

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

MediaOne of Massachusetts, Inc.,
MediaOne of Ohio, Inc.,
MediaOne Group, Inc. and AT&T Corp.

Appellants,

v.

City Manager of the City of Cambridge

Appellee.

Docket Number:

CTV 99-4

OPPOSITION TO MOTION TO CONSOLIDATE

MediaOne Group, Inc., AT&T Corp., and the affected licensees, MediaOne of Massachusetts, Inc. and MediaOne of Ohio, Inc. (collectively the “Appellants”) hereby oppose the Motion of the City of Cambridge to Consolidate Similar Matters Relating to the Town of North Andover and the City of Quincy (the “Motion”) filed on December 7, 1999.¹ There are obviously issues in common issues in these cases—the efforts by Appellees to unilaterally amend franchises with “forced access” requirements and to expand the scope of review under the transfer regulations. Nonetheless, we oppose the Motion because the Appellees are contemplating a process that is unnecessary and is designed to delay, rather than expedite, the appropriate administrative processes.

¹ On December 13, 1999, Cambridge, North Andover, Quincy and of Somerville filed a Memorandum in Support of the Motion to Consolidate (“Memorandum”). Although the City of Somerville is not included in the Motion to Consolidate, the Memorandum argues for its consolidation as well. The issuing authorities identified above are collectively referred to herein as “Appellees.”

Preliminarily, Appellants note that the applicable rule governing consolidation in this proceeding requires the concurrence of all parties. Pursuant to 801 CMR § 1.01(7)(j), “if there are multiple proceedings which involve common issues, a Party shall notify the Agency ... of this fact ... The Agency ... *may with the concurrence of all parties* ... consolidate the proceedings.”² In this situation, the consolidation requested by Cambridge (and consented to by North Andover and Quincy) would result in excessive and unjustified delay with respect to the resolution of the proceedings. On the other hand, Appellants suggest an alternative approach that will allow the central issue to be heard based on existing material in the record below.³

I. There is No Justification for Expanding the Record in this Proceeding

Ordinarily, consolidation is sought to conserve administrative resources. In this case, however, the Appellees have sought to complicate and enlarge these proceedings in the guise of consolidation. The Appellees claim a right to introduce extensive new evidence into the record, through discovery and contested evidentiary hearings.⁴ However, these cases are in fact quite simple: each issuing authority made a decision that is now on appeal to this Division. Each issuing authority either relied upon the record assembled by the Special Magistrate, or assembled its own record. Each issuing authority made a decision and sought to justify it in their orders now on appeal.

² 801 C.M.R. § 1.01(7)(j) (emphasis added). The Cable Division has directed that all the appeals regarding the MediaOne/AT&T transfers will be conducted in accordance with the Standard Adjudicatory Rules of Practice and Procedure, Formal Rules, at 801C.M.R. §1.01 et seq. See Notices dated November 24 and 30 regarding Quincy (CTV 99-3), North Andover (CTV 99-2) and Cambridge (CTV 99-4). The Division forwarded copies of those rules to the parties with its Notices. The other references to various consolidation rules in the Appellees’ Memorandum are inapplicable to this case. Memorandum at 12-13.

³ See Discussion Section IV *infra*.

The record below is the record for decision. There is neither need to nor right to supplement it with additional materials or evidentiary procedures.⁵ Logically there can be only three reasons for the evidentiary process sought by the Appellees—(i) to establish what is already on the record below; (ii) to detail information relied upon by the issuing authorities but which was not part of the record below; or (iii) to present new information which was not presented to the issuing authorities or considered by them in the proceeding below.

None of these three alternatives can warrant the type of evidentiary hearings proposed by the Appellants. As for the first, there is no dispute about the record before the issuing authorities: the record in each case should consist of the FCC Form 394s, the hearing records, and written responses on the record submitted by Appellants. No detailed evidentiary hearing is needed to establish the record below.⁶ If the Appellees seek to present non-record evidence which was nevertheless considered by an issuing authority, then the very fact that such non-record evidence was considered establishes a serious violation of Appellants' due process rights, justifying reversal of the Appellees' decisions on that ground alone.⁷ Finally, if the purpose of

⁴ Memorandum at 15; *see, e.g., Opposition of the City of Somerville To Motion For Expedited Processing of Appeal* at 7-10.

