COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION

MediaOne of Massachusetts, Inc., MediaOne Group, Inc., and AT&T Corp.,	)	
Appellants,	)	
v.	)	CTV 99-2; CTV 99-3; CTV 99-4; CTV 99-5
Board of Selectmen of the Town of North Andover, Mayor of the City of Quincy, City Manager of the City of Cambridge, and the Mayor of the City of Somerville,	)	
Appellees.	)	

JOINT OPPOSITION OF TOWN OF NORTH ANDOVER, CITY OF QUINCY, CITY OF CAMBRIDGE AND CITY OF SOMERVILLE TO APPELLANTS' MOTIONS FOR SUMMARY DECISIONS

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INTRODUCTION

The Town of North Andover, the City of Quincy, the City of Cambridge, and the City of Somerville (collectively the "Issuing Authorities" or "Appellees") oppose the Motions for Summary Decision that MediaOne of Massachusetts, Inc., MediaOne Group, Inc. (collectively "MediaOne") and AT&T Corp. ("AT&T") (collectively, the "Appellees") have filed in each of the above referenced matters pursuant to 801 CMR 1.01(h).[1]

To obtain summary decision, Appellants maintain the burden of establishing that the facts and law at issue are undisputed to the extent that the papers filed show that a

[1] The Issuing Authorities have moved that the Division consolidate the above captioned appeals in a single proceeding or hearing given the common factual and legal issues that the Division must review in each matter. The fact that the Appellee's memoranda in support of its motions for summary disposition are virtually identical in each of the four cases further amplifies the need for and propriety of a consolidated

hearing can serve no useful purpose. The record before the Division demonstrates, however, that not only are there significant issues of material fact and law but also that these facts and the law weigh heavily in favor of Division approval of the Issuing Authorities' transfer decisions.

As explained below, the decisions by the Issuing Authorities were each an appropriate exercise of the power granted them by federal legislation and consented to by the Massachusetts Legislature to promote competition in the field of cable services and for the purpose of protecting consumers. To the extent that the Division regulations are interpreted narrowly to preclude consideration of the requirement of open access, and the Division does not waive application to accommodate such consideration, the regulations are inconsistent with the applicable federal and Massachusetts statutes and must be found invalid.

Finally, the application of the regulations to preclude consideration of open access is contrary to the contractual rights reserved to Cambridge, Somerville, and North Andover under their respective franchise agreements. To so impair these contracts would violate constitutional protections and inappropriately apply later enacted regulations retroactively. For all of these reasons, the Division must allow for the Issuing Authorities' consideration of open access in the transfer decision.

The above captioned appeals all revolve around AT&T's claim that the cable wire franchises it is absorbing entitle it to become an unconstrained master of a constricting bottleneck in the Internet. The immediate concern of supporters of open access is AT&T's forced bundling of its preferred and captive ISP with its wire franchise. But what is more

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hearing. Accordingly, for the convenience of the Division, the Issuing Authorities submit this Joint Opposition in response to the Appellee's separate motions for summary decision.

broadly at risk is the very integrity of the Internet's design. Since 1975, when the architecture of the current Internet was laid out, the numbers of users has increased by nearly a millionfold; the power of computers has increased by 1000 times while their cost has dropped to one thousandth; the communications links that make up the network have increased in speed by a million times; and the Internet is being used in ways completely undreamed of at the time of its design. As Massachusetts Institute of Technology Computer Science Professor Jerome Saltzer lucidly explains, "[t]his remarkable evolution and adaptation has been made possible by one simple design principle, called the End-to-End argument. The End-to-End argument says 'don't force any service, feature, or restriction on the customer.'"
<http://web.mit.edu/Saltzer/www/publications/openaccess.html>

The Issuing Authorities either denied or conditionally approved AT&T's FCC Form 394 transfer requests that AT&T filed in connection with its takeover of MediaOne, the largest supplier of cable television services in the Commonwealth. Each of the Issuing Authorities relied upon AT&T's refusal to permit open access to its broadband network as one basis for their respective decisions. AT&T now seeks a lightning fast decision from the Division on this important public policy issue that will preserve or enhance AT&T's emerging monopoly in the market for high speed Internet connections in this state and around the country. AT&T has not met its burden with regard to summary disposition. The Issuing Authorities were within their legal rights in considering open access and concluding that the transfer must allow for open access.

AT&T's request for summary disposition is further undermined by its announcement on December 6, (made after these appeals were filed) that AT&T will

provide some form of open access to its developing cable broadband empire in the year 2002. While vague and non-binding, this announcement belies AT&T's consistent and repeated testimony in public hearings across Massachusetts that open access was technically impossible, economically infeasible to implement and contrary to the interests of the consumers. AT&T has now conceded the reasonableness of the Issuing Authorities' open access conditions.[2] Accordingly, any attempt by AT&T to summarily dispose of this action must itself be summarily dismissed.

Summary disposition is also inappropriate given the transformative nature of these transfer proceedings. The Issuing Authorities all granted initial licenses to cable television suppliers to establish community antennas and cable networks through the streets of each community so that the residents in each municipality would have better access to television programming. Technology now permits this access to be transformed from a connection to a community television antenna into a pipeline for the Internet. The subject of each of the licenses for each Issuing Authority and the range of activities to which each license now relates is expanding to embrace all aspects of digital commerce and culture. In this new landscape of communication technology speed is everything and the broadband cable network that AT&T will acquire represents the fastest Internet connection available to consumers in Massachusetts. AT&T's broadband cable empire in this state and around the nation will permit AT&T to constrain this new medium as it constrained growth and

[2] AT&T's belated acknowledgement of the feasibility and desirability of open access raises serious concerns regarding its contrary representations to scores of Massachusetts communities and their reliance on AT&T's assertions, and threats, in ultimately declining to impose open access conditions. This Division should be troubled by AT&T's conduct and consider a mechanism to allow reconsideration of this issue by additional cities and towns. The Division should note that several communities, including Brockton, South Hadley, South Deerfield, Chatham, Pelham, Amherst, Montague, Greenfield, and Burlington, attached reservations of rights to their transfer decision in an attempt to express their desire for open access in the face of AT&T's threats and now abandoned arguments.

innovation on the telephone network prior to government action that broke up AT&T's telephone monopoly. It has been on an open telephone network that the Internet has grown.

AT&T is rapidly establishing a national broadband network for Internet connection. If AT&T is permitted to maintain unfettered power to discriminate among providers, it will alter for virtually every consumer the open "end to end" architecture of the Internet. The Internet has thrived on "open access" to date. Permitting AT&T to alter that landscape by bundling its own ISP as mandatory service and discriminating against other, non-affiliated providers that seek access to the cable pipeline will inevitably stifle competition and innovation.

Because there are genuine issues of fact and law that the Division can only decide after a full evidentiary hearing and additional briefing, and because the issue of open access to the Appellees' cable broadband network is of extraordinary importance to the Issuing Authorities, consumers and providers throughout the Commonwealth, and to the Internet community at large, the Division cannot render a decision in these matters simply by laying hands upon the record developed in the public hearings and reliance upon the summary disposition papers. In all events, the law cited herein and the record in each case demonstrate that the Issuing Authorities' decisions to deny or conditionally approve AT&T's FCC Form 394 transfer requests were reasonable and appropriate on the facts and under applicable legal standards. Accordingly, as more fully set forth below, the Division should deny the Appellees' motions for summary disposition in each case and hear evidence and argument with respect to the propriety of the Issuing Authorities' decisions.

PROCEDURAL BACKGROUND OF THE CASES

This matter involves the independent determination of the Issuing Authorities to deny or to conditionally grant AT&T's FCC Form 394 requests to transfer the cable television license of each Issuing Authority in connection with AT&T's acquisition of MediaOne and MediaOne's various subsidiary companies.

A. The MediaOne/AT&T Merger and Application for Change in Control

On or about July 13, 1999, AT&T simultaneously filed an application for approval of a change in control (FCC Form 394, with exhibits) with the 175 cities and towns in Massachusetts that have granted cable television licenses to MediaOne. Under federal and state law, as well as under the individual franchise agreements, the Issuing Authorities determine after a hearing whether the proposed transfer should be approved. Applicable regulations of the Division would have required all 175 towns to conduct hearings with respect to the transfer of the subject cable licenses within sixty days of AT&T's July 13, 1999 filing. In response to these unique circumstances, the Division agreed, to AT&T/MediaOne's request to conduct optional regional hearings throughout the Commonwealth for the benefit of the subject cities and towns.

B. Regional Hearings

The Division informed all 175 communities that the Division had granted the request of AT&T/MediaOne for regional hearings and that such hearings were being scheduled.[3] The Division informed each community that the Division would hold eleven regional hearings and further informed the communities that each issuing authority, including those who participate in the regional hearings, must ultimately consider the

[3] Appellees note that there is no mention regarding the source of the Division's authority to schedule regional hearings for the purpose of bypassing individual hearings.

application and make a decision on whether to approve the transfer on its own.[4] See Cable Division Transfer Bulletin 99-4 (June 28, 199) attached as Exhibit A.

The Division appointed Charles J. Beard as the Special Magistrate for the eleven regional hearings. Following the completion of the regional hearings, Magistrate Beard issued a twenty page Summary of Proceedings and Magistrate's Report dated September 24, 1999 (the "Magistrate's Report") containing a set of *non-binding* findings and recommendations on issues that the Division had specified in the June 28, 1999 Transfer Bulletin. See Magistrate's Report at 1, attached as Exhibit B.

