. *Order* at 5. *Accord*, *Cambridge Appeal*, *supra*, at 11-12 and cases cited. With respect to transfers, the Division exercises this authority by defining through its regulations and its decisions what is arbitrary or unreasonable. *Id.* at 12. Here, both the statutory standard of Section 7 as the Division has defined it and the hearing requirements of Section 14 have been met. Nothing in Chapter 166A or Chapter 30A requires the Division to go further and pass on the applicant’s qualifications in the issuing authority’s stead.

The Division was appropriately concerned with the impact of the procedures it adopts on issuing authority review of transfer applications and the 120-day period review for review provided in Section 617 of the Cable Television Consumer Protection & Competition Act of 1992, 47 U.S.C. §537.<sup>13</sup> The two-stage process adopted here, however, creates the very conflicts that the Division sought to avoid.

Section 617 requires an issuing authority to act upon a transfer application within 120 days. As the FCC has explained in adopting the 120-day limit into its regulations, “Congress wanted to ensure that the local franchise approval process not unduly delay the consummation of transactions that do not implicate the concerns underlying the anti-trafficking provision.” *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992*, MM Docket No. 92-264, *Memorandum Opinion and Order* at 23, ¶52 (January 30, 1995). Massachusetts modeled its regulation after the federal statute and likewise

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<sup>13</sup> 47 U.S.C. §537 provides:

A franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

set a 120-day time limitation. 207 C.M.R. §4.02(2). The Division explained: “[I]n response to commenters’ concerns that issuing authorities rarely act on transfer applications promptly, and as an acknowledgement that federal law controls this issue, the Commission adopts regulations which bind issuing authorities to act within 120 days.” *In re Amendment of 207 C.M.R. 4.01-4.06*, Docket No. R-24, *Report and Order* at 11, ¶38 (November 27, 1995). The Division acknowledged that “we must adhere at a minimum to the spirit of the federal scheme that establishes a 120-day period for review of transfer applications.” *Order* at 6. Although practically speaking an appeal of a transfer denial is likely to extend the process beyond 120 days, the Division’s unnecessary de novo review of AT&T Comcast’s qualifications unnecessarily delays the process well beyond 120 days.

The 120-day limitation becomes meaningless if municipalities may issue arbitrary and unreasonable denials and leave review of the lawful criteria to an appeal before the Division.<sup>14</sup> Knowing that an arbitrary and unreasonable denial carries no consequences and that the Division will proceed to review the applicant’s qualifications in the issuing authority’s stead, an issuing authority could offer a baseless ground for denying a transfer to prolong the transfer process and gain nuisance value and leverage to negotiate more favorable license terms or other concessions outside the scope of transfer review. De novo review under these circumstances gives the issuing authority the “second bite of the apple” that Westford and the Division found would be unfair if afforded to a cable operator. *Order* at 5. Rather than enhancing “the municipality’s authority to review a license transfer application in the first instance,” *id.*, it devalues the of the issuing authorities’ role by making them unaccountable for their decisions.

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<sup>14</sup> In this case, for example, Form 394 was submitted on March 1, 2002, more than 210 days ago.

The Division has contended with a long history of disregard for the transfer process by issuing authorities, their consultants, or their counsel. Even though Section 7 has always provided that an issuing authority must act on a transfer application within 120 days even before federal law did so,<sup>15</sup> the Cable Commission recognized in 1995 that “few transfer proceedings are completed within this time;” it therefore incorporated federal law into its regulations to “bind issuing authorities to act within 120 days.” *In re Amendment of 207 C.M.R. 4.01-4.06*, Docket No. R-24, *Report and Order* at 11, ¶38 (November 27, 1995). Despite the Cable Commission’s “long-held” precedent limiting the scope of review of transfer applications and prohibiting renegotiation of licenses,<sup>16</sup> the record of the Cable Commission’s 1995 rulemaking reflects that issuing authorities often used transfer proceedings to negotiate. *Id.* at 17. In response, the Cable Commission codified its standards into regulations. *Id.* (adopting 207 C.M.R. 4.04). Even so, the Cable Division has had to deal with repeated cases in which issuing authorities have acted outside the scope of their authority<sup>17</sup> – right up to the present case, in which the Division found

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<sup>15</sup> *Teleprompter of Worcester, Inc. v. Board of Selectmen of Auburn*, Docket No. A-37, *Decision* at ¶16 (May 17, 1983) stated that:

The Commission’s transfer regulations require the holding of a hearing within a reasonable time, and the statute states that inaction for sixty days constitutes the basis for an appeal. These two provisions, when read together, require that an issuing authority schedule and hold a public hearing on a transfer application no later than sixty days after the application is filed. Once the hearing has been held, further action must be taken, again within an sixty-day period (to comply with section 14 of the statute). The action which must be taken is the issuance of the written public statement of the decision, called for by 207 CMR 4.06. Thus, the rules and the statute require a final decision on a transfer application no later than 120 days after the application for transfer is filed.