⁵ *See, e.g., Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (“Post hoc” rationalizations have traditionally been found to be an inadequate basis for review); *Consumer Federation of America and Public Citizen*, 83 F.3d 1497, 1507(D.C. Cir. 1996); *AT&T Information Systems, Inc. v. General Services Administration*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (post hoc prohibition applies to informal agency proceedings).

⁶ The record in each of the transfer proceedings is exhaustive. With respect to Somerville, North Andover and Quincy that record includes the testimony of scores of interested persons, including counsel for the Appellees, and almost 1200 pages of hearing testimony. This record is the product of 11 transfer hearings over the course of August and September 1999. The Cambridge record is also extensive, the hearing transcript is some 168 pages long and numerous interested parties participated. Moreover, the record for each respective proceeding includes numerous exhibits submitted during the hearings and supplemental responses from the Appellants concerning follow up inquiries from the issuing authorities and other witnesses.

⁷ Each of the 11 regional transfer hearings, and the Cambridge hearing, conducted below provided extensive opportunity for interested parties to introduce evidence and testimony that was available to all interested parties. Each hearing also specifically called for a date certain (prior to the issuing authorities' decisions) to close the record.

the Appellees' proposed extensive evidentiary hearings is to provide post hoc rationalizations for the contested decisions, such a purpose would be improper.⁸ Any request for “discovery” is simply a fishing expedition irrelevant to the actual basis for the issuing authorities’ decisions.⁹

II. The Central Issue in These Cases Is Neither Novel Nor Ambiguous

A. Massachusetts Transfer Law Is Clear and Well Settled

Appellees claim that there are novel legal issues involved in these transfers. No doubt, enormous quantities of hearing time could be consumed “trying” the case for and against forced access. But that is not the issue before the Division. The issue is one of transfer law: whether issuing authorities in the Commonwealth of Massachusetts may use the occasion of a transfer of control of a corporate licensee to unilaterally amend the franchise in order to impose forced access, or to consider forced access as a fifth criteria in transfers. Through the short shrift given in Appellees’ brief to the other supposed bases for the decisions below, it is clear that when pretexts are cleared away all that is left is the question of the right of issuing authorities to make

In addition, adjudicatory procedures in Massachusetts recognize this important due process concern. *See* 207 C.M.R. § 3.03(4) (“Assessment of applicant qualifications shall be limited to the information provided in the applications of file, any amendments...the issuing authority on license specifications, oral testimony given during the hearing and other relevant information **included in the hearing record.**” (Emphasis added)); Mass Gen Laws ch. 30A, § 11(4) (“All evidence...shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered” except for administratively noticed materials.); *Vitale v. Planning Board of Newburyport*, 409 N.E. 2d 237, 240 (Mass. App. Ct. 1980) (“An administrative agency may not make a decision on the basis of evidence obtained after the close of the administrative hearing.”).

⁸ Indeed, the Appellees’ request for discovery and evidentiary hearing concedes that they do not have a basis in the record to sustain their conclusions.

⁹ The Appellees’ oppositions to Appellants’ Motions For Expedited Processing are similarly based on the misguided notion that these transfer appeals should be transformed into an educational forum on the public policy implications of forced access. The essence of the Appellees’ oppositions so state in their opening paragraphs: “The open access requirement...should be reviewed by the Division in a consolidated evidentiary hearing that will allow for a complete and efficient presentation of this public policy question. Deciding this important public policy issue after developing a full administrative record is essential...” *See, e.g.,* Opposition of City of Quincy To Motion For Expedited Processing of Appeal, at 1-2. Appellees’ concerns regarding due process have been amply satisfied by the proceedings below. *See supra* n. 6, 7.

Internet law through license transfers. On that issue, there is neither novelty nor ambiguity. As Appellants demonstrated in their Memoranda in Support of Motions For Summary Decision, Massachusetts law has been clear at all pertinent times. These very licenses have been issued, amended, and transferred under those legal strictures and the hearings below were held in fulfillment of those legal requirements.¹⁰ The sole legal issue is one for which there is a dispositive answer: issuing authorities may not use corporate transfers of control to amend licenses with forced access clauses or to otherwise consider forced access as a basis for denial.

