IN THE MATTER OF THE APPLICATION
OF TRI-COUNTY CABLE, INC., FOR
CERTIFICATION IN PENNS GROVE BASED
ON ARBITRARY MUNICIPAL ACTION
AND-
THE APPLICATION OF TRI-COUNTY
FOR CERTIFICATION IN CARNEY'S POINT
BASED ON ARBITRARY MUNICIPAL ACTION

Decided February 5, 1981

Initial Decision

SYNOPSIS

In early 1980, Tri-County Cable filed applications for municipal consents to operate cable television systems with the Borough of Penns Grove. The Borough subsequently denied these applications and awarded municipal consents to Penn Communications, Inc. Tri-County then filed petitions with the Office of Cable TV of the Board of Public Utilities seeking a determination that its application had been arbitrarily denied.

The administrative law judge assigned to the case determined that Tri-County Cable had been arbitrarily denied consent and ordered de novo proceedings on Tri-County's application. The judge based this determination on the failure of the municipality to have a stenographic record made of the proceedings as required by N.J.A.C. 14:18-11.10 and upon failure of the municipality to issue a written report detailing its reasons for choosing Penn Communications within 30 days after the conclusion of the hearings as required by N.J.S.A. 49:5A-23(d).

Accordingly, the administrative law judge ordered a de novo consideration of the applications.

Richard C. McDonough, Esq., for petitioner
Warren W. Homan, Esq., for respondent, the Borough of Penns Grove (Homan and Hoerst, attorneys)
Frank J. Hoerst, Esq., for respondent, the Township of Carney's Point (Homan and Hoerst, attorneys)
Ralph H. Grebow, Esq., for intervenor, Penn Communications, Inc.
SUekoVICH, ALJ:

This matter concerns applications by petitioner Tri-County Cable, Inc. for certification to operate cable television ("CATV") systems in the respondent Borough of Penns Grove and the respondent Township of Carney's Point pursuant to N.J.S.A. 48:5A-17(d).

In early 1980, petitioner filed with respondents applications for municipal consents to operate CATV systems. Respondents subsequently denied these applications and awarded municipal consents to Penn Communications, Inc. who appears in this matter as an intervenor. On July 25, 1980, TriCounty filed petitions with the Office of Cable TV ("CATV Office") of the Board of Public Utilities seeking a determination that respondents arbitrarily denied Tri-County's applications and arbitrarily granted municipal consents to Penn Communications. The Board transmitted the matters on August 29, 1980, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The Board, through its CATV Office, has jurisdiction over CATV systems pursuant to the Cable Television Act ("CATV Act"), N.J.S.A. 48:5A-1 et seq. No person may operate a CATV system without first obtaining from the Board a certificate of approval N.J.S.A. 48:5A-15. The Board may not issue a certificate unless the applicant has previously received approval by municipal consent from the municipality in which it seeks to operate. N.J.S.A. 48:5A-15-16(a)-17(a) and 22. An applicant may be granted a certificate without the prerequisite municipal consent if it shows to the Board's satisfaction that the municipality has arbitrarily refused to grant it. N.J.S.A. 48:5A-17(d). Tri-County seeks the issuance of certificates by the Board pursuant to section 17(d) on the basis of arbitrary denials by respondents.

Tri-County and Penn Communications also allege that their "opponents" should not be granted certificates because they do not have the necessary capacity to operate the proposed CATV systems and for other technical reasons. These allegations are raised as objections pursuant to N.J.S.A. 48:5A-16(b).

A review of the background facts is essential to understanding and deciding the issues presented. After a review of all documents submitted by the parties and based upon the factual stipulations entered into at the conference, I FIND the following facts:

1. On February 11, 1980, Tri-County filed an application for municipal consent with Carney's Point.

2. On April 8, 1980, Penn Communications filed an application for municipal consent with Carney's Point.

4. The hearings were closed on June 4, 1980.

5. On June 25, 1980, Carney’s Point decided to award a municipal consent for the operation of a CATV system to intervenor.

