COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
Cable Television Division

In the Matter of:	)	
MediaOne of Massachusetts, Inc., MediaOne of Ohio, Inc., MediaOne Group, Inc., and AT&T Corp.	)	Docket No. CTV 99-2, 99-3, 99-4, 99-5 Date Issued: May 1, 2000
Appellants	)	
vs.	)	
Board Of Selectmen of the Town of North Andover, Mayor of the City of Quincy, City Manager of the City of Cambridge, Mayor of the City of Somerville,	)	
Appellees.	)	

ORDER ON MOTIONS FOR SUMMARY DECISION/ CONSOLIDATION

This action comes before the Cable Division of the Department of Telecommunications and Energy upon appellants MediaOne of Massachusetts, Inc., MediaOne of Ohio, Inc., MediaOne Group, Inc., and AT&T Corp.'s appeal of the disposition of MediaOne's cable license transfer application by the appellees, the Board Of Selectmen of the Town of North Andover, the Mayor of the City of Quincy, the City Manager of the City of Cambridge, and the Mayor of the City of Somerville.

APPEARANCES: Paul Glist, Esq.
James F. Ireland, Esq.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
FOR: MEDIAONE and AT&T
Appellants

Charles Nesson
1575 Massachusetts Avenue
Somerville, MA 02138

FOR: MAYOR OF THE CITY OF QUINCY
MANGER OF THE CITY OF CAMBRIDGE
MAYOR OF THE CITY OF SOMERVILLE
BOARD OF SELECTMEN OF THE TOWN OF NORTH ANDOVER
Appellees

TABLE OF CONTENTS

I. INTRODUCTION

On July 13, 1999, pursuant to G.L. c. 166A, § 7 and 207 C.M.R. § 4.00 et seq., MediaOne of Massachusetts, Inc., MediaOne of Ohio, Inc., MediaOne Group, Inc. ("MediaOne"), and AT&T Corp. ("AT&T") (together "Appellants" or "the Companies") submitted applications for approval of a change of control of cable television licenses from MediaOne to AT&T of 175 cities and towns in Massachusetts, including the Town of North Andover ("North Andover") and the Cities of Quincy ("Quincy"), Cambridge ("Cambridge"), and Somerville ("Somerville"). North Andover, Quincy, and Somerville participated in a regional hearing process conducted by the special magistrate appointed by the Cable Division. The regional hearings were conducted throughout August and September 1999. Cambridge held its own public hearing on August 19, 1999.

On November 10, 1999, North Andover approved the proposed license transfer contingent upon AT&T's providing "nondiscriminatory access to its cable modem platform in North Andover for unaffiliated providers of Internet and on-line services." Letter from North Andover Board of Selectmen to William Leahy, Regional Director, Government Affairs, AT&T (November 10, 1999). On the same date, Quincy approved the proposed license transfer contingent upon AT&T's providing "nondiscriminatory access to its cable system by any requesting Internet service provider, such access to be on rates, terms and conditions that are at least as favorable as the terms and conditions provided to itself, to its affiliates, or to any other person." Letter from James A. Sheets, Mayor, City of Quincy to Alicia Matthews, Director, Massachusetts Cable Television Division (November 10, 1999). Cambridge denied the proposed license transfer, stating that (1) AT&T is not likely to adhere to the terms and

conditions of the Final License, (2) AT&T itself does not have the cable television management experience to assume control of the Cambridge cable system, (3) AT&T has refused to provide nondiscriminatory access to its cable modem platform in Cambridge for unaffiliated providers of Internet and on-line services, and (4) the issuing authority does not believe the transfer is in the public interest because AT&T refused to provide nondiscriminatory access to its cable modem platform and also failed to make a case that the transfer would benefit Cambridge television subscribers. City Manager Decision Regarding the Cable Television Transfer Request (November 10, 1999). Somerville denied the proposed license transfer citing concerns that AT&T, as the transferee, lacks cable television management experience and technical expertise and that AT&T did not meet the necessary legal qualifications by failing to provide non-discriminatory access for non-affiliated ISPs to its high speed data service. Letter from Dorothy Kelly Gay, Mayor, City of Somerville to William Leahy, Regional Director Government Affairs, AT&T (November 10, 1999).

Pursuant to G.L. c. 166A, § 14, MediaOne and AT&T filed appeals from the conditional approvals of North Andover and Quincy and of the denials by Cambridge and Somerville. With each appeal, Appellants filed a motion for summary decision with supporting memoranda pursuant to 801 C.M.R. § 1.01 (7)(h). The matters were docketed as CTV 99-2 (North Andover), CTV 99-3 (Quincy), CTV 99-4 (Cambridge), and CTV 99-5 (Somerville). On December 13, 1999, Cambridge, Somerville, Quincy and North Andover (together "Appellees") filed answers and a joint motion to consolidate these matters. The Appellees filed a joint opposition to the motion for summary decision ("Joint Opposition"). In this Order, the

Cable Division addresses the Appellees' motion to consolidate and motion for summary decision.

II. MOTION TO CONSOLIDATE

Appellees request that we consolidate the appeals docketed as CTV 99-2, CTV 99-3, CTV 99-4 and CTV 99-5 into a single proceeding (Appellee Joint Memorandum in Support of Consolidation at 15).[1] In support of their motion, the Appellees argue that each of the appeals raises a common issue: the requirement to provide open access[2], i.e., unbundled and non-discriminatory access to the operator's high-speed cable modem platform to unaffiliated Internet Service Providers ("ISPs") (id. at 1, 9). Appellees assert that because the open access issue centers on a "common nucleus of facts" and is subject to appellate review under "identical legal standards," the pending appeals should be consolidated (id.). Specifically, they contend that the Appellees' evaluation of the important public policies associated with open access are at the core of each of the Appellees' decisions on transfer (id. at 14). They further contend that a consolidated hearing would conserve administrative resources and facilitate a complete and efficient presentation of this common issue (id. at 2, 14-15). Finally, Appellees assert that Appellants previously agreed to consolidate the appeals brought against two of the moving parties, North Andover and Quincy (id. at 16-17).

---

1 While the Motion to Consolidate omits the City of Somerville as a moving party, we were subsequently advised that Somerville intended to be included, but had not yet filed its answer in this proceeding. For purposes of this Order, we accept Somerville's subsequent request to be included as a moving party to the motion.

2 There is no settled definition of "open access," or even common usage of the term, as various parties also use the terms "equal access" or "forced access." For consistency alone, we refer to the issue as "open access."

Appellants agree that open access does constitute an issue common to all of the appeals brought against the Appellees. But they oppose consolidation on the grounds that it is "unnecessary and designed to delay, rather than expedite, the appropriate administrative processes" (Appellant Memorandum Opposing Consolidation at 1). Appellants allege that "Appellees have sought to complicate and enlarge these proceedings in the guise of consolidation" (id. at 2). Further, they argue that an agency may consolidate a proceeding only if all parties concur (id., citing 801 C.M.R. § 1.01(7)(j)).

We decline to consolidate the pending dockets. Despite having filed a joint opposition, Appellees cite to franchise-specific facts to support their respective positions. Consolidation could thus result in an unnecessarily cumbersome review process to the extent that it would require the parties to build and address multiple, and potentially divergent, factual records in one joint proceeding. We nevertheless accept the parties' position that open access is an issue common to the appeals brought against all of the Appellees. Thus, we find it both fair and efficient to consolidate our Order on the Motion for Summary Decision. To the extent that summary decision is denied, we will review any remaining matters respectively in the separately-docketed proceedings.