In this regard, in their Joint Opposition the Appellees misstate the standard for summary decision. The pertinent question is not whether there are “no issues of fact” (see Joint Opposition at 23) but rather whether there are “no **genuine** issues of **material** fact.”¹¹ *Outdoor Advertising* does not adopt any more stringent standard as Appellees suggest,¹² but simply recognizes that summary judgment is appropriate where a hearing would serve no useful purpose because no *genuine* issues of *material* fact exist that could change the outcome of a proceeding.¹³ The Answers submitted by the Appellees in Quincy and North Andover confirm that there are no

¹⁰ See, e.g., *Appellants’ Memorandum in Support of Motion For Summary Decision Regarding the City of Quincy* at 10-15 (“Quincy Memorandum”); *Appellants’ Memorandum in Support of Motion For Summary Decision Regarding the City of Cambridge* at 13-17, 22-25 (“Cambridge Memorandum”).

¹¹ See, e.g., *Greater South Shore Cablevision v. Board of Selectmen of Scituate*, CATV Docket No. A-32 at para. 18 (January 11, 1983); *Belmont Cable Associates v. Board of Selectmen of the Town of Belmont*, CATV Docket No. A-65 at 3 (1988); *Ridge Cablevision Corp. v. Board of Selectmen of the Town of Braintree*, CATV Docket No. A-33 at 2 (1983) (Emphasis added).

¹² See Joint Opposition at 25-26. *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass App. Ct. 775 (1980). Summary judgment is appropriate where an opposing party has not “tendered any evidence which on its face meets the **statutory standards as particularized by the regulations**” See Weinberger, et al. v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 620 (1973) (emphasis added).

¹³ See *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 605 (5th Cir. 1994) (“[W]e refuse to attach talismanic significance to the absence of the stock phrase “genuine issue of material fact”...courts and agencies regularly use a variety of terms to describe the two pillars of summary judgment.”)

issues of material fact and that this case is resolvable on the law by summary decision.¹⁴

Moreover Appellees' efforts to interject irrelevant issues of fact into this proceeding should be rejected.¹⁵

B. Appellees' Remedy Is Rulemaking

The Appellees take issue with the Division's rule, but this is not the process by which rules are amended. If the Appellees believe that Rule 4.04 can be improved, they should file a petition for rulemaking, the affected parties would be invited to participate, and the issues could be aired on a full and complete record. But this is not what the Appellees seek. The Appellees sought to leverage the looming deadline to consummate a corporate merger into a "self-help" remedy. They sought to ignore the Cable Division's rules and extort a concession to which they are not entitled. Now, when called to account, they claim "unique" circumstances,¹⁶ profess to

¹⁴ See *Answer of City of Quincy To Appeal Of AT&T/MediaOne*, CTV 99-3, ¶ 8, December 14, 1999; *Answer of Town of North Andover To Appeal Of MediaOne*, CTV 99-2, ¶ 8, December 14, 1999. Appellees have failed to come forward with relevant material in opposition to the motion. See *Newport Federal Savings and Loan Ass'n v. United States*, 259 F. Supp. 82, 89 (E.D. Ark. 1966) cited by Commission in the *Belmont Cable Associates* case.

¹⁵ For example, the fact that Appellants have discussed forced access in the hearings does not constitute any agreement that these are valid transfer issues. Similarly, Appellees' reference to the submission by AT&T Canada Long Distance Services Company ("AT&T Canada") in 1997 to the Canadian Radio-Television and Telecommunications Commission ("CRTC") has no bearing whatsoever on this proceeding. AT&T has never controlled AT&T Canada. Foreign ownership restrictions in Canada prohibit AT&T from such control. AT&T Canada licenses the AT&T brand in association with certain telecommunications services and AT&T Canada developed and advocated this and its other public policy positions entirely independent of AT&T. Moreover, in Canada cable modem service was presumed to be a common carrier service due to the different regulatory treatment of cable service in Canada. Thus, Appellees are distorting the relevance of an outdated filing made by an independent company in a foreign market in an attempt to distract the Cable Division from the relevant issues in this case. Likewise, The Appellees misconstrue the content and implications of the AT&T/Mindspring letter. The letter, contains none of the concessions imagined by Appellees, but does demonstrate what AT&T and MediaOne have explained throughout this process: that the marketplace is the proper place for this issue to unfold. Clearly, the Appellees' assertion that the letter proves that there are no unresolved technical problems relating to forced access has no basis in the letter itself. The relationship to be developed will follow the expiration of AT&T's existing contract with @home in approximately two years. In short, that relationship has absolutely no relevance to this proceeding.