6. No stenographic transcripts were made of the hearings conducted on May 5, 1980 and May 8, 1980, by Carney’s Point. It is not clear if a stenographic transcript was made of the June 4th hearing. A stenographic transcript was made of the Carney’s Point meeting conducted on June 25, 1980.

7. On September 4, 1980, Carney’s Point filed with the CATV Office written findings concerning its decision of June 25, 1980.

8. On February 11, 1980, Tri-County filed an application for municipal consent with Penns Grove.

9. On April 8, 1980, Penn Communications filed an application for municipal consent with Penns Grove.

10. On May 8, 1980, Penns Grove held a public hearing concerning petitioner and intervenor’s applications. No stenographic transcript was made of this hearing. The minutes of the hearing were taken by the Borough Clerk and were subsequently approved by the Borough Council. The hearing of May 8, 1980 was continued to and closed on June 3, 1980. It is not clear if a stenographic transcript was made of the June 3rd hearing.

11. On July 1, 1980, Penns Grove decided to issue a municipal consent to intervenor and to deny a municipal consent to petitioner.

12. A stenographic transcript was made of the meeting conducted on July 1, 1980.


The issues to be decided as stipulated at the conference and set forth in the prehearing order are as follows:

1. Does the lack of a stenographic record made by a court reporter certified in this State, as required by N.J.A.C. 14:18-11.10, of the hearings held by Carney’s Point on May 5, 1980, and by Penns Grove on May 8, 1980, constitute a basis for the Board to grant a certificate of approval to Tri-County pursuant to N.J.S.A. 48:5A-17(d)?

2. Do the findings of the Carney’s Point Township Council filed with the CATV Office on September 4, 1980, meet the requirements of a written report pursuant to N.J.S.A. 48:5A-23(d) and
N.J.A.C. 14:18-11.12, in light of the fact that they were not issued on June 25, 1980, the date of the Council’s decision. Do the findings sufficiently state the Council’s decision and the reasons therefore?

3. Do the written findings filed by Penns Grove with the CATV Office on August 13, 1980, contain a sufficient statement of the Borough Council’s decision pursuant to the provision cited in issue 2 above?

4. Can petitioner seek a certificate from the Board pursuant to N.J.S.A. 48:5A-17(d) in light of the fact that respondents granted a municipal consent to intervenor, or is this section limited to situations where municipalities refuse to grant any municipal consents?

5. In light of the fact that intervenor cannot apply to the Board for a certificate on the basis of municipal consents issued by respondents in the near future, are the following allegations of petitioner ripe for decision or, alternatively, should such allegations be filed by petitioner with the CATV Office as an objector pursuant to N.J.S.A. 48:5A-16(b):

   (1) Intervenor does not have the financial capacity required by N.J.S.A. 48:5A-28(c).

   (2) Petitioner was not given the opportunity to question intervenor's witnesses presented at the public hearings.

   (3) Petitioner did not receive copies of financial documents submitted to respondents by intervenor.

   (4) Intervenor did not submit the required financial documents to respondents within the required time period.

6. In light of the situation referred to in issue 5 above, are the following allegations contained in intervenor’s “counter-petition” ripe for decision or should they be filed by intervenor with the CATV Office on an objector basis if the Board determines that respondents arbitrarily refused to issue municipal consents to petitioner:

   (1) Petitioner lacks standing because the application for municipal consents filed by Tri-County with respondents were in the name “Tri-County Cable Television Company” while the present proceeding was instituted in the name “Tri-County Cable.”

   (2) The application submitted by petitioner to Penns Grove was deficient because its filing was not authorized by an affidavit of an authorized representative of petitioner.