Magistrate Beard considered the scope of his charge to be focused on a narrow interpretation of the four criteria set forth in 207 CMR 4.04 the consideration of the transferee's (a) management experience; (b) technical expertise; (c) financial capability; and (d) legal ability to operate a cable system under the existing license. See Magistrate's Report at 2. It is important to note, however, that Magistrate Beard acknowledged that this narrow interpretation was based upon Division regulations and decisions that had yet to be challenged to any court in the Commonwealth. See id.

Magistrate Beard firmly acknowledged the importance of what he characterized as "public policy" issues in the context of the transfer of MediaOne's cable television monopoly to AT&T. The Magistrate's Report states, in pertinent part:

> It is clear from the record in this proceeding that the transfer of MediaOne's licenses to AT&T is an event far different from the hundreds, if not thousands, of license transfers that have taken place to date in the Commonwealth. Never before has a company as large and as diversified as AT&T, and with so many plans for transforming the delivery of cable services, sought to enter the Massachusetts cable market.

[4] Under federal law, a failure to render a decision within 120 days is deemed an approval. 47 C.F.R. §76.502(c).

> The transfer obviously raises a host of public policy questions. I was charged with the duty of helping cities and towns assess whether AT&T has the legal ability, the management experience, the technical expertise, and the financial capability to fulfill all of the obligations under the MediaOne licenses.

See Magistrate's Report at page 20. Foremost among these "public policy" issues was the open access debate. Magistrate Beard noted that "the [open access] issue has enormous importance as a public policy issue . . . " Id. In fact, detailed testimony on the open access issue was presented at several of the regional hearings and was summarized in the Magistrate's Report.

In the end, while Magistrate Beard perceived of his role and authority to make recommendations following the regional hearings as limited in scope, the Magistrate made note of the fact that the acquisition of cable monopolies in Massachusetts by AT&T is an extraordinary event with vast public policy and other considerations and that the open access issue is central among them. See id. at 3.

C. AT&T/MediaOne Presented Its Open Access Position In Public Hearings

Despite a proposed limitation on the scope of the public hearings by Magistrate Beard, it became obvious that the issue of open access was to play a major role in the deliberations and considerations of each of the affected towns. See id. In at least eight of the eleven hearings, residents and representatives of the various issuing authorities raised the issue of open access.[5] Throughout the hearings, the participants at the hearings "*raised important questions about whether the Road Runner service [MediaOne's captive Internet*

[5] See Boxford Regional Hearing (August 4, 1999) at 44-45; Barnstable Regional Hearing (August 9, 1999) at 59, 69; Newton Regional Hearing (August 10, 1999) at 51-52, 64; Springfield Regional Hearing (August 11, 1999) at 42; Malden Regional Hearing (August 31, 1999) at 36, 59-61; Foxboro Regional Hearing

service provider] is being provided in a manner that will stifle competition and limit the growth of broadband services." See id. (emphasis supplied).

Notwithstanding Magistrate Beard's belief that his scope of review was restricted in a manner that precluded his consideration of the open access issue, the legal implications of a closed system were specifically addressed at the hearings. Various issuing authorities, consumer groups and other interested parties presented testimony that an exclusive arrangement between AT&T and the MediaOne Road Runner service was anti-competitive, including testimony that the arrangement was likely susceptible to anti-trust challenge. See Weymouth Regional Hearing (September 9, 1999) at 67-68. Further, AT&T's ongoing litigation in Portland, Oregon on the open access issue was raised on numerous occasions, as were open access ordinances that had been enacted in Broward County, Florida. See e.g. Barnstable Regional Hearing (August 9, 1999) at 55.

In addition, portions of AT&T's filing to the Canadian cable television authority, the CRTC, regarding open access issues were read into the record.[6] In that filing, AT&T strongly advocated for an open access directive because of the anti-competitive impact of a closed system:

> [Cable operators and local telephone companies] have the ability to exercise significant market power through the control which they exercise over bottleneck broadband access facilities and through the dominance which they enjoy in their respective core business markets….
>
> The potential for anti-competitive behavior can manifest itself in a number of ways. One, pricing of Broadband accessing services below cost in some markets so as to preclude service by other service providers. [Two,] [p]ricing

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(September 2, 1999) at 67-69; Burlington Regional Hearing (September 8, 1999) at 151; Weymouth Regional Hearing (September 9, 1999) at 63.

[6] *Comments of AT&T Canada Long Distance Services Company, addressed to* Telecom Public Notice CRTC 96-36 (February 4, 1997) (attached as Exhibit C).

> services above costs in uncontested markets thus providing [a source of profits] with which to subsidize other services. Three, discriminatory behavior in relation to the terms and conditions for broadcast access services and refusal to unbundle bottleneck components thus disadvantaging service providers with whom the access provider competes in downstream markets.[7]

In sum, there was important and extensive discussion in the hearings concerning the anti-competitive effect of the planned transfer of control of the licenses despite Magistrate Beard's view that the open access issue was not directly tied to the four criteria in 207 CMR 4.04. AT&T participated actively in, and in certain instances initiated, that debate.

There was also substantial discussion during the hearings concerning the adverse effect of a closed system upon the public interest. As Magistrate Beard described, the discussions were "frequently vigorous, sometimes contentious … and grew to the point that AT&T decided to make a *special presentation* about its views on the 'open access' question." See Magistrate's Report at 4 (emphasis supplied). AT&T not only presented its side of the open access debate at length in the ordinary course of the hearings, see e.g. Foxboro Regional Hearing (September 2, 1999) at 59-66, but, in fact, introduced what it asserted as a panel of experts to make a formal presentation on the issue. See Burlington Regional Hearing (September 8, 1999) at 90-127.

[7] See Weymouth Regional Hearing at 95-96 quoting *Comments of AT&T Canada Long Distance Services Company*.

D. The Issuing Authorities' Hearings and Decisions

1. The City of Cambridge

On August 19, 1999, Cambridge, under the supervision of its City Manager, Robert Healy, held a public hearing to address AT&T's transfer request as required by 207 CMR 4.00. See Cambridge Hearing transcript attached as Exhibit D. At that time, Mr. Healy indicated that the record would remain open for public comment until September 10, 1999. At the meeting, Appellants presented their side of the debate concerning the issue of "open access." The parties' also discussed the failure of MediaOne to comply with the License Agreement.

As City Manager, it was the responsibility of Mr. Healy to decide whether to grant the transfer request. Mr. Healy properly considered the information received from the meeting. In addition, Mr. Healy made no decision prior to the close of the public hearing comment period.

In his role as City Manager, Mr. Healy determined that any approval of the request must be conditioned on several factors, i.e. compliance with the License, a showing of the requisite management experience by AT&T, as well as non-discriminatory access to its broadband system provided to other ISPs by AT&T. With respect to the latter, Mr. Healy continued negotiations with AT&T beyond the public comment period, including correspondence to AT&T consistently maintaining that approval of the request would in part require this open access commitment from AT&T. See October 20, 1999 Healy correspondence attached as composite Exhibit E.

In its submission to the Division, AT&T mischaracterizes a subsequent City Council hearing as a "cable hearing" and as part of this record. The City of Cambridge

held its appropriately noticed public hearing as required by law on August 19, and kept the record open for public comment for three weeks thereafter. The City Council meeting referenced by AT&T in its submission was merely a forum for the City Manager to update the City Council on the status of the license transfer. The Issuing Authority properly rendered its decision on November 10, 1999, after failing on a number of occasions to receive adequate assurance that the transferee (a) would comply with the existing license, (b) had sufficient management experience and (c) would provide access to other ISPs in a non-discriminatory manner. Thus, Cambridge complied with all applicable law regarding the transfer decision and procedures. See Cambridge Decision attached as composite E.

2. The City of Quincy

On or about November 10, 1999 the City of Quincy issued a written decision to the Division with respect to AT&T's FCC Form 394 request (the "Quincy Decision"). A copy of the Quincy Decision is attached hereto as Exhibit F.

The Quincy Decision specifies that Quincy approves of the transfer of its cable license from MediaOne to AT&T based, in part, upon the recommendations set forth in the Magistrate's Report and based further upon the specific representations and warranties that AT&T and MediaOne made at the regional public hearings referenced above.[8] In addition, consistent with its reliance upon the Magistrate's Report and the Magistrate's acknowledgment of the importance of the open access issue, Quincy made its approval of AT&T's FCC Form 394 request expressly contingent upon AT&T, as holder of the Quincy cable license, providing nondiscriminatory access to its cable system by any requesting Internet service provider on "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." See November 10, 1999 correspondence.

3. The Town of North Andover

On or about November 10, 1999, the Town of North Andover sent AT&T a copy of its written decision with respect to AT&T's FCC Form 394 request (the "North Andover Decision"). North Andover also provided a copy of the decision to the Division. A copy of the North Andover Decision is attached hereto as composite Exhibit G.