¹⁶ The Appellees claim that there is a unique business transformation at issue in this merger. The Appellees appear to have forgotten that MediaOne's position on "forced access" has always been to let the marketplace decide what business relations develop, precisely as has been AT&T's. The Appellees also appear to have forgotten that

seek an amendment to the rule, and ask to apply it retroactively to a hearing which has already been concluded. Alternatively, they seek a “waiver” of the rule—retroactively—to sanitize their past transgressions. But the Appellees already sought that waiver from the Cable Division and were denied.¹⁷ The time for appeal has run. The Appellees also sought that waiver from the FCC, but it has not been granted. It is too late to amend or waive this rule retroactively and upset the settled rights of MediaOne, AT&T, and the licensees.

III. The Massachusetts License Transfer Regulations Comply With Applicable Law

The Appellees also take issue with Rule 4.04 itself, claiming that it violates the statutory and constitutional rights of the issuing authorities.¹⁸ Even if this were the appropriate forum in which to air such claims, the Appellees cannot prevail. The Appellees have no contractual right to impose forced access on MediaOne. Whatever may be said of the Contract Clause, it is not a license for local governments to unilaterally amend their contracts. Indeed, that is one of the evils which the Contract Clause was designed to address.¹⁹

MediaOne already offers video, voice, and high-speed data in Massachusetts. The transfer in and of itself does not even affect the “change” on which Appellees are basing their plea.

¹⁷ See, e.g., Cambridge Memorandum at 17, n. 64. Indeed, the Cable Division has twice denied such waiver requests with respect to these proceedings. See *Letter to Charles Nesson, Harvard Law School from Alicia C. Mathews, Director, Cable Television Division*, Oct. 8, 1999. Appellees argue that the Division consider that the North Andover waiver was denied only one day before the Magistrate’s Report, however, the Division reaffirmed its denial with the second waiver request well after that date on October 8, 1999.

¹⁸ See, e.g., Motion at 13-14; Joint Opposition at 23-32.

¹⁹ See *Terri Arriaga, et al. v. Members of the Board of Regents*, 825 F. Supp. 1, 8-9, 14-15 (D. Mass. 1992) (contracts clause protects legitimate expectations of private contracting parties); *United States Trust Company v. New Jersey*, 431 U.S. 1, 20-21 (1977).

Nor is Chapter 166A Section 7 an open-ended right to unilaterally amend licenses in the name of “public policy” on the occasion of upper-level corporate mergers.²⁰ The limitations of Section 7 are of no surprise to the Appellees. The meaning of the statute was clear for years before *Bay Shore*, and the statute itself has remained unchanged throughout.²¹ Although Appellees claim that the “rule” was not adopted until 1995, it is settled law that an agency can adopt laws of general applicability through adjudication as well as through rulemaking.²² Moreover, agencies have the discretion to choose between rulemaking and adjudication, or to issue interpretive pronouncements where needed to clarify ambiguities in existing policies.²³ The law has been clear, and settled.²⁴ Each of the Appellees have conceded this fact by previously following the requirements of Rule 4.04 in approving the transfer of the licenses to

²⁰ See, e.g., *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 657, 65 L. Ed. 1149, 41 S. Ct. 611 (1921) (the Court “[could] not believe that Congress intended to discourage, hinder or obstruct the orderly merger or consolidation of corporations”); *Thompson v. Commissioner*, 205 F.2d 73, 77-78 (3d Cir. 1953); aff’d by 222 F.2d 893 (3d. Cir. 1955) (merger would not deprive the government of “the particular management and financial responsibility which rendered the contractor a responsible bidder”).

²¹ *Bay Shore Cable TV Associates v. Town of Weymouth*, Docket No. A-55 (released Nov. 13, 1985) (“*Bay Shore*”). Appellees cite dictum in *Somerset* for the proposition that issuing authorities have wider rights than *Bay Shore* indicated. Joint Opposition at 40. We are not aware of any decision in which issuing authorities have been sustained in going beyond the four criteria of *Bay Shore*.