In this joint order, we also clarify an issue raised in the parties' filings regarding the record of the proceedings below and the Cable Division's appellate role. Because the issue similarly affects the conduct of all the proceedings, it is appropriate to address it at the outset and in this joint order. In their Opposition to the Motion to Consolidate, Appellants assert that "[t]he record below is the record for decision [on appeal]. There is neither need nor right to supplement it with additional materials or evidentiary procedures" (Appellant Memorandum

Opposing Consolidation at 3). Appellees suggest that the Cable Division must apply an "arbitrary and capricious" standard to our review of the transfer decisions (Joint Opposition at 31, citing Rollins Cablevision v. Somerset, Docket No. A-64 (1988)).

The Parties have misconstrued the role of the Cable Division with respect to the record below. The Massachusetts Administrative Procedure Act, together with our enabling act, establish that the Cable Division must develop the record on which we make our findings on appeal. G.L. c. 30A, § 11; G.L. c. 166A, §§ 7, 14, 19. Under Section 19, the public hearing held by an issuing authority in accordance with Section 7 is exempted from the formal procedures of G.L. c. 30A.[3] Thus, the parties have not yet been entitled to the protections afforded by Chapter 30A.[4] G.L. c. 30A, § 10. Section 14 of G.L. c. 166A allows a licensee who is aggrieved by the action of an issuing authority in denying consent to the transfer or assignment of a license or control thereof to appeal the decision to the Cable Division. The Cable Division's Section 14 proceeding is the first proceeding conducted pursuant to Chapter 30A in the transfer review process. G.L. c. 166A § 19; Continental Cablevision of Massachusetts, Inc., and Adams-Russell Co., Inc. v. Board of Selectmen of the Town of Danvers and Rollins Cablevision of Massachusetts, Docket No. A-29 Memorandum and Order

---

[3] Although the Cable Division arranged the regional hearing process to which several issuing authorities availed themselves, the regional hearings are essentially consolidated Section 7 hearings and thus are also exempt from the formal procedures of Chapter 30A.

[4] Chapter 30A provides procedural protections such as the opportunity to prepare and present evidence and argument, the right to call, examine and cross-examine witnesses, and the right to a decision stated on the record accompanied by a statement of reasons for the decision. G.L. c. 30A, § 11.

on Discovery Requests, at 7 (March 10, 1983); Colony/Six Plus Cablevision, Inc. v. Milford Board of Selectmen, and Colonial Cablevision Corp., Docket No. A-22 (1982); KSH Cable Corp. v. Mayor of Brockton and Continental Cablevision of Massachusetts, Inc. Docket No. A-24 (1982). The Cable Division must provide parties with the procedural protections required by Chapter 30A and is, therefore, obligated to investigate and evaluate the transfer application de novo.[5]

III. MOTION FOR SUMMARY DECISION

A. Summary of Positions

1. Appellants

The Appellants contend that there are no issues of fact in dispute and that Appellees' attempts to impose open access requirements either as a condition of transfer approval, or as a reason for denial, are contrary to the transfer and licensing schemes established by the Cable Division and are "arbitrary and unreasonable" in violation of G.L. c. 166A, § 7 (see, e.g., Memorandum in Support of Summary Decision, CTV 99-4, at 1-2). Thus, Appellants argue that summary decision is warranted (id. at 2, 13). Substantively, the Appellants argue that Massachusetts law expressly prohibits unilateral imposition of new license requirements as a

---

[5] Although the Appellees cite to Rollins Cablevision v. Somerset, Docket A-64 (1988) in support of their assertion that the Cable Division should conduct an "arbitrary and capricious" review, we now rule that Rollins incorrectly stated the role of the Cable Division in appeals of license transfer denials. The "arbitrary and capricious" standard enunciated in Rollins applies to appellate review of decisions made pursuant to full procedural protections, such as those granted under Chapter 30A. As the Appellees' decisions are exempted from Chapter 30A, we cannot apply the "arbitrary and capricious" standard of review and we therefore will not confine ourselves to the record below.

condition of transfer approval or as the basis of a transfer denial (id. at 16, citing 207 C.M.R. § 4.04(2)). Appellants also argue that the denials are contrary to the relevant legal criteria under Massachusetts law (id.). Specifically, Appellants argue the Cable Division's transfer regulations state that issuing authorities shall consider only the four stated criteria and that an issuing authority shall not propose amendments or renegotiate the terms of the existing license or any renewal proposals during the transfer process (id., citing 207 C.M.R. § 4.04 (1) and (2)). According to Appellants, the cable licenses at issue do not require MediaOne to provide open access and the attempt to impose such a requirement would be an attempt to circumvent the license amendment process (see, e.g., Memorandum in Support of Summary Decision, CTV 99-5, at 19-20, citing 207 C.M.R. § 3.07.).

Appellants further assert that Cambridge and Somerville cannot base their denials on the proposition that AT&T itself lacks the managerial and technical ability to assume the obligations of MediaOne (id. at 21-23). Appellants maintain that AT&T demonstrated its managerial qualifications during the transfer proceedings below by presenting its own expertise, the expertise of Tele-Communications, Inc. ("TCI") personnel, and the expertise of the MediaOne management structure that would be retained following the merger (id. at 22). With respect to Somerville, Appellants argue that in June of 1999 the Mayor approved of MediaOne's managerial and technical qualifications in the Time Warner/MediaOne transfer (id. at 23). With respect to Cambridge, Appellants argue that under identical circumstances the City Manager consented to the transfer of control from Continental Cablevision to US WEST in 1996 (Memorandum in Support of Summary Decision, CTV 99-4, at 23). Appellants also assert that Cambridge's contention that AT&T is not likely to adhere to the terms and conditions of

the Final License is speculative and improperly based on compliance issues raised during the current License renewal negotiations (id. at 25).

2. Appellees

According to Appellees, AT&T's refusal to allow unaffiliated ISPs access to its broadband network for the purpose of offering their services to cable modem subscribers is a valid ground for denial of the transfer (Joint Opposition at 2-3). Appellees contend that providing unaffiliated ISPs such access is a critical public policy issue that transcends more traditional transfer review concerns. The very integrity of the Internet, according to Appellees, hinges on AT&T's willingness to offer open "end to end" architecture that has, up to this point, allowed the medium to thrive (id. at 3, 5). Appellees argue that the factual issues involving open access to AT&T's cable modem service that arose in the proceedings below warrant further development on this record (id.). Appellees further argue that the disputed facts in this proceeding include the impact on competition and consumer choice, AT&T's ability to provide nondiscriminatory access, and how rapidly open access can be provided (id.). As such, Appellees contend that the Appellants have not met the burden to prove that there are no issues of material fact and that they are entitled to judgment as a matter of law (id. at 2). According to Appellees, a hearing is necessary to address these issues as well as several important public policy issues (id. at 5).