Representatives of North Andover participated in the regional hearing that the Division conducted on August 12, 1999 in Lowell. Based upon the representations and warranties that AT&T and MediaOne made at that hearing, the transcript of the proceedings, additional communications with MediaOne, and its own independent review of the facts, North Andover approved the transfer request of AT&T. North Andover's approval was expressly contingent on five conditions: (1) that there be no increase in subscriber rates as a result of the transfer of control; (2) that AT&T comply in all respects with all of the terms and conditions of the North Andover Renewal License; (3) that AT&T resolve certain compliance matters with the Renewal License identified in an attachment to the North Andover Decision; (4) that AT&T provide nondiscriminatory access to its cable modem platform in North Andover for unaffiliated providers of internet and "on-line" services; and (5) that AT&T pay all applicable taxes due to the town.

4. The City of Somerville

On or about November 10, 1999 the City of Somerville issued a written decision to AT&T with respect to AT&T's FCC Form 394 request (the "Somerville Decision"). A

[8] Quincy also provided AT&T the opportunity to be heard directly by the city officials. The open access issue was also discussed at a City Council meeting. The councilors unanimously adopted a resolution in

copy of the Somerville Decision was provided to the Division. A copy of the Somerville Decision is attached hereto as composite Exhibit H.

Representatives of Somerville participated in the region public hearing that the Division held in Malden, Massachusetts. In addition to considering evidence and material submitted at the Malden regional hearing, MediaOne wrote directly to Somerville with respect to the issue of open access to Internet service providers over cable television lines.[9] Thus, MediaOne raised and responded to Somerville's concerns with respect to the open access issue directly.

Somerville denied AT&T's transfer request. See Somerville Denial Letter dated November 10, 1999 attached as Exhibit H. Among the reasons set forth in the Somerville Decision are the following:

- In Somerville's review of the available evidence, AT&T, as the transferee, lacks cable television management experience and technical expertise. Somerville concluded that because AT&T, as transferee, had no direct experience in operating cable systems for municipalities, the transfer was inappropriate.
- Somerville rejected AT&T's plea that it would obtain or gain an appropriate level of municipal cable television experience by employing or otherwise relying upon MediaOne employees. Somerville informed AT&T that MediaOne had not demonstrated management or technical expertise with respect to the Somerville cable system that was beneficial to Somerville's cable subscribers. Accordingly, AT&T's purported reliance on MediaOne's experience and technical ability was rejected with sound reason.

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favor of open access.

Finally, Somerville noted that AT&T's refusal to permit nondiscriminatory access to its high speed cable modem Internet platform poses a substantial legal barrier to the operation of a free and competitive market for high speed data services. Somerville specifically found that AT&T's position on this important public policy issue rose to the level of a potentially actionable anti-trust violation that Somerville could not and would not condone.

E. AT&T / MediaOne's Appeals

The Appellants filed appeals of the North Andover and Quincy Decisions on November 23, 1999. The Appellants filed their appeal in the Cambridge matter on November 29, 1999. Lastly, Appellants filed their appeal of the Somerville Decision on December 3, 1999. The Issuing Authorities filed motions for extensions of time in which to respond to the Appellants' motions for summary decision and related materials on or about December 1, 1999, seeking an extension of time for filing responsive briefs and materials through December 10, 1999. The Appellents assented to the requested extension and related motion.

The Issuing Authorities have also moved that the Division consolidate any hearings in the above captioned matters in a single hearing or proceeding given the common issues of law and fact in each case. Finally, the Issuing Authorities have opposed the Appellee's motions for expedited proceedings in a separate memorandum filed contemporaneously with this Opposition.

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[9] Somerville also petitioned the FCC for guidance on this issue. In response to this request, MediaOne stated it "must reassess our launch date for high-speed Internet service" in Somerville. Composite Exhibit H.

THE OPEN ACCESS ISSUE IS CENTRAL TO THESE APPEALS

A. Open Access on Broadband - This is the Way

Open access, simply described, is the requirement that cable companies offer non-affiliated Internet Service Providers ("ISPs") non-discriminatory access to broadband cable customers. Recently, cable television companies have begun to introduce cable modem services that provide access to the Internet without a telephone connection and at speeds many times faster than traditional telephone Internet connections. Cable companies to date, however, have not permitted their own customers to select the customer's preferred ISP. Rather than affording consumers "open access," cable companies such as MediaOne and AT&T are requiring their customers to take the Internet service that the cable company offers as a "bundled" or "tied" service.

A customer in Massachusetts who wants broadband service cannot receive this desired connection to the Internet without paying for the captive Road Runner ISP that MediaOne owns and controls as a separate affiliated company. Thus, the MediaOne/AT&T system is a "closed access" system in which any consumer who wants the benefits of cable broadband data transmission must pay ***twice*** - first paying for the content, navigation, email service and other services of the ISP that the cable company owns or controls and then paying additional amounts for the customer's desired ISP. The results of a "closed access" system on competition include higher prices, less consumer choice, stifled innovation, and constraints on the free flow of information and electronic commerce.

B. The Importance Of Open Access In The Current Cable Debate

The open access issue is being debated and, due to AT&T's refusal to consent to true open access, litigated around the country. The Appellants describe the open access debate as "trench warfare." In reality, AT&T has undertaken a nation-wide blitzkrieg to kill the open access debate before it more seriously threatens AT&T's emerging monopoly on the delivery of high speed Internet service and cable based telephone service through AT&T's rapid purchase of cable operators around the country. AT&T's recent public embrace of open access is grossly insufficient. Absent a legally binding commitment, AT&T's open access announcement is a Trojan horse and makes all the more reasonable the Issuing Authorities' refusal to open their gates to AT&T. As a result, Massachusetts is in a unique position to shape this critical consumer and business issue. The implications of AT&T's refusal to commit to open access will negatively impact millions of Massachusetts consumers and hundreds of Massachusetts Internet service providers and related businesses.

The issue of open access is not merely in the profit interest of giant ISPs like AOL and Mindspring, but also in the public interest of the Internet community at large. Nationally, proponents of open access include the following: the National Association of Counties; Center for Media Education; Consumer Federation of America; Consumers Union; Media Access Project; OMB Watch; and the OpenNET Coalition, consisting of more than 900 independent ISP and technology companies. We add the voices of Cambridge, North Andover, Quincy and Somerville to the list.

More than 2.5 million people in approximately 42.1% of Massachusetts households are "online." There are approximately 55 independent ISPs located in Massachusetts and

another 400 ISPs located outside the Commonwealth that provide services to Massachusetts homes and residents. Internet service providers and related companies provide tens of thousands of jobs to Massachusetts residents.

It is simply not credible to suggest that the open access issue - so fundamental to the future delivery of Internet services in this state - is not relevant in this proceeding.

C. Denial of Open Access Is Harmful to Robust Competition

Limitation on consumers' ability to choose their ISPs means less competition among all ISPs, slower growth and less innovation on the Internet itself. Without the robust competition that open access provides, cable companies such as AT&T/MediaOne may exert extraordinary control over content and access. Accordingly, the open access issue is a legitimate public policy consideration for local authorities. As set forth below, the authority to review issues of competition in the context of the transfer of a cable license was delegated to local authorities by the federal government.

Efforts by entrenched cable companies and the emerging Internet giant, AT&T, to characterize the open access debate as an effort to regulate the Internet should be dismissed as what they are: a smokescreen generated to obscure the anti-competitive conduct from which AT&T seeks to reap huge rewards. The debate is neither about regulation of the Internet nor about denying cable companies a return on their investment. "Open access" does not mean "free access." The Issuing Authorities simply ask for a level playing field on which ISPs can compete by receiving access to broadband cable networks on terms that are no more or less favorable than the terms that cable companies offer to their own affiliated ISPs.

D. The Portland Litigation

The open access issue has already been litigated in favor of local authorities and open access. Earlier this year, the United States District Court for the District of Oregon ruled that an open access requirement imposed on AT&T by the City of Portland was within the authority of the local government, not preempted by federal statutes that regulate cable television, did not violate the First Amendment, Commerce Clause or Contract Clause of the U.S. Constitution, did not violate the Oregon Constitution and did not breach existing franchise agreements. See AT&T, et. al. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999), appeal pending, No. 99-35609 (9th Cir.) (attached as Exhibit I) Against the backdrop of the Portland litigation, the Appellants cannot credibly maintain that open access is not relevant or that it is not an issue that local authorities may consider.

E. AT&T's Recent Commitment To "Open Access"

1. AT&T's December 6 Promise to the FCC

On December 6, 1999 AT&T wrote to FCC Chairman, William E. Kennard, purporting to articulate AT&T's commitment to provide open access to unaffiliated ISPs at some point in the future. The letter was the by-product of meetings between AT&T, Mindspring, Excite@Home, a local official, the Media Access Project (a public interest group), and the Mayor of Atlanta. Media Access Project dropped out of the discussion due to numerous, fundamental problems with AT&T's position, nor did the Mayor of Atlanta join in the letter. A copy of the AT&T letter of December 6 and responsive letters from MindSpring and the Media Access Project of the same date are attached hereto as composite Exhibit J.

AT&T's promise to the FCC that AT&T will provide its own version of "open access" to ISPs in or about mid-2002 is vaguely articulated in the December 6, 1999 letter which provides:

- a choice of ISPs;
- the ability to exercise a choice of ISPs without having to subscribe to any other ISPs service (i.e. paying for MediaOne's captive Road Runner ISP *and* the consumer's ISP of choice);
- a choice of Internet connections at different speeds and prices;
- control over "start pages" and other aspects of the consumer's Internet experience;
- functions on the high speed modem that are, to the extent technically feasible, comparable to those available on other high speed connections.