²² See, e.g., *Arthurs v. Board of Registration in Medicine*, 418 N.E.2d 1236, 1246-1247 (Mass. 1980) (“It is a well recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking.” citing *SEC v. Chenery*, 332 U.S. 194, 201-202 (1947)). Such policies announced in adjudications may be precedents in future cases); *Hastings v. Commissioner of Correction*, 674 N.E.2d 221, 224 (Mass. 1997); *Town of Brookline v. Commissioner of the Department of Environmental Quality Engineering*, 439 N.E. 2d 792, 799 (1982).

²³ See *Arthurs v. Board of Registration in Medicine*, 418 N.E.2d at 1246 n. 26.

²⁴ Moreover, Appellees’ position that only the law at the time of the Cambridge license grant is applicable in the Cambridge context specifically undermines their reliance on *Somerset*, which was decided almost three years after the license grant. Joint Opposition at 39-40. Appellees’ suggestion that the *Bay Shore* decision was not well settled policy because it was issued a month before the Cambridge license grant ignores years of prior and consistent Division policy. In addition, “since the [Division’s] decisions are public” Cambridge was constructively deemed to be aware of *Bay Shore*. *Id.* at 1246.

MediaOne.²⁵ North Andover, and even counsel to the Appellees, have conceded the rule's applicability in this proceeding in seeking a waiver of those rules from the Division to allow consideration of forced access during the proceedings, which waivers were denied and are final.²⁶ Likewise, the City Manager commenced the Cambridge transfer hearing by declaring that it was "being conducted pursuant to 207 CMR 4.00."²⁷

Appellees also incorrectly claim that Section 613(d)(2) of the Communications Act (47 U.S.C. §533(d)(2)) empowers issuing authorities to impose conditions on license transfers.²⁸ This Section prohibits franchisors from adopting cross-ownership rules for cable. A 1992 amendment clarifies that a franchisor is not barred by this Section from denying consent to change in ownership "in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction."²⁹ Appellees misunderstand this provision.

First, this provision does not provide authority to mandate ISP access to the cable system. On its face, the proviso merely clarifies an exception to the cross-ownership rule. There is no affirmative grant of power in the provision to violate or ignore numerous other provisions of law.

²⁵ See, e.g., Appellants' Memorandum In Support of Motion For Summary Decision Regarding City of Cambridge License Transfer Denial ("Cambridge Memorandum"), Exhibit 13 -- *Transfer Report, Approval of the Request for Transfer of Control of the Cable Television Final License*, Issued by City Manager, Robert W. Healy (Aug. 19, 1996); Appellants' Memorandum In Support of Motion For Summary Decision Regarding City of Somerville License Transfer Denial ("Somerville Memorandum"), Exhibit 2-- *Letter to Bartlett F. Leber, Esq., Vice President and Corporate Counsel MediaOne from Dorothy A. Kelly Gay, Mayor, Somerville*, June 16, 1999.

²⁶ Somerville sought similar relief from the FCC.

²⁷ Cambridge Memorandum, Exhibit 2 at 4

²⁸ See Joint Opposition at 27-29. How Cambridge can pose this argument in light of its reliance on *Salem v. Warner Amex Communications, Inc.*, 392 Mass. 663 (1984) is curious. According to Appellees, the applicable law for interpreting the Cambridge license was the law in effect in 1985 when the license was issued. Joint Opposition at 39-40. The federal statutory provision relied on here was adopted some seven years later.

²⁹ 47 U.S.C. § 533(d).

The legislative history explains Congress's limited purpose in adding current Section 613(d) was to overturn one case (*Cable Alabama Corp. v. City of Huntsville*), in which the earlier version of Section 613 was held to prohibit a local franchising authority from denying the buyout of one cable system by another cable system in the same franchise area.³⁰ However, these municipalities have not sought to preserve competition between cable system operators, but rather to promote “competition” between a single cable system operator (MediaOne) and entities that provide online services over telephone lines and therefore do not “deliver” cable service at all. Indeed, it is particularly ironic that Appellees’ attempt to rely on this section to justify their actions because MediaOne’s delivery of high-speed Internet access is actually bringing customers an added competitive choice among all on-line providers, and particularly among high-speed providers (such as xDSL or Hughes’ DirectPC).³¹ It is not reducing competition. Moreover, after AT&T acquires MediaOne’s cable systems in these communities, MediaOne (albeit with a new owner), will continue to deliver cable service in these communities. The change in MediaOne’s ownership has no effect on competition in the provision of cable service.³²

³⁰ Cable Television Consumer Protection and Competition Act of 1992, H.R. REP. NO. 102-628, 102d Cong., 2d Sess. (“1992 House Report”) at 91.