<sup>16</sup> See *In re Amendment of 207 C.M.R. 4.01-4.06*, Docket No. R-24, *Report and Order* at 17, ¶58 (November 27, 1995); *BayShore Cable TV Assocs. v. Board of Selectmen of the Town of Weymouth*, Docket No. A-55, *Decision* at 3 n.3 (November 13, 1985) (citing *CATV Commission Advisory*, March 9, 1983).

<sup>17</sup> See, e.g., *MediaOne of Mass., Inc. v. Board of Selectmen of the Town of North Andover*, Nos. 99-2, 99-3, 99-4, 99-5, *Order on Motions for Summary Decision/Consolidation* at 31-32 (May 1, 2000) (failure to provide open access not within applicable review criteria); *Rollins Cablevision of Southeast Mass., Inc. v. Board of Selectmen of the Town of Somerset*, No. A-64, *Decision* at 5 (June 10, 1988) (finding “the Board’s decision making was essentially speculative and not adequately supported by facts”); *BayShore Cable TV Assocs. v. Board of Selectmen*

that Westford improperly attempted to negotiate for an upgrade of the cable system. *Order* at 14. Unless the Division holds issuing authorities accountable for adhering to its standards, such practices will continue.

Under Section 617, a transfer application not acted upon within 120 days is “deemed granted” by operation of law without further review. 47 U.S.C. §537 (a). Approximately 60 to 65 issuing authorities in Massachusetts failed to act upon the AT&T Comcast application within 120 days, allowing the application to be deemed granted by operation of law. That outcome “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.” *Order* at 8. Nevertheless, the Division does not step in to conduct the review of qualifications that these issuing authorities failed to conduct; to do so would be contrary to Section 617. It is no less contrary to Section 617 to step in where the issuing authority has abdicated its legitimate review of qualifications. When an issuing authority violates Section 7 as a matter of law and rejects a transfer denial for “pretextual” reasons (as Westford has done here), review of the application should not be subject to further delay and the issuing authority should be ordered to approve the transfer.

The Division in fact has taken just that approach in *AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Ashburnham*, CTV 02-8. There, the issuing authority did not respond to the appeal of its denial, filing neither an answer nor an opposition to Appellants’ Motion for Summary Decision. Instead of concluding that the failure to respond does not mandate a conclusion that AT&T Broadband possesses the necessary qualifications and conducting its own hearing on these qualifications, the Division issued an Order to Show Cause why Appellants’

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*of the Town of Weymouth*, Docket No. A-55, *Decision* at 3-4 (November 13, 1985) (Board improperly conditioned its approval on addition of new terms to the license).

Petition should not be granted. The Order to Show Cause provided that, unless Ashburnham responds to this, the Cable Division “will grant Appellants’ Petition and order Ashburnham to approve the transfer of control of the license.” *Order to Show Cause* at 2. Westford’s failure to justify its denial does not warrant a different remedy than Ashburnham’s failure to defend.

Consistent with Section 617 and the Division’s “ultimate authority” over cable licensing, therefore, the Division should be required to “order the issuing authority to conform with its decision” by approving the transfer. G.L. c. 166A, §14.

### **CONCLUSION**

The Division appropriately sought to harmonize Sections 7 and 14 of Chapter 166A and to balance those considerations with the purposes of the federal transfer scheme. *Order* at 6-10. Under the circumstances of this case, however, the Division’s attempt to reconcile these interests missed in two respects. It misapplied summary decision law and it misinterpreted Section 14 to require further consideration of the facts concerning AT&T Comcast’s qualification that were not in dispute. Such an inquiry is contrary to summary decision precedent, it is not required under Section 14, and it undermines the purpose of the 120-day time limits in federal law and incorporated into Massachusetts regulations.

WHEREFORE, Appellants request that the Department issue an order:

- (a) granting Appellants’ Motion for Summary Decision in full;
- (b) reversing the Division’s ruling that it must conduct a second-stage review of AT&T Comcast’s qualifications; and
- (c) remanding to Westford with instructions to approve Appellants’ transfer application within 10 days.

Respectfully submitted,

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Dated: October 2, 2002

LIT 1359972v1

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

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AT&T CSC, INC.,	)	
AT&T CORPORATION, and	)	
AT&T COMCAST CORPORATION,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
BOARD OF SELECTMEN OF THE	)	
TOWN OF WESTFORD,	)	
	)	
Appellee.	)	
<hr/>	)	

**Docket No. CTV 02-5**

**CERTIFICATE OF SERVICE**

I, Matthew L. Vittiglio, on behalf of the above-named Appellants hereby certify that a copy of the following documents:

1. Appellants' Motion for Reconsideration;
2. AT&T CSC., AT&T Corp., and AT&T Comcast Corporation's Petition for Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision; and
3. Appellants' Memorandum of Law in Support of Its Support of Appeal of Cable Division's Interlocutory Order on Motions for Summary Decision

was served on this day, via hand delivery on all parties of record:

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Dated: October 2, 2002

/s/ Matthew L. Vittiglio  
Matthew L. Vittiglio