AT&T promised to negotiate open access contracts with independent ISPs "to take effect upon the expiration of existing exclusive contractual arrangements . . . " AT&T further stated that it would provide independent ISPs with:

- Internet transport services for high speed access at "reasonably comparable" prices to those offered to other ISPs for similar services;
- the opportunity to market directly to consumers using AT&T's Internet broadband network;
- the opportunity to bill customers directly;
- the opportunity to differentiate service offerings to consumers.

2. "Open Access Lite"

The AT&T commitment to the FCC is an important step in the right direction and an admission by AT&T that open access is the means by which the Internet may best continue to develop. However, at its core, AT&T does not promise true open access but "open access lite" - a version of open access that AT&T is attempting to control on AT&T's terms and on a timeline that permits AT&T to maintain the status quo for more than two years.

As set forth in the letters of Dave Baker of MindSpring and Andrew Jay Schwartzman of Media Access Project, AT&T's promise to the FCC does not commit

AT&T to a truly "open" path on its broadband network for independent ISPs. As noted by Mr. Baker,

> While we sincerely appreciate the open access commitments which AT&T is making, they will not take effect until after the exclusive arrangements with affiliated companies such as Excite@Home expire, currently set for mid-2002… Also, while this letter of intent establishes an important principle that AT&T will not discriminate in favor of affiliated ISP's like Excite@Home over unaffiliated ISP's, they could still impose constraints such as limitations on video streaming or IP telephony on all users of their system.

Baker correspondence, December 6, 1999 attached as composite Exhibit J.

AT&T's December 6 letter to the FCC is an effort to manage the advent of "open access." AT&T's unsuccessful litigation in Portland and the continuing challenges to steadfast defense of "closed access" at state and local levels are the handwriting on the wall that motivated AT&T to abandon many of the first line defenses that AT&T raised in the various public hearings at issue in this matter. Now that AT&T is in apparent retreat from its anti-open access position, the Division should consider the open access issue in a full evidentiary hearing on the merits of the Issuing Authorities' respective decisions and respect their choice to make open access binding on AT&T.

3. AT&T Should Not Be Permitted To Dictate the Timeline

As set forth in the correspondence attached hereto as composite Exhibit J, AT&T has promised to transition its broadband Internet network to some form of open access following the expiration of purported exclusive contracts with unidentified ISPs. As stated in AT&T's December 6 letter to the FCC, ". . . AT&T has agreed to adhere to the following [open access] principles once these exclusive contractual arrangement no longer apply." The "exclusive contractual arrangements" to which AT&T obliquely refers are its relationship with the nation-wide ISP Excite@Home and, perhaps, to its contemplated ownership and control of the Road Runner ISP here in Massachusetts.

According to AT&T, these alleged exclusive arrangements are scheduled to expire in or about mid-2002. AT&T did not state in its letter to the FCC that AT&T owns 58% of Excite@Home. Following the merger with MediaOne, AT&T would presumably own and control the Road Runner ISP in Massachusetts. Therefore, AT&T's purported "exclusive relationships" are essentially deals struck with itself. AT&T's commitment to the FCC is an attempt to forestall the opening of AT&T's broadband network for two years or more while AT&T develops new strategies to deal with the public assault on its developing broadband monopoly. There can be little dispute that AT&T can provide open access in short order without running afoul of the alleged contracts it maintains with entities that it owns or controls. Permitting AT&T to delay the opening of the broadband path to independent ISPs for two years or more would allow AT&T to execute an "end run" around its own promise to remove the barriers it has in place to nondiscriminatory broadband access.

ARGUMENT

A. The Summary Decision Standard Has Not Been Met

In this matter, the Appellants seek a summary decision from the Division that the Issuing Authorities' denials or conditional approvals of the AT&T license transfer were invalid under applicable law. Appellants fall far short of meeting their burden of demonstrating that there are no issues of fact in this matter and that they are entitled to judgment as a matter of law. The Appellants cite little or no authority for the proposition that they are entitled to such a determination without hearing on the important public policy issues that are central to this controversy. Appellants only proffer 801 CMR 1.01(7)(h) as grounds for relief on a summary basis.

801 CMR 1.01(7)(h) simply provides the mechanism by which the Division *may*, in appropriate circumstances, decide a case in a summary proceeding. The regulation does not articulate the high standard that the Appellants must meet here to obtain relief without a hearing. 801 CMR 1.01(7)(h) provides, in pertinent part:

> [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.

This regulation does not, in and of itself, entitle the Appellants to a summary decision or establish the standard that Appellants must satisfy. It merely provides the procedural mechanism for the motion.

As specifically set forth in Division Regulation 4.06, this appeal ". . . shall be initiated in accordance with the provisions of M.G.L. c. 166A, §14." 207 CMR 4.06. The Regulation goes on to specify that "[t]he Commission may, *after a hearing conducted*

pursuant to M.G.L. c. 166A, §14, issue such order as it deems appropriate . . ." Id. (emphasis supplied). Thus, the need for a hearing on any appeal from a transfer proceeding is presumed in the applicable regulation.

Chapter 166A provides that the Division ". . . *shall* hold a hearing upon each such appeal, requiring due notice to be given to all interested parties." M.G.L. c. 166A, §14. Again, the need for a hearing is presumed with the use of mandatory, rather than permissive, language.[10] The Appellants further rely upon the Division's decisions in Belmont Cable Associates v. Board of Selectmen of the Town of Belmont, CATV Docket No. A-65 (1988) and Ridge Cablevision Corp. v. Board of Selectmen of the Town of Braintree, CATV Docket No. A-33 (1983). In both cases, the Division articulated a standard for summary decisions under 801 CMR 1.01(7)(h) that is virtually identical to the standard for summary judgment under the Massachusetts and Federal Rules of Civil Procedure.

In the Braintree case, the Division noted:

> The [Division] has held that a summary decision is "appropriate where it has been demonstrated that no genuine issue as to any material fact exists and where the moving party is entitled to judgement as a matter of law."
>
> CATV Docket No. A-33 at 2.

In the Belmont case, the Division noted:

> Under 801 CMR 1.01(7)(f) [now (h)], 'any Party may with or without supporting affidavits move for summary decision in his[/her] favor . . . The [Division] has held that summary decision is 'appropriate where it has been demonstrated that no genuine issue [of] material fact exists and where the moving party is entitled to judgment as a matter of law.'

[10] A person not a party but substantially and specifically affected by the proceedings may likewise be permitted to participate, including the right to argue orally at the hearing and to file an amicus brief. 801 CMR 1.01(9).

> (citation omitted). On a motion for summary decision, the moving party has the burden of establishing that there are no issues of fact. Under Federal Rules of Civil Procedure, all doubts are resolved against the moving party, and supporting affidavits and depositions are carefully scrutinized by the court. (citation omitted).
>
> CATV Docket No. A-65 at 3.

Accordingly, the Division has adopted a standard for motions made under 801 CMR 1.01(7)(h) that mirrors the summary judgment standard under the Massachusetts and Federal Rules of Civil Procedure. The standard for summary decisions under M.G.L. c. 30A sets an even higher bar.

Chapter 166A specifies further that any hearing provided for in Section 14 of the statute ". . . shall be subject to the provisions of chapter thirty A." M.G.L. c. 166A, §19. In the context of adjudicatory administrative proceedings under Chapter 30A, the standard for summary decisions is extraordinarily high - arguably higher than the standard for summary judgment in civil litigation before a court in the Commonwealth.

In Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775 (1980), the Massachusetts Appeals Court articulated a detailed standard for summary decision in administrative adjudicatory proceedings. In ruling that a summary decision was appropriate on the unique facts of that case, the Appeals Court held:

> . . . in the State context before us, administrative summary judgment procedures do not transgress statutory or constitutional rights to a hearing where those procedures are such that they allow the agency to dispense with a hearing *only when the papers or pleadings filed conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision.*

Id. at 785-86 (emphasis supplied).

In the Outdoor Advertising case, the parties' submissions confirmed that there were no facts in dispute and that the application of the governing law to those facts was clear. Here, the landscape is quite different and has been radically changed in the past few days by AT&T's purported promise to the FCC that AT&T will permit open access on its cable networks. There are numerous facts in dispute with respect to AT&T's merger with MediaOne, most notably its impact on competition and consumer choice, AT&T's ability to provide nondiscriminatory access to its broadband network to Internet service providers, how rapidly such open access service can be provided, and a host of other pertinent facts. Moreover, the application of the statutes, regulations and other authorities to the facts of this case is complex and a matter on which the Division must hear evidence and argument from all interested parties, including any interested parties who seek to intervene pursuant to 801 CMR 1.01(9) prior to the scheduled dates for any hearings in this matter.

Outdoor Advertising clarifies the standard applicable here. In order to obtain the relief they seek without the hearing that the Division's regulations and Chapter 166A require, the Appellants must demonstrate *on the face of the submissions* that there is absolutely no possible useful purpose to a Division hearing. Thus, the high standard that governs summary decisions in the context of an administrative proceeding is more akin to a motion to dismiss as opposed to a motion for summary judgment. If there is any possibility that a hearing on the merits of the case will be "useful," the Division must conduct an evidentiary hearing.