Appellees assert that the Cable Division cannot apply 207 C.M.R. § 4.04 to preclude consideration of the open access issue; to do so would exceed the Cable Division's authority under both federal and state law (id. at 27). With respect to federal law, Appellees claim that the 1992 Cable Act allows communities to consider the competitive effect of transfers on cable

services (id. at 27-28, citing 47 U.S.C. § 533(d)(2); AT&T, et. al. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999), appeal pending, No. 99-35609 (9th Cir.)). Appellees claim that issuing authorities may deny a license transfer under federal law when the transfer would limit competition in the provision of cable services (id. at 28-29, citing 47 U.S.C. § 533(d)(2)). With respect to state law, Appellees contend that the Massachusetts Legislature, by allowing issuing authorities to make the initial decision in a transfer application, subject to an "arbitrary and unreasonable" standard of review, intended to place the federally-granted authority to promote competition and consumer choice with local authorities (id. at 30, citing G.L. c. 166A, § 7). According to Appellees, the imposition of a more narrow standard by the Cable Division contradicts federal and state law (id. at 27, 37).

Cambridge and Somerville also assert that denial on management expertise and license compliance issues is appropriate (id. at 48). In support, Appellees assert that AT&T does not have any "direct" managerial experience in the operation of cable television systems (id. at 14, 48-49). Appellees also reason that non-compliance by MediaOne's current management is material to the transfer review process when the applicant puts forth the retained managerial experience of the transferor in support of its own management qualifications (id. at 14, 50).

B. Standard of Review

Appellees argue that Section 14 prohibits the Cable Division from disposing of this matter without a hearing, thereby precluding disposition by summary decision (Joint Opposition at 26-27). However, the Standard Adjudicatory Rules of Practice and Procedure, which govern the conduct of formal proceedings of agencies subject to Chapter 30A, authorize the use of full or partial summary decision in agency decisions. 801 C.M.R. § 1.01(7)(h). The rule

specifically provides that "[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense." Id. Summary decision may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-786 (1980).[6] Moreover, an evidentiary hearing is never required if the only disputes involve issues of law or policy. Kenneth Culp Davis, Administrative Law Treatise, Volume 1, § 8.4, p. 389, (citing Heckler v. Campbell, 4161 U.S. 458 (1983); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)). The Cable Division has stated that summary judgment is "appropriate where it has been demonstrated that no genuine issue of material fact exists and where and the moving party is entitled to judgment as a matter of law." Belmont Cable Associates v. Belmont, CATV Docket No. A-65, at 3 (1988).

The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would have no burden on an issue if the case were to go to trial. Attorney General v. Bailey, 386 Mass. 367, 371, cert. denied sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of

---

[6] Appellees assert that Outdoor Advertising creates a higher standard for administrative summary decision under 801 C.M.R. § 1.01(7)(h) than the standard for summary judgment established under Mass. Civ. Pro. R. 56. We find Appellee's arguments to be unsupported and contrary to long-standing interpretation of the case. See Alexander Cella, Administrative Law and Practice, Massachusetts Practice Volume 38, § 423.

material fact in order to defeat a motion for summary judgment. O'Brion, Russell & Co. v. LeMay, 370 Mass. 243, 245 (1976).

C. Analysis and Findings

1. State Law Sets the Substantive Standard of Review

Appellants contend that there are no material questions of fact and that they are entitled to judgment under the law applicable to license transfers, G.L. c. 166A, § 7 and the Cable Division's transfer regulations, 207 C.M.R. § 4.00. Appellees dispute the applicability of 207 C.M.R. § 4.04 to these matters. This provision contains a standard of review for license transfer applications:

> (1) In reviewing an application for a transfer or assignment of a license or control thereof, an issuing authority shall consider only the transferee's
> (a) management experience,
> (b) technical expertise,
> (c) financial capability, and
> (d) legal ability to operate a cable system under the existing license.
>
> (2) As part of an issuing authority's review of an application for a transfer or assignment of a license or control thereof, an issuing authority shall not propose amendments to or renegotiate the terms of the existing license or any license renewal proposal.

207 C.M.R. § 4.04.

Appellees argue that the Cable Division's transfer regulations, specifically the standard of review, 1) is an invalid exercise of our rulemaking authority; 2) impairs their contractual rights; and 3) is inconsistent with federal law. Alternatively, Appellees argue that were we to find our regulations valid, we should waive them in these instances. We address the Appellees' arguments.

a. The Transfer Standard of Review is a Valid Exercise of Our Rulemaking Authority

Appellees assert that to the extent that the Cable Division narrowly interprets the transfer regulations to prohibit consideration of the open access issue, the Cable Division exceeds the statutory authority to promulgate regulations consistent with G.L. c. 166A (Joint Opposition at 31, citing Massachusetts Hospital Assoc. v. Dept. of Medical Security, 412 Mass. 340, 346 (1992)). Appellees argue that the Cable Division's transfer regulations unreasonably limit the broad scope of review allowed under G.L. c. 166A, § 7. In citing Massachusetts Hospital, Appellees essentially argue that Section 7 establishes a comprehensive standard of review and that a more narrowly defined standard is neither required, nor allowed.

Section 7 of G.L. c. 166A provides that "[n]o license or control thereof shall be transferred or assigned without the prior written consent of the issuing authority, which consent shall not be arbitrarily or unreasonably withheld." While a municipality is vested with the authority to approve a license transfer under Section 7, the Legislature has granted the Cable Division ultimate authority over licensing matters in the Commonwealth, including transfers. G.L. c. 166A, §§ 7, 14.[7] The Supreme Judicial Court has confirmed the Cable Division's ultimate authority in licensing matters. Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission, 372 Mass. 495, 496 (1977); Waltham Tele-Communications, et al. v. O'Brien, 403 Mass. 747, 749 (1989).

---

[7] Section 14 of G.L. c. 166A provides in pertinent part: "Any … licensee who is aggrieved by the action of an issuing authority … denying consent to the transfer or assignment of a license or control thereof, or by the issuing authority's failure to act within the period of sixty days may appeal therefrom to the division … by a petition in writing, setting forth all material facts in the case."

Section 7 sets out a broad standard for review of transfer applications. The Cable Division is authorized to issue such standards and regulations as we deem necessary to carry out the purpose of Chapter 166A. G.L. c. 166A § 16. As ultimate licensing authority, it is the responsibility of the Cable Division to determine what is "arbitrary and unreasonable" in the license transfer context. G.L. c. 166A, § 7, 14, 16; see Cleary v. Cardullo's Inc., 347 Mass. 337, 344 (1964); Care and Protection of Charles 406 Mass. 162, 173 (1989).

In this regard, we find Appellees' argument based on Massachusetts Hospital not persuasive. In Massachusetts Hospital, the Supreme Judicial Court invalidated the Department of Medical Securities' regulations establishing performance standards because their enabling statute contained comprehensive and complex language setting standards and the role of the agency in enforcing those standards was narrowly defined. In contrast to the Department of Medical Securities' role under its enabling statute in Massachusetts Hospital, the Cable Division is charged with enforcing a broad standard for transfers under our enabling statute and has express authority to develop additional standards to carry out the purposes of the statute. G.L. c. 166A § 7, 14, 16. Here, the Cable Division has properly exercised our authority to set standards and promulgate regulations in order to provide a comprehensive standard of review consistent with the broad standard set forth in Section 7.

The Cable Division's transfer standard of review, duly established under Chapter 30A procedures through both adjudication and rulemaking, puts all interested parties on notice of the proper standard of review in the license transfer process and carries out the protective purpose of the transfer standard under Chapter 166A. The transfer standard of review was formally enunciated in Bay Shore Cable TV Associates v. Weymouth, Docket No. A-55 (1985). In Bay

Shore, we articulated the purpose of, and the legal standards governing, the transfer review process.