³¹ In each of the communities at issue here, there is (or shortly will be) widespread availability of cable modem service from competitors (such as RCN) and DSL service from Bell Atlantic. All jurisdictions are under the Hughes DirectPC Satellite footprint. Burlington Regional Hearing Transcript, at 98-109, September 8, 1999.

³² Similarly, Appellees’ are incorrect in asserting that Section 632(d) of the Communications Act (47 U.S.C. §552(d)) supports their decisions. See Joint Opposition at 29-30. This provision concerning consumer protection requirements has absolutely no bearing on the forced access issue. The consumer protection laws to which Section 632(d)(1) refers are generally applicable laws proscribing such things as fraud or misleading advertising, or other similar types of unfair or deceptive practices in the direct relationship between cable companies and consumers. *In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act & Competition Act of 1992: Rate Regulation*, 10 F.C.C.R. 1226 at ¶111 (1994). Moreover, such rules must be consistent with other legal restrictions on issuing authorities. “A state or franchising authority may not, for instance, regulate the rates for cable service in violation of Section 623 of Title VI, and attempt to justify such regulation as a ‘consumer protection’ measure”. Cable Communications Policy Act of 1984, H. R. Rep. No. 934, 98th Cong., 2d Sess. at 79.

Second, whatever may be said of the clause, the Commonwealth of Massachusetts is fully authorized to limit the power of local issuing authorities. As the Supreme Judicial Court has explained in addressing the state's oversight of the cable industry, "The authority to license the operators of such systems was confirmed in the cities and towns as 'issuing authorities,' with oversight and ultimate control of the licensing function in the newly-created Commission."³³ That is precisely what has occurred in Massachusetts under the current transfer rule, *Bay Shore* and the policy advice that preceded it.

Finally, there is no serious dispute that the cable division's transfer regulations are well within the Cable Division's broad statutory authority. Chapter 166A, Section 16 provides the Cable Division with broad rulemaking authority to adopt rules to implement Chapter 166A:

The Commission may after hearing issue such standards and regulations as it deems appropriate to carry out the purpose of this chapter for which purpose it may employ such expert assistants as it deems necessary.³⁴

Courts interpreting this provision have consistently "recognized that in the area of cable television, 'the legislature had granted broad agency authority to deal with an entire area of activity...'"³⁵ In *New England Cable* the court upheld the Commission's authority to adopt security deposit requirements in its regulations despite the fact that Chapter 166A made no

³³ *Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission*, 372 Mass. 495, 496, 362 N.E.2d 897, 899 (1977) (footnote omitted); *Gillis v. Massachusetts Cablevision, Inc.*, 340 N.E.2d 872, 875 (1976).

³⁴ M.G.L. ch. 166A, §16.

³⁵ *See, e.g., New England Cable Television Association, Inc. v. CATV Commission*, Superior Court Civil Action No. 70134 (1984) ("New England Cable").

mention of such requirements. Cable Division regulations will be upheld if “reasonably related to the Commission’s ‘oversight and ultimate control of the licensing function...”³⁶

Contrary to Appellees’ characterization, *Nuclear Metals* is entirely consistent with this line of authority. *Nuclear Metals* confirms that:

“A state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing”...Regulations properly adopted by an administrative agency stand on the same footing as statutes and all rational presumptions are to be made in favor of their validity...”³⁷

Significantly, the Court in *Nuclear Metals* vacated the agency regulation because it conflicted with a specific requirement set forth in the governing statute.³⁸ By contrast, Section 166A provides broad authority to the Cable Division. *Nuclear Metals* does confirm, however, Appellants’ position that a claim concerning “the interpretation of statutory and regulatory language and the validity of the agency’s interpretation of its regulation...are questions of law...” *Nuclear Metals* supports summary decision in this case.

IV. Expedient Consideration Of The Forced Access Issue In a Consolidated Oral Argument On The Existing Record Is Required

What emerges from the pleadings to date is a central legal issue: do issuing authorities in Massachusetts have the right to create a fifth forced access transfer criteria, or use the occasion of a

³⁶ See *Springfield Cable License Amendment*, Docket No. NA-3 (Oct. 6, 1988) (citing *Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission*, 372 Mass. 495, 496 (1977); *Continental Cablevision of Massachusetts v. Board of Selectmen of the Town of Danvers*, CATV Docket No. A-29 (March 10, 1982); *Saccone v. State Ethics Commission*, 395 Mass. 326, 335 (1985).