Even if the lower "summary judgment" standard applies, Appellants are not entitled to relief without a hearing. In this case, the Division cannot take action without providing the Issuing Authorities, or other interested parties, the opportunity to be heard and to put

the evidence in support of the Issuing Authorities' respective decisions before the Division and in the record of this case.[11]

For the reasons described above, the Appellants have failed to meet the high standard for a summary decision and the Division should deny the motion for summary disposition. Moreover, as set forth below, Appellants legal arguments fail as well.

B. Application of the Regulations to Exclude Consideration of Open Access Exceeds the Division's Authority

Appellants maintain that the Division's regulations preclude any consideration of the open access issue by the Issuing Authorities. If the Division interprets Regulation 4.04 so as to prohibit consideration by the Issuing Authorities of the anti-competitive effects of closed access, then the Regulation as applied must be found invalid. The Division will have exceeded the authority granted it by statute and impermissibly narrowed the rights of the Issuing Authorities in a manner contrary to the express intent of the relevant federal legislation and its own enabling statute. As noted earlier, these Regulations have yet to be challenged; therefore, this is a critical matter of first impression that must be carefully addressed by the Division. See Magistrate's Report at 2.

1. If applied to preclude consideration of open access, the regulations as applied are contrary to Congressional intent and federal law

Congress gave express authorization for consideration of competition issues during transfer proceedings. 47 U.S.C. §533 provides in relevant part,

[11] Appellants "reservation" of their right to assert federal and Massachusetts claims in later proceedings is likewise inappropriate and is not accepted by the Appellees. As a general matter, failure to raise a matter in administrative adjudicative proceedings before an agency constitutes a waiver of that matter and precludes that matter from being raised on judicial review. See Massachusetts Elec. Co. v. Mass. Comm. Against Discrimination, 375 Mass. 160, 172 (1978); City of Boston v. Mass. Comm Against Discrimination, 39 Mass. App. Ct. 234, 242 (1995); Mass. Practice, Administrative Law §1548.

> 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 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)(2) (emphasis supplied).

This provision of the Cable Television Consumer Protection and Competition Act of 1992 amended prior legislation in order to promote competition in cable services. See H.R. Rep. No. 102-628 at 91 attached as Exhibit K. Congress explicitly gave the states or franchising authorities the power, and thus the responsibility, to make license control decisions in a manner intended to promote or maintain competition. See id. See also Portland, 43 F. Supp. 2d at 1152.

Prior to the 1992 amendment, the legislation generally prohibited a franchising authority from denying control of a franchise license because of an applicant's ownership or control of any other media interests. See 47 U.S.C. 533(d). Reading this restriction as absolute, the court in Cable Alabama Corp. v. City of Huntsville held that the city could not deny a license transfer because of adverse effects the change in control would have on competition within the city. See 768 F. Supp. 1484 (N.D. Ala. 1991). Reacting to this interpretation, Congress amended the legislation to explicitly grant this authority. See H.R. Rep. No. 102-628 at 91. As provided in the legislative history,

> [The Cable Alabama] ruling clearly is inconsistent with the intent of [§533] (c) and (d). Moreover, it is inconsistent with one of the major purposes of the Cable Act, which is to "promote competition in cable communications," …. The amendment to subsection [533] (d) clarifies the right of the franchising authorities to promote competition by denying a franchise to a person if the grant of the franchise would limit competitive cable services in a franchise area. The amendment … also overturns the decision in Cable Alabama Corp." See id.

Thus, a local franchising authority was expressly provided the right to promote competition by denying a license transfer if such a transfer would limit competitive cable services in the authority's jurisdiction.

This designation of power to the local franchising authorities by the federal government is entirely consistent with cable regulation historically. From its first foray into cable regulation now fifteen years past, Congress maintained that the local franchising process was to be relied upon as "the primary means of cable television regulation." See Cable Communications Policy Act; H.R. Rep. No. 98-934 at 19 attached as Exhibit L. This reliance was a continuation of the local authority that had been exercised for decades over cable operators pursuant to the general police powers over the streets and public ways accessed by the systems.

In addition, subsequent legislation directed at cable services expressly preserved the state and local authority's ability to counter practices intended to restrain commerce. See 47 U.S.C. §521 note; 47 U.S.C. §152 note (c)(1). In 1992, Congress stated that its actions were in no way to be construed "to alter or restrict in any manner the applicability of any Federal or State anti-trust law." 47 U.S.C. §521 note. Later, Congress noted that the Telecommunication Act of 1996 "shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. §152 note (c)(1). Thus, the obligation of the local authority or state to maintain and promote competition delegated by 47 U.S.C. §533 is a consistent application of federal policy.

Congress's intent to use the franchising authority as the primary means of preserving competition and protecting the public interest is further evidenced by 47 U.S.C

§552(c). This provision explicitly provides, "[n]othing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this subchapter."

Massachusetts clearly did not intend to exercise this right to protect competition and consumer choice at the state level. The Massachusetts Legislature expressly determined that all authority to approve transfers was to be vested in the issuing authorities subject only to the limitation that a transfer decision not be "arbitrary or unreasonable." See M.G.L. c. 166A, §7. As a result, the federally granted authority to promote competition and protect consumer choice rests with the issuing authority. A decision by the Division to deny the local authority this power, thereby precluding consideration of the anti-competitive effects of this transfer, is inconsistent with federal law and must be found invalid.

2. The regulations as applied are inconsistent with the purposes of G.L. c. 166A

The refusal to allow consideration of the issue of open access by the Division is also contrary to the intent of the Massachusetts Legislature and the Division's enabling act. General Law 166A, §7 requires an issuing authority to review any application for a license transfer and provides that consent thereto, "shall not be arbitrarily or unreasonably withheld." The Division's strict application of Regulation 4.04 as advocated by Appellants would narrow the Issuing Authority's discretion so as to preclude consideration of a factor significant to a municipal cable license transfer. 207 CMR 4.04. Such a restriction cannot be reconciled with the purpose of the governing legislation and cannot stand. See Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd., 421 Mass. 196, 211 (1995).

An administrative agency has no authority to exceed the power conferred upon it by its enabling statute. See Massachusetts Hospital Assoc. v. Dept. of Medical Security, 412 Mass. 340, 346 (1992) (statute did not empower department to set performance standards for hospital collection and credit collection practices). It is well established that an agency's rulemaking power does not include the power to make law. See Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 545 (1998) (agency lacked authority to create private right of action when intent for such not expressed in statute). Instead, an agency maintains the much more limited power to carry into effect the purposes of the legislature as expressed by statute. See id. Thus, agency action must be invalidated when it is not consonant with the purpose of the statute. See Nuclear Metals, 412 Mass. at 211.

The Massachusetts Legislature recognized the need for a town or city to maintain control over its cable license in order to protect its residents and, by statute, granted it wide discretion suitable for such supervision. See M.G.L. c. 166A, §7; see also Campbell CATV Systems Assoc. Part III v. East Bridgewater, Docket No. A-46 (CATV 1984) (to allow Commissioner's opinion regarding applicant's corporate structure as evidence that denial of license grant is unjustified would usurp the issuing authority's role in the licensing process, as it maintains ultimate responsibility for grant.). To this end, the Division has acknowledged that the "arbitrary or unreasonable" standard of review parallels the "arbitrary or capricious" review of transfer decisions in other areas of the law. See Rollins Cablevision v. Somerset, Docket A-64 (1988).

Under the arbitrary or capricious standard, deference should be given to the considerable expertise and interest of a local licensing authority and its judgment should not be disregarded unless deemed whimsical or not based on logical analysis. See Great

Atlantic & Pacific Tea Co. v. Bd. of License Comm. of Springfield, 387 Mass. 833, 837-38 (1983) (recognizing degree of expertise of local authority in alcoholic beverage regulation); Cf. McDonald's Corp. v. East Longmeadow, 24 Mass. App. Ct. 904, 905-06 (local authority permitted to look at factors not directly connected to food preparation and delivery in denying food license); Mosey Café, Inc. v. Licensing Bd. for City of Boston, 338 Mass. 199, 205 (1958) (statute without standards for granting entertainment licenses confers quasi-judicial authority to do so in a manner that is not unreasonable or arbitrary).

Regulation 4.04 purports to restrict the issuing authority's consideration of a license transfer to only four factors deemed germane by the Division. Such a restriction is entirely at odds with the Massachusetts Legislature's intent if, as here, a relevant and reasonable concern cannot be addressed as a result. See Nuclear Metals, Inc., 421 Mass. at 211. Application of Regulation 4.04 to prevent the Issuing Authorities from considering the issue of open access in this transfer decision clearly exceeds the Division's mandate to carry into effect the purposes of the statute and instead constitutes unauthorized lawmaking. See Loffredo, 426 Mass. at 545. Imposing these limits impermissibly narrows the ample discretion granted the Issuing Authorities pursuant c. 166A, §7 and cannot survive scrutiny. See Mass. Hospital Assoc., 412 Mass. at 346. Due to the serious competition implications of AT&T's closed access policy and its sudden conversion into an open access advocate, the requirement that open access be provided to customers is certainly not arbitrary or unreasonable and therefore must withstand Division review.