> In the transfer process, the underlying concern is providing the issuing authority an opportunity to determine whether the transferee can assume the obligations of the transferor and continue the level of service provided by the transferor. In determining a potential transferee's ability to "step into the shoes" of the transferor, relevant factors include the transferee's financial capability, management and technical expertise, character and experience.

Bay Shore at 3. In that Order, we also established a legally significant delineation between an issuing authority's transfer review function and its role as franchiser: "It is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the transfer process. If an issuing authority wants to negotiate the terms of its license or to amend it, it may do so in a proceeding held pursuant to a license renewal or license amendment." Id.

The transfer standard of review was later adopted as part of our amended transfer regulations at 207 C.M.R. § 4.04. The regulation codifies the principle that transfer review is not an opportunity for issuing authorities to propose amendments to or renegotiate the terms of the existing license. See In re Amendment of 207 C.M.R. §§ 4.01-4.06, Docket No. R-24, Report and Order at 17-18 (1995) ("Report and Order on Transfers"). Thus, subsection 4.04 sustains a regulatory separation between two important and distinct public processes. The franchising process – including initial and renewal licensing and amendments thereto – grants issuing authorities the power to negotiate the terms and conditions by which cable services are offered to local residents. 47 U.S.C. § 541(a); 47 U.S.C. § 545(a); 47 U.S.C. § 546(a); 207 C.M.R. § 3.00, et seq. It is the legal process in which municipal representatives seek to

achieve contractual benefits that are responsive to local needs, interests and priorities. Central to this process is the opportunity to negotiate terms and obligations after discussion and public comment. See 207 C.M.R. § 3.00, et seq. The transfer process, by contrast, reflects a protective intent: it was designed to ensure that a transferee – who, by definition, was not a party to the franchise at the time it was executed – is nonetheless fully qualified to fulfill the existing franchise obligations. Bay Shore at 3; Report and Order on Transfers at 17-18. As further evidence of the limited nature of transfer reviews, federal and state law limit the time period for considering a transfer application to 120 days, a time period deemed adequate for transfer review but not for license negotiations. Compare 47 U.S.C. § 537, G.L. c. 166A, §§ 7, 14, 207 C.M.R. § 4.02(2) with 47 U.S.C. § 541(a), 47 U.S.C. § 546(a); 207 C.M.R. §§ 3.02, 3.05, 3.07.

We have determined that Section 7 serves a protective purpose and facilitates meaningful transfer reviews. The Cable Division's standard of review, announced in Bay Shore and codified in 207 C.M.R. § 4.04, furthers the purposes of Section 7 and thus is a valid exercise of our authority under Section 16 of Chapter 166A.

b. The Regulations Do Not Impair Appellees' Contractual Rights

Appellees argue that subsection 4.04 interferes with Issuing authorities' contractual rights in a manner that violates the Contracts Clause of the U.S. Constitution (Joint Opposition at 37, citing Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978)). According to Appellees, subsection 4.04 impairs issuing authorities' contractual rights by restricting them from including certain provisions in their franchise agreements relative to transfers. For example, Appellees assert that Cambridge "reserved the supervisory capacity" in its license to

inquire into whether the transfer of control would be in the "public interest" (id. at 38, citing Cambridge License at § 2.2(d)). Appellees also assert that North Andover "reserved the right" to consider "other lawful and reasonable criteria in accordance with applicable laws" and Somerville similarly reserved the right to consider "any other criteria allowable under law" (id., citing North Andover License at § 2.4(b), Somerville License at § 2.6(b)). According to Appellees, because they have authority to consider the broad public interest or other criteria in evaluating a transfer, they may exercise this authority by including such transfer provisions in their agreements with a cable operator.

Appellees' arguments on this point lack merit because the municipalities do not have an inherent right to contract with respect to cable franchises. Rather, their contractual rights in this regard are prescribed by the Legislature. Although Chapter 166A grants municipal officials the authority to negotiate license terms and award licenses, this authority is not absolute. New England Telephone and Telegraph Company v. City of Brockton, 332 Mass. 662, 664 (1955). By exercising their authority to assess proposed transfers of these licenses, issuing authorities are acting as public officers under a delegation of power from the Legislature. Id. at 664. Thus, in the review of transfer applications, issuing authorities may exercise authority only to the extent it was delegated to them by the Legislature through Chapter 166A. G.L. c. 166A, §§ 7, 14, 16, 19.

Through Chapter 166A, the Legislature created a comprehensive licensing scheme, enumerating mandatory license terms that parties must include in their franchise agreement and placing other restrictions on the contractual freedom of the parties to a cable license. G.L. c. 166A, §§ 3, 5. For example, under Section 3 the Legislature placed restrictions on the

awarding of cable licenses by issuing authorities, requiring all cable licenses to be non-exclusive and limited to a term of 15 years.[8] Section 3 also requires licensees to commit to areas to be served under a license, as well as dates for the completion of system construction and the availability of service. Section 5 enumerates several license conditions to which a cable operator must agree, including: damage indemnity clauses, insurance and bonding requirements, free cable drops to designated public entities, road repair obligations, and service interruption credits, among others.

Chapter 166A also places limitations on the parties' ability to contract by mandating the fundamental procedural protections for the parties to the licencing process and placing the responsibility of oversight with the Cable Division. For example, Section 6 prescribes the notice and public hearing requirements an issuing authority must follow before awarding a license, including a requirement that an issuing authority issue a statement of reasons for acceptance or rejection of a license application. Further, Section 11 comprehensively details the causes for which an issuing authority may revoke a license granted pursuant to Chapter 166A. In addition, Chapter 166A empowers the Cable Division to authorize license terms and conditions, and to review and approve or disapprove issuing authorities' actions and decisions in the licensing process. G.L. c. 166A, §§ 3, 14. Further, the Legislature assured compliance with Chapter 166A by requiring parties to use forms prescribed by the Cable Division throughout the licensing process. G.L. c. 166A, §§ 4, 7, 13.

---

[8] Federal law similarly places restrictions on the actions of local franchising authorities. For example, franchise fees are limited to five percent of an operator's gross revenues (47 U.S.C. § 542(b)), franchise authorities may not regulate the content of cable services (47 U.S.C. § 544(f)), and may not dictate subscriber equipment or transmission technology (47 U.S.C. § 544(e)).

Under the state franchising process, there is no independent role for issuing authorities to anticipate and impose substantive standards on potential transfer applicants in the cable license. Issuing authorities may not circumvent the statutory transfer scheme by reserving or assuming a right never granted to them by the statute. New England Telephone, at 667 (1955) (citing Treasurer & Receiver General v. Revere Sugar Refinery, 247 Mass. 483, 491 (1924) ("The general doctrine is that conditions and terms inserted in a license by a public board not authorized or warranted by law are void.")). Thus, Appellees' reliance on the Contract Clause is inappropriate, as the Appellees' authority to award cable franchise licenses is granted by the Massachusetts Legislature. G.L. c. 166A § 3; see New England Telephone, at 666. As such, the Appellees' authority is not absolute, but limited to the scope of the enabling statute and the regulations promulgated thereunder.