Each of these issues will now be considered in turn.
ARBITRARY REFUSAL

APPLICATION OF N.J.S.A. 48:5A-17(d)

Penn Communications argues that section 17(d) of the CATV Act does not apply in the present case because respondents decided to issue municipal consents to an applicant for municipal consent, intervenor, and that an applicant can be granted a certificate by the Board pursuant to section 17(d) only when a municipality decides to grant no municipal consents. Tri-County argues that, in light of the fact that the municipality can decide to grant more than one municipal consent, the Board can grant a certificate to an unsuccessful applicant at the municipal level on the basis of an arbitrary refusal.

I conclude that Penn Communications' position is without merit. A review of the CATV Act, including section 17(d), demonstrates that there is no statutory bar to the Board granting a certificate to Tri-County on the basis of an arbitrary refusal by respondents even though they voted to give municipal consents to Penn Communications.

N.J.S.A. 48:5A-17(d) reads in pertinent part as follows:

If a municipality shall arbitrarily refuse to grant the municipal consent required under the terms of this act prerequisite to issuance of a certificate, or to act upon an application for such municipal consent within 90 days after such application is filed, then the applicant CATV company may avoid the necessity of first obtaining such municipal consent by showing to the satisfaction of the board that the municipal consent is being arbitrarily withheld.

Pursuant to the CATV Act, a municipality may issue a municipal consent to one or more applicants. N.J.S.A. 48A:5A-23(e). The granting of a municipal consent to one applicant does not automatically mean that the denial to another was not arbitrary. A situation can easily be envisioned in which a municipality grants one applicant a consent which is justified while arbitrarily withholding consent from another. In such a situation, there is no reason to prevent the unsuccessful applicant from seeking a certificate pursuant to 17(d). I therefore CONCLUDE that the Board can grant a certificate pursuant to section 17(d) of the CATV Act when a municipality has granted one or more municipal consents.

All petitions alleging arbitrary refusal as the basis of a certification application must provide proof that the municipal consent is being arbitrarily withheld. N.J.A.C. 14:17-6.6(b). For the reasons hereinafter discussed, I CONCLUDE that Tri-County has met this burden.
LACK OF STENOGRAPHIC TRANSCRIPTS

A municipality is required to hold a public hearing, which has been noticed in at least one newspaper circulated within the municipality, no sooner than 60 days and no later than 90 days after the filing of an application for a municipal consent. N.J.S.A. 48:5A-23(b) and (c). Board regulations require municipal governing bodies to make a public record, which record shall be a stenographic transcript made by a court reporter certified in the State, of all public hearings conducted pursuant to section 23 of the CATV Act. This regulation was effective on August 1, 1978. N.J.A.C. 14:18-11.10.

As discussed previously, a stenographic transcript was not made of the proceedings conducted by Carney’s Point on May 5, 1980 and May 8, 1980; and by Penns Grove, of the hearing conducted on May 8, 1980. The question presented is whether the lack of stenographic transcripts at these hearings constitutes an arbitrary refusal by respondents to grant municipal consents to Tri-County.

Although a stenographic transcript was not made, minutes were taken by the Borough Clerk of the hearing held on May 8, 1980 in Penns Grove. The minutes of this hearing were subsequently reduced to a typed transcript, copies of which were submitted to me. Petitioner argues that these minutes are insufficient to meet the requirements of N.J.A.C. 14:18-11.10. Penn Communications argues that the lack of certified stenographic records of the public hearings conducted by respondents should not be the basis for the Board’s granting a certificate to petitioner. In this respect, Penn Communications argues that stenographic records were made by both respondents of the final proceedings at which the municipalities voted to grant municipal consents to intervenor. Penn Communications also argues that the lack of stenographic transcripts at the prior hearings is not a fatal defect because, if necessary, testimony concerning the issues important to the members of the municipal governing bodies in granting consents to Penn Communications can be presented at hearings before the Office of Administrative Law. In this respect, intervenor argues that the lack of stenographic records might “simply show error” by respondents in conducting a “new procedure.” Finally, Penn Communications argues that the “maximum result of the lack of such transcripts should be for the Board to remand the matter to respondents for additional hearings of which stenographic transcripts are made.” In essence, Penn Communications argues that the lack of stenographic transcripts does not rise to the level of an arbitrary refusal to grant municipal consents to petitioner.
I am not persuaded by Penn Communications' arguments. The Board has been granted, pursuant to the CATV Act, broad powers to promulgate rules and regulations concerning the operation of CATV systems as well as the procedures to be followed concerning applications for municipal consents. N.J.S.A. 48:5A-10. All municipal consents issued pursuant to the CATV Act must conform in form and substance with all requirements of the act, federal law, and the rules, regulations and orders promulgated by the CATV Office. Compliance with federal and State regulations is a precondition for the operation of a CATV system. N.J.S.A. 48:5A-16(b), -17(a) and -25.