C. The Division Should Waive Regulation 4.04 For Consideration Of Open Access In The Transfer Decision

The Division could easily avoid invalidation of its own regulations in this unique circumstance by waiving the application of Regulation 4.04. Doing so would be consistent with the purpose of the waiver provision and the intent of both Congress and the Massachusetts Legislature as described above. The Division should upon its own initiative, and the Issuing Authorities hereby request the Division to, waive Regulation 4.04 for the purposes of this appeal. In support of this request for waiver, the Issuing Authorities submit the information provided in the Magistrate's Report, the regional hearings, the Cambridge hearings, and relevant correspondence.

1. The negative effects on competition of this transfer justify the waiver of Regulation 4.04

The Division has the authority to waive particular provisions of the regulations when doing so would be "consistent with the public interest." See 207 CMR 2.04; In Re Amendment of 207 CMR 4.01-4.06 at ¶61. In its own words, the Division noted,

> the [Division's] role must be flexible given the current trends of the telecommunications industry. Trying to craft and interpret transfer regulations at a time when technologies, corporate structures, and industries are changing and converging is difficult. The [Division] has determined, therefore, that it is prudent to establish a waiver provision in its transfer regulations. . . [to] allow the [Division] the necessary flexibility to evaluate novel circumstances surrounding transfer proceedings.

In Re Amendment of 207 CMR 4.01-4.06 at ¶60.

To the extent that the promotion of competition required by the federal government is not subsumed within the consideration of "legal ability," the open access issue is of such relevance and importance that the Division must waive application of Regulation 4.04 on its own initiative.

Although Regulation 4.04 may serve its purpose for a majority of common license transfers, this request by AT&T implicates public policy questions of "enormous importance" that reach far beyond what a narrow interpretation of the Regulation can properly address. See Magistrate's Report at 18. As AT&T's Canadian submission underscores, the provision of open access is critical to removing a situation where competition in a major market is unduly impaired. See AT&T Comments at i.

In enacting Regulation 4.04, the Division claims to have followed reasoning dating as far back as 1983. See Bay Shore Cable, Docket No. A-55 citing CATV Commission Advisory, March 9, 1983. In fact, Bay Shore Cable allowed consideration of additional factors, including character and performance in other communities. In any event, a narrow interpretation of the criteria enumerated in 4.04 does not accommodate consideration of the extensive and damaging effect upon competition raised by the transfer at hand. This is exactly the convergence of technology and industries for which the waiver was enacted. Failure to exercise this waiver power is inconsistent with the Division's own regulations and contrary to the powers expressly delegated by the federal government.

As the Special Magistrate noted, this transfer "is an event far different from the hundreds, if not thousands of license transfers that have taken place to date in the Commonwealth …. The transfer obviously raises a host of public policy questions." See Magistrate's Report at 20. The Division must waive application of Regulation 4.04 in order to confront these public policy questions. It should do so in the transfer proceeding, so that the appropriate resolution is uniform, speedy, and protective of the public interest.

2. AT&T received sufficient notice and opportunity to address the issue of open access

Pursuant to Regulation 2.04, North Andover previously requested a waiver of Regulation 4.04 for its determination of the license transfer. 207 CMR 2.04. This request was denied by the Division on the grounds that it was untimely and, based upon an erroneous assumption, that the parties did not have adequate notice to respond at the regional hearings to open access advocates. See Division correspondence dated September 23, 1999. attached as Exhibit M.

G.L. c. 30A, §11 requires that parties to a hearing be provided sufficient notice of the issues so that they have "a reasonable opportunity to prepare and present evidence and argument." M.G.L. c. 30A, §7; see also New England Telephone & Telegraph Co. v. Dept. of Public Util., 372 Mass. 678, 686 (1977). In practice, the notice must "sufficiently apprise" a party of the relevant issues. See O'Brien v. Div. of Employment and Security, 393 Mass. 482, 484 (1984). The record of the regional hearings and subsequent meetings between AT&T and the Issuing Authorities demonstrate not only that AT&T and MediaOne were sufficiently apprised, but took every advantage to present evidence and argument.

Unfortunately, the Division did not have the opportunity to review the Magistrate's Report prior to denying North Andover's request for waiver.[12] Examination of the Report dispels any concerns the Division may have harbored that AT&T and MediaOne could not sufficiently respond to the open access issue. To the contrary, "[t]here was considerable discussion during the hearings about the issue of 'open access'." Magistrate's Report at 17. From the time the issue was first raised on August 4, AT&T had nine additional hearings

[12] The Division announced its decision on September 23, one day before the Report was issued.

and over a month to present its side of the debate. See LaPointe v. License Bd. of Worcester, 389 Mass 454, 458 (1983) (insufficient notice of hearing cured at first hearing and continuation for one week deemed sufficient).

Indeed, AT&T took full advantage of these opportunities. It spent significant time and resources advocating its view, including introduction of a panel of experts to put its views formally on record. See id. On another occasion, an AT&T employee spoke at great length specifically concerning the legal and non-legal justifications for a closed system. See Foxboro Regional Hearing at 59-66. According to the Magistrate, "the discussions were frequently vigorous, sometimes contentious." Id. at 3. As evidenced by the section of the report devoted strictly to the numerous competing arguments raised during the hearings, the open access issue was extensively covered during the regional hearings. See id. at 18-20. It is clear, then, that Appellants received sufficient notice so that they could respond and completely address the issue of open access in a meaningful manner. Moreover, AT&T sought and was granted numerous additional opportunities to address local officials directly in meetings and written communications.

The Cambridge hearing likewise provided AT&T a meaningful opportunity to present its side of the open access argument. See Cambridge Hearing at 39-42, attached as Exhibit D. In addition, Cambridge officials and Appellants met and exchanged correspondence on a number of occasions during which the issue of open access was discussed. See Exhibit E. This included a three page letter from AT&T to the Cambridge City Manager exclusively directed at the issue of open access. See November 3, 1999 correspondence.

D. Regulation 4.04 Substantially Impairs the Issuing Authorities' Contractual Rights

Even if the Division finds generally that Regulation 4.04 should be applied in these circumstances, specific application of these restriction to these license agreements is impermissible because it would substantially impair the Issuing Authorities' contractual rights in a manner unnecessary to serve an important public purpose. See U.S. Const. Art. I, §10; Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

The Supreme Court has developed a three-step test to determine if subsequent legislation has impermissibly impaired contractual rights. See Spannaus, 438 U.S. 234 (1978). First, the court must determine that a subsequent law has in fact impaired a contractual relationship. See id. at 244; Parella v. Retirement Bd. of R.I. Employee's Retirement System, 173 F.3d 46, 59 (1st Cir. 1999). Second, it must then decide whether this impairment is substantial. See Spannaus, 438 U.S. at 244; Little v. Comm. of Health & Hospitals of Cambridge, 395 Mass. 535, 555 (1985). In making this determination, it should consider how a contract is affected and whether the abridged right is "replaced by an arguably comparable security provision." See United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 19 (1977). Finally, the court must then determine if the substantial impairment is reasonable and necessary to "meet an important general social problem." See Spannaus, 438 U.S. at 247.[13]

Application of Regulation 4.04 to the Cambridge, Somerville, and North Andover license agreements violates the Contract Clause. First, a contractual relationship unquestionably exists between the Issuing Authorities and MediaOne, and the Issuing

[13] Although a court generally grants deference to an agency's regulations adopted pursuant to statute, action based upon "an incorrect interpretation of a statute is not entitled to deference." See Mass. Hospital Assoc., 412 Mass. at 345-46.

Authorities' contractual rights concerning the transfer approval process are restricted by Regulation 4.04. See Eagerton, 462 U.S. 174, 189 (1983) (state law prohibiting certain tax allocations by company restricted contract options).

Moreover, these rights are substantially impaired by forcing the Issuing Authorities to narrow their considerations as required by Regulation 4.04. Under its license agreement, Cambridge expressly reserved the supervisory capacity to inquire into "whether the proposed change of control and ownership is in the public interest." Cambridge License, §2.2(d) attached as Exhibit N.

Likewise, both Somerville and North Andover by contract reserved the right to consider, amongst other things, experience in the cable industry, character qualifications, performance in other communities, and "other lawful and reasonable criteria in accordance with applicable laws." North Andover License, §2.4(b) attached as Exhibit O; Somerville License, §2.6(b) attached as Exhibit P (right to consider "any other criteria allowable under law").

At the time the contracts were executed, an issuing authority in Massachusetts was entitled to base its transfer decision on any concern as long as it was reasonable and not arbitrary. See M.G.L. c. 166A, §7. Moreover, as discussed in detail above, federal law explicitly authorized an issuing authority to deny a cable license transfer where such a change in control would limit competition in the provision of cable services. See 47 U.S.C. §533(d)(2).

Application of Regulation 4.04 to preclude consideration of open access to the Licenses abolishes the Issuing Authorities' contractual right to consider the effects of the transfer upon consumer interests and fails to replace it with any comparable security

provision. See United States Trust, 431 U.S. at 19. This clearly constitutes a substantial impairment of the license agreements. See Spannaus, 438 U.S. at 244.

Significantly, these restrictions do not confront an important social problem. See id. at 247. On the contrary, eliminating their right to consider issues characterized by Magistrate Beard as of "enormous importance" undermines the Issuing Authorities' ability to protect the interests of their residents. See id. at 249. In such circumstances, the deference granted the Division as to the necessity and reasonableness of a particular measure "simply cannot stand." Spannaus, 438 U.S. at 247; Mass. Hospital Assoc., 412 Mass. at 345-46.