Appellees state that at the time the contracts at issue were executed, an issuing authority in Massachusetts was entitled to base a license transfer decision on any concern as long as it was reasonable and not arbitrary (Joint Opposition at 39-40, citing G.L. c. 166A, § 7). According to Appellees, they included specific language regarding transfer review in their licenses with MediaOne (id. at 38). Appellees argue that this language should control over the regulatory standard later promulgated (id. at 38-39). In support, Appellees state that "[a]s a general rule, the law in existence at the time an agreement is executed necessarily becomes part of the agreement, and amendments to the law after execution are not incorporated unless the contract unequivocally demonstrates the parties' intent to so incorporate" (id. at 39, citing Feakes v. Bozyczko 373 Mass. 633, 636 (1977)).

Contrary to Appellee's assertions, the Bay Shore case defined the law at the time the

licenses were executed. Bay Shore clearly announced the "step into the shoes" standard and the prohibition against license amendments. As discussed above, the Cable Division announced our interpretation of the statutory language and the purpose of transfer proceedings under the statute well before the licenses were issued.[9] Subsection 4.04, which Appellees argue impairs their authority, is merely a codification of the existing standard and not a subsequent amendment to the law. Under Appellees' own analysis, the law at the time the licenses were executed prohibited issuing authorities from withholding consent to a transfer in an arbitrary or unreasonable manner, whether through procedural error, inaction, or by applying a contractual standard contrary to the standard of review required by law. Therefore, by creating contractual provisions that would conflict with state law if applied, the Appellees were acting beyond their scope of authority.

Appellees assert that even if the regulatory transfer standard of review does not interfere with their contractual rights, the Cable Division is nevertheless precluded from applying its regulations retroactively to licenses granted before the promulgation of subsection 4.04 (Joint Opposition at 39, citing Salem v. Warner Amex Cable Communications, Inc., 392 Mass. 663 (1984)). This argument fails for two reasons. First, as discussed above, Appellees never possessed the authority to include contractual terms creating independent standards for the review of license transfer applications. Second, and more directly, the transfer regulations

---

[9] The Bay Shore decision was issued on November 13, 1985, before the execution of any of the licenses at issue. Although the City of Cambridge complains that the Bay Shore decision was announced only shortly before their License was issued, the decision was nonetheless issued. Moreover, the decision clarified an administrative policy implemented years before the Cambridge License was executed. (November 18, 1981 Letter From General Counsel Kenneth Spigle to S.K. MacNown; January 24, 1983 Letter from General Counsel Kenneth Spigle to Lawrence Pszenny.)

apply to license transfer applications (not to cable licenses) and operate prospectively. The regulatory review process commences once the applicant submits a Form 394. In this situation, the regulations became applicable on July 13, 1999, when the Appellants submitted the Forms 394. Accordingly, we find that our interpretation of Chapter 166A, § 7 does not impair or otherwise interfere with the individual licenses in violation of Appellees' contract rights.

c. 207 C.M.R. § 4.04 is Consistent With Federal Law

Appellees assert that applying our transfer rules in a way that would prohibit them from considering the open access issue within the context of their transfer decisions would impermissibly restrict rights granted to local franchising authorities by Congress (id. at 27-30, 41-42, citing 47 U.S.C. § 533(d)).[10] Specifically, Appellees argue that Congress explicitly gave the states or local franchising authorities the power to make transfer decisions in a manner intended to promote or maintain competition (id. at 27-28). They also contend that federal law provides states and local franchising authorities the right to "protect … consumer choice" (id. at 30). They claim that because the local franchising authority was intended by Congress to be "the primary means of cable television regulation," it is proper for them, as local franchising authorities, to conduct a competitive analysis as part of their transfer review (id. at 29). According to Appellees, their analysis is restricted only by the limitation that consent to a

---

[10] Federal law provides: Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction, or (2) 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. 47 U.S.C. § 533(d).

transfer not be "arbitrarily or unreasonably withheld" (id. at 30). Appellees take their argument one step further when they assert that federal law not only authorizes state and local officials to regulate transfers as to "promote competition and protect customer choice," but that state and local officials have the "responsibility" to do so (id. at 28). Appellees conclude that if the state does not exercise the federally-granted power to promote competition and protect customer choice during the transfer review process, then local issuing authorities are obligated to do so, thus requiring the Cable Division to apply our standard of review in a manner that allows Appellees to consider these issues in their transfer review (id.).

We find Appellees' arguments to be unpersuasive because they incorrectly interpret the relationship between federal law and state law in Massachusetts. Appellees argue that as "franchising authorities" under federal law, they possess broad, unrestricted authority over the review of transfer applications. However, under federal law, the term "franchising authority" means "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10). The governmental entity so empowered varies widely from state to state. For example, some states, like Oregon, leave cable television regulation almost entirely to local authorities. Oregon Statute §§ 190.030-190.110 (1997). Other states, like Connecticut, preempt local franchising and regulate exclusively at the state level. Conn. Gen. Stat. §§ 16-331-333o (1999). Still other states, like Massachusetts and New York, permit local franchising subject to state regulatory standards. G.L. c. 166A, § 3 (1999); N.Y. Public Service Law §§ 211-30 (1999). More specifically, the Massachusetts Legislature delegates initial licensing and initial transfer review to issuing authorities, but permits the Cable Division to establish standards for local franchising and to retain ultimate authority over licensing matters

generally. G.L. c. 166A, §§ 3, 14; Warner Cable, 372 Mass. 495.

The Federal Communications Commission has recognized the delegation of power in Massachusetts. At the request of the Cable Division, the FCC clarified the meaning of franchising authority with respect to the regulation of cable rates within the Massachusetts statutory scheme. Although the federal definition of franchise authority narrowly identifies the entity "empowered to grant a franchise," the FCC demonstrated that a broader analysis is necessary to determine the entity or entities functioning as franchise authorities within a state scheme.

> We conclude that, under principles of municipal corporation law, [the Cable Division] can be considered a "franchising authority" … The power of a local government to grant franchises must be expressly granted or necessarily implied from an express grant of power. Local governments have no inherent regulatory power. That Massachusetts chose to delegate its franchising powers to municipalities does not mean that it gave up its power to grant franchises. … We thus clarify that "franchising authority" means, for rate regulation purposes, the authority empowered by state law to regulate rates. In Massachusetts' case, this entity is [Cable Division], even though it has delegated its authority to issue franchises to local governments.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (released May 3, 1993) at 5685-6, ¶ 71.

Thus, Appellees have misconstrued the extent of their authority to approve or withhold consent to transfers. The Appellees' powers and duties as "franchising authorities" with respect to the review of transfer applications are limited to the powers and duties they possess as issuing authorities under Chapter 166A. Because issuing authorities derive their authority to review transfer requests from the State, through Chapter 166A, the State may define that

authority by establishing a standard of review issuing authorities must follow in reviewing transfer applications. That standard of review is found in Section 7 of Chapter 166A and subsection 4.04 of the Cable Division's transfer regulations.

With respect to Appellees argument that federal law requires states and franchising authorities to deny or restrict transfers in circumstances they deem to be anti-competitive, and that in the absence of state action, issuing authorities are required to do so, we note that Congress did not mandate any state or local franchising role in the transfer process, whether related to competition, consumer choice, or otherwise. 47 U.S.C. §§ 537.[11] Rather, Congress intended to leave the area open for permissive regulation by state or local officials. Id. In Massachusetts, the Legislature and the Cable Division acted in this area by creating a comprehensive license transfer process. G.L. c 166A, § 7, 207 C.M.R. § 4.00 et seq. Therefore, our regulations are consistent with federal law.