³⁷ See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board*, Mass. 196, 211-212 (1995) and cases cited therein (“*Nuclear Metals*”).

³⁸ In *Nuclear Metals* the regulation was vacated because an “unambiguous” statutory requirement for establishing an assessment that considered on site storage of waste was simply not incorporated into the rule. *Nuclear Metals* at 212. Unlike the regulatory scheme governing the Cable Division, the Court stated that “there is nothing in the statute which suggests that the board has been granted discretion to eliminate from its computation of the assessment...[data for waste stored on site].”

transfer of control of a license to unilaterally amend that license in order to impose forced access. That issue pervades each of the cases on appeal. Moreover, it is clear from the short shrift the Appellees give to the other supposed bases of decision³⁹ that the power of unilateral amendment is the only issue in these cases, and that AT&T is fully qualified under the four criteria.⁴⁰

The MediaOne/AT&T corporate merger is presently scheduled to close on or before March 31, 2000. The parties have obtained consents to approval from 95% of the franchising authorities nationwide, and we expect the remainder to be forthcoming in short order. The exhaustive record below establishes overwhelmingly that AT&T possesses the requisite qualifications under the applicable criteria, and it is not appropriate to allow these few issuing authorities to cause the Commonwealth, or the Appellants, to consume more resources than necessary to resolve the outstanding legal issue. We submit that the most expeditious means for handling these cases is for the Division to:

1. accept the record as closed and submitted;
2. accept the legal issue as having been fully joined and briefed in the Appellants' Memoranda and Appellees' Joint Opposition;
3. schedule oral argument on the single common and dispositive legal issue; and

³⁹ Appellees appear to contend that AT&T plans to terminate all MediaOne management. This was not a basis for decision, but is post hoc rationalization. Nor was it the experience with US West. Indeed, the Department may officially notice that Mr. Hostetter is advising AT&T in this transaction. *See, e.g., Rebecca Cantwell, Cable Legend Brings Power Into Denver, AT&T Brings Hostetter Into An Advisory Role In Its Broadband Empire*, Rocky Mountain News, October 10, 1999, Section C, p 1; *Richard Siklos and Ronald Gloves, The Man Behind AT&T's Coup*, BUSINESS WEEK, May 17, 1999, at 36. Similarly, Appellees have utterly failed to raise any genuine issue that AT&T is legally, technically and managerially qualified to operate the cable systems. Joint Opposition at 42-51. Appellees' suggestion that the Division simply concoct a post hoc rationalization for a legal qualification issue based on the forced access issue is not only forbidden (*see supra* note 5) but relies upon wholly unfounded speculation that finds no basis in this record or in any other.

⁴⁰ Ms. Rebecca Nesson, a Harvard Law student affiliated with the Berkman Center, confirmed this in testifying at the Burlington hearing—" [A]s far as the four criteria are concerned...AT&T deserves to have this transfer of license. It is quite competent to take over the MediaOne license..." Later Ms. Nesson stated that "I think its time to reconsider the scope of the license and for the cities in Massachusetts that are faced with this decision to be able to choose [forced access]." Burlington Transcript at 151-154.

4. schedule that argument during the first week of January, 2000.

There is no need for evidence to be taken. All that is needed is the argument of the common legal issue. This process will satisfy the hearing requirements of Mass. Gen. Laws 166A §14 and allow summary decision to be granted, if appropriate, following the argument. Under these procedures, MediaOne, AT&T, and the affected licensees would consent to consolidation.

Conclusion

For the forgoing reasons, MediaOne, AT&T, and the licensees oppose the motion to consolidate, but would concur to a consolidated oral argument, based upon the existing record, on the common and dispositive legal issue of whether the Appellees had the authority under the Massachusetts transfer regulations to amend licenses to impose forced access or to consider forced access as a relevant factor in ruling upon the transfer applications. If this proposal is accepted, the administrative efficiencies advanced by the Appellees will be fully realized, while the needs for corporate reorganization may be protected.

Respectfully submitted,

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