E. Regulation 4.04 Should Not Be Applied Retroactively

Even if the Division finds that application of Regulation 4.04 is not a violation of the Contracts Clause, the Regulation and the restrictions imposed thereunder cannot be applied retroactively to the Cambridge and Somerville license agreements. See Salem v. Warner Amex Cable Communications, Inc. 392 Mass. 663 (1984). The license agreements were executed before Regulation 4.04 or any regulation interpreting the relevant statute was adopted, therefore the applicable law for this appeal must be whether consent to AT&T's license transfer was arbitrarily or unreasonably withheld, especially in light of their motive of preserving competition. See M.G.L. 166A, §7.

As 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. See Feakes v. Bozyczko, 373 Mass. 633, 636 (1977). In Salem, the Supreme Judicial Court held that amended procedures for cable rate regulation did not apply to a

cable license signed two years prior because the license did not clearly indicate that the parties intended to incorporate future amendments of the legislation and regulations. See 392 Mass. at 667-69. The Court found the absence of the words "and amendments thereto" in the license agreement as significant in determining that there was no intent of the parties to incorporate future changes. See id. at 667.

Regulation 4.04 unquestionably altered an issuing authority's scope of considerations in a license transfer decision. First, Appellants assert that the Division's decision in Bay Shore Cable TV Assoc. v. Weymouth effectively established Division policy prior to the execution of the licenses. CATV Docket A-55 (1985). Appellees agree that the Division may, in the interest of consistency, view prior adjudication as guiding. However, as the Supreme Court pointed out, this is "far from saying… that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public." NLRB v. Wyman-Gordon, 394 U.S. 759, 765-66 (1969). Further weakening this position is the fact that Bay Shore Cable allowed for considerations beyond the four enumerated in 4.04 and was decided only a month prior to the execution of the Cambridge License, hardly the time necessary to establish firm Division policy. CATV Docket No. A-55. Second, contrary to Appellants' assertion, the Division in 1988 agreed that an issuing authority was permitted to review factors other than management, technical expertise, financial capability and character so long as these other considerations were not arbitrary or unreasonable. See Somerset, Docket A-64 at 4-5, explaining Bay Shore Cable, Docket A-55. Thus, the applicable law concerning the discretion of an issuing authority was substantively changed in 1995 by the Commission

Report and Order promulgating Regulation 4.04. See In Re Amendment of 207 CMR 4.01-4.06 at 18.

There is no language in either the Cambridge or Somerville license that "clearly establishes" the parties' intent to incorporate changes in the existing law into their agreement. To the contrary, both licenses reiterate the standard of review in effect at the time of the agreement, i.e. that consent shall not be unreasonably or arbitrarily withheld. See Cambridge License §2.2(a); Somerville License §2.6(a). Moreover, in the absence of defining standards, the parties emphasized particular factors that would constitute appropriate considerations in a license transfer. See Cambridge License §2.2(d); Somerville License §2.6(b). Thus, the alteration of the substantive rights of the parties under these license agreements would be an unlawful retroactive application of Regulation 4.04. See Salem, 392 Mass. at 668-69.

F. Conditional approval is an appropriate exercise of the Issuing Authorities' pre-existing rights under the license agreements

The appellants represent the Issuing Authorities' conditional approval subject to open access as an amendment to the licensing agreements. On the contrary, the Issuing Authorities' consideration of open access is the legitimate exercise of a right reserved under the agreements and applicable law.

As explained above, the applicable law authorizes the Issuing Authorities to deny a request for license transfer where such a change in control would limit competition in the provision of cable services. See 47 U.S.C. 533(d)(2); M.G.L. c. 166A, §7. This power necessarily includes the "lesser power to impose conditions under which it will permit a change in control." Portland, 43 F. Supp.2d at 1152. Thus, the conditional approvals by

Quincy and North Andover are an appropriate exercise of their rights under the law and do not constitute any amendment of the licensing agreements.

G. Failure to Provide Open Access Involves Appellant's Legal Ability and Technical Expertise to Operate the Cable System under the Existing License.

The Division need not find its own regulations invalid. Alternatively, the Division could find that the Issuing Authorities' denials or conditional approvals of the transfer application are based upon consideration of transferee's legal ability and technical expertise to suitably operate the cable system under the existing licenses and must be upheld.

1. AT&T's legal ability

a. *The Issuing Authorities retain the power provided by federal legislation to promote competition*

The inability or unwillingness of AT&T to provide open access to its system is contrary to the competition endorsed by Congress in this field. See 47 U.S.C. §533. There exists a legitimate and reasonable concern regarding the adverse effect on competition that this transfer would promote, a concern that Congress expressly recognized as within the purview of an Issuing Authority's consideration in a transfer proceeding. See 47 U.S.C. §533(d)(2).

Congress not only recognized the importance of competition within the industry but explicitly left it to the state or local issuing authority to ensure that this competition existed. See id.; AT&T Corp. v. Portland, 43 F. Supp.2d 1146, 1152 (D.Or. 1999).[14] Along these same lines, Congress also expressly granted the state or local authority the power to act for the purpose of consumer protection in the sphere of cable services. See 47 U.S.C. §552(c).

[14] See Argument *supra* §B(1).

The Massachusetts Legislature chose not to assume the power to control competition at the state level but instead limited the Division's power to deferential review of an issuing authority's transfer decision. See M.G.L. c. 166A, §7. This allocation of power placed the right and responsibility of maintaining competition squarely upon the shoulders of the Issuing Authorities and any review by the Division must be limited to consideration of whether the Issuing Authorities were arbitrary or unreasonable. See Id.

b. *AT&T's failure to provide open access adversely affects competition and implicates restraint of trade provisions*

AT&T's failure to provide open access clearly limits competition and consumer choice in the provision of cable services. In addition, the Issuing Authorities are reasonably concerned that this refusal implicates serious federal and state restraint of trade policies. See 15 U.S.C. §§1-7; M.G.L. c. 93 §4.

AT&T has itself denounced the anti-competitive effects of a closed system and trumpeted the need for regulation to ensure equal access for ISPs in a different venue. See AT&T Canada's Comments to CRTC attached as Exhibit C. In its submission to the CRTC, AT&T noted the ability of companies to exercise significant market power through the control which they assert over "bottleneck broadband" (their words) access facilities. See id. at i. This anti-competitive behavior was forecasted by AT&T to manifest in a number of ways, including "discriminatory behaviour in relation to the terms and conditions for broadcast access services and a refusal to unbundle bottleneck components, thus disadvantaging service providers with whom the access provider competes in downstream markets." Id. AT&T requested that the Canadian government mandate open access until "safeguards to ensure that broadband access services continue to remain

available from the cable companies on a non-discriminatory and unbundled basis." See id. at ii. It is difficult for AT&T to now disclaim the anti-competitive effects of it operating a closed system in Massachusetts.

Furthermore, it is a violation of both federal and state law to restrain trade or commerce by creation of a "tying" or "bundling" arrangement. See 15 U.S.C. §1, M.G.L. c. 93 §4. Such an impermissible arrangement has four elements: (1) two distinct and separate products; (2) a refusal to sell the tying product separate from the tied product; (3) the seller's possession of sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and for the purposes of the Sherman Act; and (4) a not insubstantial amount of interstate commerce in the tied product affected by the tying arrangement. See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461 (1992); Parikh v. Franklin Medical Center, 940 F.Supp. 395 (D. Mass. 1996).

Here, AT&T will continue an arrangement whereby a Massachusetts consumer cannot receive connection to the internet through AT&T's broadband cable system without paying for the Road Runner ISP service that MediaOne controls as a separate, affiliated company. Thus, a consumer desiring the full content and services of another ISP will be forced to pay twice, once for the mandated Road Runner ISP and again for the desired ISP. The obvious results of such bundling include higher costs, decreased consumer choice and stifled innovation.[15] It is clear that the refusal of AT&T to provide open access to other ISPs implicates the necessary elements of this anti-trust provision.[16]

[15] This bundling has been compared to Microsoft's operating system/Internet browser arrangement currently being prosecuted by the U.S. Department of Justice. See Maher, *Cable Internet Bundling: Local Leadership in Deployment High Speed Access*, 52 FED. COMM. L.J. 211, 223-25 (1999)(attached as Exhibit Q); ExParte Submission of Professor Mark A. Lemley and Professor Lawrence Lessig, FCC CS Docket No. 99-251

There is recent precedent to support these denials and conditional approvals upon this basis. In Portland, AT&T argued that the city's review of the transfer application was limited to consideration the transferee's technical, legal and financial qualifications. See 43 F.Supp.2d at 1155. The Portland court found that mandatory access requirements were appropriately related to the transferee's legal qualifications to assume control of the licenses so as to fall within the city's contractual rights. See id.

The anti-competitive results impair AT&T's fundamental legal qualifications to perform under the contract and are appropriate considerations by the Issuing Authorities in the license transfer decision. They certainly are not arbitrary or unreasonable factors on which to base a transfer application determination. Therefore, the decisions of the Issuing Authorities must be upheld. See M.G.L. c. 166A, §7; Portland, 43 F.Supp.2d at 1155.

2. AT&T does not maintain or is unwilling to utilize the technical expertise to perform this contract in a lawful manner.