Finally, insofar as Appellees rely on the AT&T, et. al. v. City of Portland, 43 F. Supp. 2d 1146, 1152 (D. Or. 1999), appeal pending, No. 99-35609 (9th Cir.)) ("Portland") decision to support their authority to impose open access, that case presents a very different set of legal circumstances than are at issue here. The ruling in the Portland case concluded that a local issuing authority could exercise the power to promote competition as part of its transfer review. 43 F. Supp. 2d at 1152 (citing Proprietors of Charles River Bridge v. Proprietors of Warren

---

[11] Federal law does not require states or franchising authorities to approve sales or transfers of cable systems, but permits states or franchising authorities to do so if state law so requires. 47 U.S.C. § 537. Further, if the review is not completed within 120 days, federal law deems the transfer request approved, a result inconsistent with Appellees' argument that a competitive analysis is mandated. Id.

Bridge, 36 U.S. 420, 547-48 (1837).) The court accepted the issuing authorities' application of 47 U.S.C. § 533(d) as a valid exercise of their inherent authority. Id. The court gave deference to the localities' decisions about the competitive effects of the transfer, and proceeded to discuss the remaining federal law issues involved in the dispute. Id.

We find that the Portland decision is of limited relevance here. The distinguishing feature in that case is the absence of a state licencing scheme. The district court in Portland was not required to consider state law because, simply put, Oregon does not provide a state scheme for regulating cable franchise transfers. The difference here, of course, is that the Commonwealth does. In Massachusetts, a comprehensive state law scheme governs the transfer review process, including the standard of review for issuing authority decisions on transfer. As a result, issuing authorities are precluded from withholding consent to a transfer on open access grounds to the extent these grounds fall outside our standard of review.

Federal law does not preempt or otherwise limit the Cable Division's authority to apply our standard of review to the grounds for decision raised by the Appellees. We therefore find to be without merit Appellees' assertion that the Cable Act prohibits us from finding that their open access claim falls outside out standard of review.

d. Request for Waiver of 207 C.M.R. § 4.04

Alternatively, the Appellees suggest that even if the regulations were a valid exercise of the Cable Division's authority, we should waive the standard of review to allow for legal consideration of the open access issue in light of the strong public policy issues presented (Joint Opposition at 33). The Appellees thereby raise the question of whether, for the purpose of our ruling on the Appeal, we should now modify the standard of review governing the transfer of a

cable franchise. In support of their request, Appellees argue that the proposed transfer between MediaOne and AT&T raises important public policy questions that should be resolved during the transfer process in order to protect the public interest (id. at 34). Specifically, the Appellees contend that the proposed transfer would have an extensive and damaging effect upon competition in a major market, and that such negative effects on competition justify waiver of the standard of review (id. at 33-34).[12] Appellees further contend that to the extent the open access issue is beyond our current standard of review, it represents the kind of unanticipated yet far-reaching public policy issue contemplated for consideration by the Division at the time the waiver provision was promulgated (id. at 33, citing Report and Order on Transfers at 18-19).

Our authority to waive our regulations is found at 207 C.M.R. § 2.04.[13] The regulation provides that, consistent with the public interest, the Cable Division may waive any provision of our regulations for good cause shown. 207 C.M.R. § 2.04. Generally, we have exercised this authority to waive rules that are procedural in nature. These rules would otherwise compel Issuing authorities and operators to abide by deadlines or procedures that may be unrealistic or unnecessary in the context of a rapidly changing market. We have granted these requests in an

---

[12] The Appellees contend that good cause also exists to support a waiver of the standard of review because the Appellants were afforded some procedural protections in the underlying proceedings and would therefore not be prejudiced in the event we were to waive or modify our review standard at this juncture. (Opposition at 35) We find that this argument is misplaced given that we must conduct this proceeding de novo.

[13] The Cable Division repealed the specific waiver provision at Section 4.06 and promulgated a general waiver provision applicable to all of our regulations at Section 2.04. In re Amendment of 207 C.M.R. §§ 2.00 - 10.00 Report and Order, Docket No. R-25, (1996).

effort to streamline issuing authority action on a broad range of franchising matters, including the transfer process. For example, recently we have found that in some instances waiving our procedural franchising rules has served to facilitate the entrance of competitive providers and the introduction of new services to Massachusetts municipalities and their residents. See, e.g., November 18, 1999 Letter to John F. Maher, Town Counsel, Town of Arlington; November 30, 1998 Letter to Wayne Friedrichs, Chairman, Acton Board of Selectmen (waiving advertising requirements and application deadlines for the initial licensing process under 207 C.M.R. § 3.03(2)).

Appellees reference our Order promulgating the transfer regulations in support of their contention that the regulations provide the necessary flexibility in a changing market environment to support a broader interpretation of our standard of review (Opposition at 33, citing Report and Order on Transfers, at 18-19). Significantly, the referenced paragraph does not address our standard of review for transfers per se. Rather, it speaks to the transfer rules generally; the vast majority of which are procedural in nature. In fact, the paragraph references an example of a potential procedural waiver.

While our waiver provision is not formally limited in applicability to rules that are strictly procedural in nature, it has not been used as a vehicle to change a substantive standard of review. By their nature, regulations are rules of general applicability. Cella § 371, at 668. As such, there are well-established procedural safeguards to ensure that the interests of persons affected by changes to such regulations are protected. G.L. c. 30A; 207 C.M.R. § 2.01. Waiving the substantive standard of review governing all operators and issuing authorities under our jurisdiction would raise due process issues not triggered by waivers of procedural

requirements. For example, to the extent that issuing authorities or operators rely on an existing standard of review in making legal and business decisions, as the Appellants and several issuing authorities apparently did below, changing that standard of review without appropriate procedural due process would be unreasonable and unfair. In dealing with an administrative agency, parties are entitled to rely upon existing rules and, where applicable, to be the beneficiaries of such rules. Cella § 725, at 104 (citing DaLomba's Case, 352 Mass. 598 (1967)). Consistent with our responsibility to promulgate, interpret and enforce our rules to accomplish effective oversight of the licensing processes, we have applied the current standard of review to every proposed license transfer in the Commonwealth for over 15 years. [14]

Approving the requested waiver of 207 C.M.R. § 4.04 would blur the legal distinctions between the franchise and the transfer processes, arguably undermining both. In the absence of 207 C.M.R. § 4.04, the transfer process would no longer serve an exclusively protective function. Rather, it would become a forum for Issuing authorities to replay the licensing process by entering into a series of informal franchise negotiations aimed at leveraging their transfer approvals in exchange for system upgrades, outright grants or other benefits not previously negotiated into their licenses. Conversely, waiving 207 C.M.R. § 4.04 may lead transfer applicants, some of whom may otherwise lack the substantive qualifications to "step into the shoes" of the franchisee, to seek to avoid the rigors of a proper transfer review by

---

[14] In fact, this was the standard of review applied by the Appellees and 118 other issuing authorities who reviewed MediaOne's transfer application in connection with its 1996 purchase of Continental Cablevision. Letter to John Patrone, Commissioner, Massachusetts Cable Television Commission (July 15, 1996).

offering to renegotiate license terms in exchange for local transfer approval. In our view, neither outcome is consistent with the public interest.

We therefore conclude that the public interest continues to be well served by our existing standard of review. We find that the four-prong performance standard contained in 207 C.M.R. § 4.04(1) continues to represent an important expression of the public interest in ensuring that every transfer applicant is capable of assuming all of the responsibilities – managerial, technical, financial and legal – under the existing franchise. Subsection 4.04(1) provides issuing authorities a general but well-defined standard to ensure that every transferee is fully qualified to abide by the terms of the existing franchise. In addition, subsection 4.04(2) preserves the purpose of the transfer approval process by requiring a meaningful review of the applicant's relevant qualifications and preventing the dilution of the process by the introduction of peripheral issues. Thus, while we recognize the importance of the open access debate, we find that the regulatory purpose of our existing review standard – namely, ensuring that only qualified transfer applicants are granted franchises -- transcends the undeniably important public policy considerations surrounding the open access issue. Accordingly, we find that the Appellees have not demonstrated that the public interest would be served by waiving our regulatory standard of review for considering transfer applications under 207 C.M.R. § 4.04.

2. Application of State Law to the Dispute

We now apply the transfer standard of review to the matters at hand to determine whether there are any genuine issues of material fact and whether the Appellants are entitled to a decision as a matter of law. As part of our analysis, we address whether the open access issue, as raised by the Appellees, may be considered under our current standard of review.

a. Open Access Issues

Appellees have either withheld or conditioned consent to the Appellants' transfer application, at least in part, on the basis of AT&T's unwillingness to offer unaffiliated ISPs open access to its cable modem platform. Appellees posit that requiring open access as a condition of transfer approval or as a basis for denial is not an amendment to the existing license, but an exercise of legal rights (Joint Opposition at 41). Appellees further argue that the statutory power to deny a license transfer includes the lesser power to place conditions on the consent to transfer (id.). Appellants counter that the Cable Division's transfer regulations purposely prohibit issuing authorities from attempting to renegotiate terms of the franchise agreement during the license transfer process (see, e.g., Memorandum in Support of Summary Decision, CTV 99-4, at 16). Further, Appellants contend that with respect to the open access issues the material facts in this case are not disputed, that the issues of fact Appellees raise are not relevant to the proceeding, and that the case may be resolved on the law (Memorandum Opposing Consolidation at 5-6).

The transfer regulations state "[a]s part of an issuing authority's review of an application for a transfer or assignment of a license or control thereof, an issuing authority shall not propose amendments to or renegotiate the terms of the existing license or any license renewal proposal." 207 C.M.R. § 4.04(2). To the extent that a condition the Appellees seek to impose upon AT&T was not included in the license agreement with MediaOne, the condition would be an amendment to the license and beyond the Appellees' authority. Moreover, because the Appellees' power to deny a transfer is limited by the scope of the state transfer statute and regulations, the lesser power to condition, if it exists, similarly is limited in scope.

Appellants contend that the Appellees' respective licenses do not contain terms or conditions for open access[15] (see, e.g., Memorandum in Support of Summary Decision, CTV 99-4, at 13). Appellees do not dispute the Appellants' claim that none of the existing licenses expressly provides for open access, but argue that their consideration of open access is the exercise of a right reserved under the agreements and applicable law (Joint Opposition at 41). We address the Appellees' claims regarding their exercise of "reserved rights" in Section III(C)(1)(b), above. We further find that contract interpretation presents a question of law properly to be undertaken by this agency. See Robert Indus., Inc. v. Spence, 362 Mass. 751, 755 (1973); USM Corp. v. Arthur D. Little Sys., Inc., 28 Mass. App. Ct. 108, 116 (1989). Upon review of these licenses, we find that none contains provisions requiring MediaOne to provide open access. Thus, as a matter of law, we conclude that the Appellees cannot unilaterally alter their existing licenses by mandating that AT&T provide open access to non-affiliated ISPs.

Appellees also assert that Appellants' failure to provide open access precludes the Appellants from satisfying two of the four criteria for transfer consideration: legal ability and technical expertise. Appellees argue that AT&T lacks the legal ability and technical expertise to assume MediaOne's licenses, and that, therefore, the actions they took on the transfer were within the scope of review (Joint Opposition at 42). Appellees contend that AT&T's failure to

---

[15] The licenses at issue are: Initial Cable Television License City of Cambridge dated December 31, 1985; North Andover Renewal License dated February 11, 1994; Quincy Renewal License dated June 4, 1996; and Somerville Renewal License dated August 19, 1992. These documents are filed as public documents with the Cable Division pursuant to G.L. c. 166A, § 3. The Cable Division hereby takes administrative notice of these Licenses pursuant to G.L. c. 30A, § 11(5) and 801 C.M.R. § 1.01(10)(h).

offer open access "implicates serious federal and state restraint of trade policies" (Joint Opposition at 43). According to the Appellees, these "anti-competitive" developments "impair AT&T's fundamental legal qualifications to perform under the contract" (id. at 45). With respect to AT&T's technical ability to operate the cable systems, Appellees claim that while AT&T has the technology to offer open access, it "is unwilling to effect the technical capacity to operate and update the cable system as required under applicable law, and the existing licenses" (id. at 47). Appellees contend that because connection of multiple ISP's to a cable system has been demonstrated on a small scale, and because other telecommunications companies have committed to carry multiple ISP's, AT&T's failure to use available technical expertise to operate the cable systems in a lawful manner is sufficient grounds to deny the license transfer. In Appellees' view, the questions of AT&T's legal ability and technical expertise are factual.

While we concur that an assessment of AT&T's legal and technical qualifications generally would involve factual inquiries, these factual inquiries are not material here. Importantly, issuing authorities are guided in their application of the four criteria set out in subsection 4.04(1) by the prohibition against license amendments set forth in subsection 4.04(2). Efforts by issuing authorities to add to, enhance or otherwise modify existing franchise obligations in the pretext of requiring compliance with the four criteria of the transfer standard is prohibited. 207 C.M.R. § 4.04(2). Appellees may not allege failure to meet the legal and technical prongs of subsection 4.04(1) as grounds for denial when the grounds for denial also exceed the limits of subsection 4.04(2).

With respect to the legal prong, the Appellants contend that they possess the legal ability to assume control of MediaOne's licenses. Appellees dispute this contention to the extent that AT&T fails to provide open access. The failure to provide open access does not reflect on AT&T's "legal ability" to meet current franchise terms because these franchises do not now provide for open access. In order for Appellees' arguments to have merit, an amendment to the license would be required. Given that such an amendment would violate subsection 4.04(2), Appellees' denial of AT&T's transfer application on grounds that the applicant does not fulfill the legal requirement of subsection 4.04(1)(d) is invalid.

Similarly, AT&T's lack of an open access offering does not reflect on its technical ability to operate the cable systems under the subject licenses because the licenses do not include any open access commitments. Although Appellees assert that the technical expertise to provide open access is "required under applicable law," AT&T must only demonstrate that it has the technical expertise to operate a cable system under the terms of the "existing license." 207 C.M.R. § 4.04(1)(b). Thus, while Appellees discuss the technology issue at some length, the discussion does not raise any material factual issues regarding AT&T's ability to demonstrate its "technical expertise…to operate a cable system under the existing license" in accordance with our standard of review under subsection 4.04(1)(b).