The technology to operate the cable systems in a lawful manner is available to AT&T. Connection of multiple ISPs to an existing cable carrier's facility has been demonstrated on a smaller scale and this technology is essentially in existence for much larger operations. One carrier successfully demonstrated the connection of multiple ISPs in Clearwater, Florida. See Burlington Regional Hearing at 121, 145. In a separate proceeding, the Canadian Radio-television and Telecommunications Commission (CRTC)

(attached as Exhibit R). Whereas Microsoft made it difficult to load a competing browser, the bundling at issue by AT&T effectively disables relevant competition by permitting only a fraction of competitor's services to be utilized or, in the alternative, economically irrational by requiring the consumer to pay twice for the comparable services of a non-affiliated ISP.

[16] At least one suit has been filed in federal court alleging violation of the Sherman Act as a result of this unlawful tying scheme. See GTE Internetworking, Inc. v. Tele-Communications, Inc. (W.D. Penn. 1999) (attached as Exhibit S).

noted that a similar demonstration was being conducted within its jurisdiction. See CRTC 99-11 attached as Exhibit T.

At the regional hearings, AT&T acknowledged these successful multiple ISP connections but asserted that multiple connections on a larger scale would require "substantial operational effort," including investment in new functionality and an upgrade of "a bunch of our existing hardware and software." See Burlington Hearing Transcript at 122. The aforementioned CRTC decision belies this grim outlook by AT&T. There, the Canadian Cable Television Association, a group of cable providers currently offering high speed retail Internet services of comparable magnitude as MediaOne, announced that it expects that cable companies will be in a position to implement commercial access service as early as mid-2000. See CRTC 99-11. Most contradictory, a Tacoma tele-communication company just announced that it will provide open access to multiple ISPs through its cable system by the end of the year, as the company's network has "worked flawlessly" in its tests using three separate ISPs. See Press Release (December 1, 1999) attached as Exhibit U.

A representative of GTE, the carrier that performed the Florida demonstration, likewise dispelled AT&T's claim that open access on a large scale is not readily feasible but instead only required reasonable effort and commitment. See Burlington Regional Hearing at 145; see also Weymouth Regional Hearing at 88 (MIT Professor Hausman noted that required open access in Canada and Australia did not deter relevant providers from the necessary investment and upgrade).

Finally, AT&T has fallen upon its own sword. Its recent agreement with the FCC confirms the fact that it either presently maintains the technology to provide for open

access or is in a position to apply this technology shortly. The President of the Media Access Project, in his letter explaining why he could not sign off on AT&T's open access declaration, stated:

> Even as technologists at the highest levels of AT&T and Excite@Home were representing to me that there is no technological impediment to providing citizens with access to multiple ISP's, their lobbyists have continued to argue the contrary position before numerous state and local legislative and regulatory bodies. Indeed a significant factor in my decision to withdraw from the talks you asked me to attend was the claim … by Excite@Home's General Counsel that "The technology simply does not yet exist to allow multiple ISPs to share a coaxial cable on a commercial basis."

See Schwartzmann correspondence at composite Exhibit J.

The statements made by AT&T throughout the regional hearings and Cambridge hearing to the effect that such application would not be economically or technologically feasible for a considerable amount of time is characteristic of the general insincerity with which AT&T has addressed the legitimate concerns that the Issuing Authorities have raised throughout these transfer proceedings.

It is clear that AT&T, by the intransigence it continues to display on this matter, is unwilling to effect the technical capacity necessary to operate and update the cable system as required under applicable law, and the existing licenses. The Issuing Authorities did, and indeed must, account for this refusal in their review of the transfer application. The failure of the transferee to utilize the available technical expertise to operate the cable systems in a lawful manner is sufficient grounds for denying a license transfer and the Issuing Authorities' decisions must be upheld on these grounds.

3. Cambridge's denial based upon the additional consideration of the transferee's lack of management experience and failure to adhere to the existing license is appropriate grounds for denying AT&T's transfer request.

The Cambridge Denial of AT&T's transfer request was appropriately based upon a number of additional factors. AT&T's attempt to mischaracterize the Cambridge proceedings and ultimate basis for its decision must be addressed. First and foremost, Appellants assert that they "presented evidence satisfying the four relevant criteria set forth in 207 CMR §4.00." See Appellants' Memorandum at 10. Despite this portrayal by Appellants, the determination of whether the Appellants satisfied the relevant criteria is a decision left by law to Cambridge. 207 CMR 4.04. As demonstrated by the City's denial of its transfer request, Appellants soundly failed to meet these requirements.

AT&T cannot refute Cambridge's ability to inquire into the transferee's management experience in determining whether a to grant a transfer request. See 207 CMR 4.04. Here, AT&T has admitted that it, as transferee, does not possess the requisite experience to operate a cable system in Massachusetts. Throughout the public hearing, AT&T referenced the management of MediaOne as providing the necessary leadership for this undertaking. See Cambridge Hearing attached as Exhibit D. In its subsequent response to the Cambridge Request for Information, AT&T was again forced to admit this fact.

> Follow-up Question 1:
> Q. *Has AT&T ever managed any cable systems in Massachusetts? If so, which systems and during what period of time?*
> A. No.

See MediaOne/AT&T Response to the Cambridge Request for Information (September 10, 1999) attached as composite Exhibit E.

In light of this inexperience in the operation of cable systems, AT&T purports to rely upon its own experience in communications generally, the "embedded expertise" of the TCI management, and the MediaOne management structure that would be retained following the merger. See Appellants Memorandum at 23. Only the first is relevant to a transfer decision in Massachusetts, however.

Recent history justifies Cambridge's concern. In 1996, Magistrate Beard served the same role in US West's takeover and transfer of cable licenses held by Continental. As here, Magistrate Beard found the requisite management experience in US West's maintenance of the Continental personnel. See Summary of Proceedings and Magistrate's Report (July 16, 1996) at 6-7 attached as Exhibit V. Soon thereafter, however, the large majority of Continental management was either transferred to another region or released.[17] This highlights the fact that in such corporate mergers today, plans for retaining the management of the purchased company are often temporary, are frequently a necessary posturing for approval, and are not a reliable basis for judging management experience in this context. Therefore, under the most limited interpretation of an Issuing Authorities' discretion pursuant to Division's regulation, Cambridge's denial of the transfer due to AT&T's lack of management experience is a legitimate concern, is certainly not arbitrary or unreasonable and must be upheld.

Furthermore, AT&T's reliance upon MediaOne's management only strengthens Cambridge's grounds for denial.[18] AT&T misinterprets the City's demand for license

[17] See Mark Landler, *Head of U.S. West's Cable Unit Resigns Abruptly*, N.Y. TIMES, Aug. 7, 1997, at D6.
[18] Somerville likewise based its denial of the transfer request in part upon AT&T's lack of cable management experience in Massachusetts, MediaOne's ongoing failure to perform sufficiently under the existing license, and MediaOne's representations that Somerville would not receive telephony and high speed Internet services in the near future.

compliance as an attempt to amend the Agreement. On the contrary the Agreement as written provides:

> For the purposes of determining whether it shall consent to such a change in control and ownership, *the City may inquire into … all matters relative to whether such Person is likely to adhere to the terms and conditions of the Final License…*
> Cambridge License, §2.2(d) (emphasis supplied) (Exhibit N).

Along these same lines,

> The consent of the Issuing Authority to a Transfer of the Final License *shall not be given if it appears from the application or from subsequent investigation that … (2)the License will not be adhered to…*
> Cambridge License, §2.2(h) (emphasis supplied) (Exhibit N).

Thus, Cambridge expressly reserved the right to deny a transfer request when it appeared that the License would not be adhered to by the transferee. The long list of compliance issues presented to AT&T by the City establishes the fact that the license was not being adhered to by MediaOne and its current management. Instead of demonstrating the change needed, AT&T's attempts to rely upon this same management to demonstrate its ability undermines its argument that it maintains the management experience. In this case, the same wrong twice applied, i.e. MediaOne management, does not make a right.

AT&T's attempt to dismiss this basis as superficial is also inconsistent with the history of this matter. Compliance with the existing license was of paramount importance throughout. One week after the hearing, counsel for Cambridge sent a follow-up set of questions that he perceived as not fully addressed at the hearing. See August 26, 1999 correspondence attached as composite Exhibit E. In the correspondence, Cambridge listed a total of fifty-four (54) areas in which MediaOne management had failed to comply with the *existing* license.

After AT&T refused to respond to these issues, Cambridge again on November 2, wrote to MediaOne indicating nine sections of the license suffering from non-compliance and requesting assurance that these failures would be remedied. See November 2, 1999 correspondence attached as composite Exhibit E. MediaOne, in its reply, confirmed that these remained outstanding problems and that they were working towards their resolution. See November 10, 1999 correspondence included in composite Exhibit E. Thus, it is apparent that Cambridge's decision, in large part based upon uncertainty of the transferee's compliance to perform under the existing license, was certainly not unreasonable or arbitrary and therefore must withstand review by the Division.

CONCLUSION

For the foregoing reasons, the Division should deny MediaOne and AT&T's appeal of the Issuing Authorities' decisions concerning AT&T's Requests for Transfer. The Appellants fall short of meeting their burden for summary disposition. In addition, the record establishes that consideration of open access by the Issuing Authorities in this decision is appropriate. Accordingly, the Division regulations must be interpreted to allow for this consideration of open access or the regulations must fall.

Hearings and deliberations consistent with this conclusion are necessary and requested.

Respectfully submitted,
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