Appellees may not use AT&T's alleged inability or unwillingness to offer open access as grounds for ruling that the Company does not have the legal ability or the technical expertise to fulfill the obligations contained in the Appellees' current franchises. Neither the legal nor the technical open access issues raised by the Appellees bear on the applicant's ability to "step into the shoes" of the incumbent provider and fulfill all existing technical and legal franchise

obligations, and are thus not genuine issues of material fact. Given that this was the sole basis for North Andover's and Quincy's conditional approval of the license transfer, we conclude that, as a matter of law, the withholding of consent by these two municipalities was unreasonable and arbitrary under G.L. c. 166A, § 7 and 207 C.M.R. § 4.04. We note that North Andover and Quincy inserted severability clauses within their respective transfer decisions.[16] As a result, the transfer approval vote stands for North Andover and Quincy without the open access conditions. With respect to Cambridge and Somerville, to the extent that denial of the transfer was based on AT&T's failure to provide open access, the denials are unreasonable and arbitrary.

b. Other Issues

In their respective decisions, Cambridge and Somerville also denied approval of the proposed transfer on grounds other than AT&T's failure to provide open access. City Manager Decision Regarding the Cable Television Transfer Request (November 10, 1999); Letter from Dorothy Kelly Gay, Mayor, City of Somerville to William Leahy, Regional Director Government Affairs, AT&T (November 10, 1999). We address these grounds.

i. Public Interest/Specific Benefit

Cambridge denied the transfer, in part, claiming that the transfer is not in the public interest because "AT&T has failed to make a case that the transfer, especially given its $58 billion price tag, would benefit Cambridge cable television subscribers" (Cambridge City Manager Decision at 4). Cambridge states as a basis for denial that AT&T failed to offer

---

[16] Each decision contains a clause that states that in the event any portion of the decision is determined to be invalid, the remaining portions of the decision will remain in effect.

programs that would improve cable services for Cambridge subscribers (id.) Appellants move for summary decision to dismiss this ground for denial, arguing that there is no specific "public interest" or "additional benefit" requirement for transfers under current law but that, even if there were, these requirements would be met by the proposed transfer (see, e.g., Memorandum in Support of Summary Decision, CTV 99-4, at 19-22).

As discussed above, we find that the transfer standard of review serves the public interest by ensuring that transfer applicants are qualified to step in the shoes of the transferor. By requiring AT&T to provide additional benefits to Cambridge subscribers in order to meet what it determines to be the public interest, Cambridge attempts to re-define the standard of review with respect to cable license transfers. The transfer review standard properly focuses on whether the proposed transferee is able to "step into the shoes" of the transferor for the purpose of carrying out the terms of the existing license. Bay Shore at 3. Relevant factors for issuing authority consideration of this standard are limited to the transferee's management experience, technical expertise, financial capability and legal ability to operate a cable system under that license. 207 C.M.R. § 4.04(1). Thus, Cambridge may not deny a transfer application based on the transfer applicant's failure to demonstrate how it will improve cable services in the City. Accordingly, to the extent that Cambridge's denial is based on the transfer's lack of "the public interest" or its lack of "benefit to cable television subscribers," we find it to be arbitrary and unreasonable, as a matter of law.

ii. Management Experience

Cambridge and Somerville also base their denials on AT&T's alleged lack of management experience. The Appellants challenge the Cities' denials on these grounds,

seeking summary decision (see, e.g., Memorandum in Support of Summary Decision, CTV 99-5, at 21-23).

The Appellants claim that the evidence presented below demonstrates that AT&T possesses the management experience to operate a cable system under the existing licenses (id. at 22). In support, Appellants assert that the retained MediaOne management, TCI's embedded management expertise, and AT&T's own management are sufficient to meet the regulatory standard (id. at 22-23). Appellants also state that both Cambridge and Somerville have approved of MediaOne's management in recent transfers under similar circumstances (id.). The Appellants contend that on this basis they are entitled to prevail as a matter of law (id.). However, Cambridge and Somerville dispute the Appellants' factual claim, insisting that they did not receive adequate assurances that the transferee possesses adequate managerial experience (Joint Opposition at 48, citing 207 C.M.R. § 4.04(1)(a)). Material factual issues do exist. For example, to the extent that Appellees assert that AT&T lacks direct experience to manage cable television systems, we must determine if Appellees' rejection of AT&T's other management experience is reasonable. In addition, we must inquire into Appellees' speculation about AT&T's future plans for retaining or releasing current management personnel. Thus, despite the Appellants' arguments to the contrary, there exists a disputed issue of fact regarding the sufficiency -- or insufficiency -- of AT&T's management experience to operate a cable system under the existing licenses. Accordingly, summary decision is denied.

iii. Future Adherence to Franchise Terms

Cambridge finds as an additional basis for its denial that AT&T is not likely to adhere to the terms and conditions of the existing license (Cambridge City Manager Decision at 1, 3).

The Appellants move to dismiss as arbitrary and unreasonable the Cambridge denial based on this point. The Appellants state that under Massachusetts law, the issuing authority must strictly limit its transfer review to whether the transferee will be able to perform the terms of the existing license (Memorandum in Support of Summary Decision, CTV 99-4, at 28, citing Report and Order on Transfers at 18). Cambridge disputes the Appellants' position that the applicant will perform the license terms. Ability to comply with existing license terms involves a factual question that may, or may not, be material to the transfer process. We lack sufficient information to determine whether the factual issue is relevant. Further proceedings in this matter will determine the materiality of the grounds under the transfer standard of review. Accordingly, we deny summary decision on this point.

IV. CONCLUSION

In our analysis, we do not consider the merits of the open access dispute. Rather, our conclusions are based on an analysis of the license transfer review process under Massachusetts law. This process is governed by a standard of review that has served, and continues to serve, the public interest; first by ensuring that every transfer applicant is fully qualified to abide by the terms of the existing franchise, and second, by preventing the dilution of the process by the introduction of issues extraneous to the franchise. The standard of review does not allow Appellees to require open access as part of this transfer review process. Thus, to the extent the Appellees based their decision on an open access requirement, they acted beyond the scope of the transfer review process.

Where Appellees acted within the scope of their authority, we will address unresolved factual issues in the separate proceedings for Cambridge and Somerville. We note that

Appellants filed a motion for expedited process. We intend to proceed as expeditiously as possible. To this end, we will contact Cambridge, Somerville, and Appellants shortly to schedule a procedural conference. All parties should be prepared to discuss a procedural schedule. Parties will be ordered to submit pre-hearing memoranda identifying the legal and factual issues remaining to be resolved with respect to the denials issued by Cambridge and Somerville.

V. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: Appellees' Joint Motion to Consolidate is hereby DENIED; and it is

FURTHER ORDERED: Appellants' Motion for Summary Decision filed in CTV 99-2 is hereby GRANTED; and it is

FURTHER ORDERED: Appellants' Motion for Summary Decision filed in CTV 99-3 is hereby GRANTED; and it is

FURTHER ORDERED: Appellants' Motion for Summary Decision filed in CTV 99-4 is hereby GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED: Appellants' Motion for Summary Decision filed in CTV 99-5 is hereby GRANTED IN PART and DENIED IN PART.

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

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

APPEALS

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 1997, c. 164, § 273. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within 7 days of the filing of the initial petition for appeal.