The small but growing body of case law interpreting the CATV Act and the Board's regulations demonstrate that they are to be broadly applied and strictly construed. In a recent case, In re Micro-Cable Communications Corp., 175 N.J. Super. 33 (App. Div. 1980), the Appellate Division considered the argument of Vision Cable Company that the Borough of Leonia arbitrarily denied a certificate to Vision and granted one to Micro-Cable Communications Corp. because of violations of N.J.A.C. 14:18-11.4 and 11.8. In upholding the  

\[N.J.A.C. 14:18-11.4\] reads as follows:

No member of the municipal governing body may communicate ex-parte by telephone or otherwise, or meet with any applicant concerning any substantive matter contained in the application on file without first notifying all other applicants of such meeting or communication. Nothing herein shall prohibit communication, without notice, concerning procedural matters associated with the filing or hearing of an application.

\[N.J.A.C. 14:18-11.8\] reads as follows:

(a) Any applicant shall be allowed at any time until the date of hearing, after he has submitted his application, to provide additional information in the form of amendments to that application, provided, however, that the applicant shall be required to advise any other person whose application is on file at the time that such additions or amendments have been submitted. If any applicant wishes to provide additions or amendments to the application at any stage after the close of such hearing, he shall also be required to provide notice of such additions to each other applicant. At any stage of the hearing, the presiding officer may call for further evidence upon any issue and require such evidence to be presented by the applicant or applicant's concerned.

(b) Copies of such amendments shall be filed with the Office within three days of the filing with the municipality.
Board’s dismissal of Micro-Cable’s application for a certificate, the court, noting that the CATV Act requires that the Board’s rules and regulations be complied with before the issuance of a certificate, interpreted N.J.A.C. 14:18-11.4 as being “... essentially a strict liability provision,” Micro-Cable, supra at 205. The court applied the same rationale to N.J.A.C. 4:18-11.8, Micro-Cable, supra at 205. In so doing, the court noted that one of the principal reasons for enactment of the CATV Act was to minimize the potential for abuse and corruption at the municipal level. In this respect, the court quoted extensively from a report issued by the State CATV Study Commission prior to the enactment of the act:

‘Accusations of municipal corruption’ in connection with the granting of franchises, also cited by the Legislature, has been so dramatically highlighted by the news media as to require little further emphasis here. On the contrary, it may be appropriate to point out that municipal corruption and favoritism are only a small part of the abuses and shortcomings of the municipal franchise process as it has existed. Certain allegations of corrupt overtures were related to this Commission by two CATV operators who testified before us; these allegations have been referred to the appropriate authorities. In addition, we have heard certain vague tales of apparent openness to corruption by municipal officials; how much of this stems from actual corrupt intentions and how much from a general aura of suspicion generated by a few prominent cases, we cannot, of course, estimate [State of New Jersey, CATV Study Comm. Report, supra, at 35-36; footnote omitted.]

Micro-Cable, supra, at 206.

The court further noted that the “... prior notice provisions of the Administrative Code are an integral part of the process designed to eliminate even the appearance of impropriety in the award of CATV franchises at the municipal level.” Micro-Cable, supra, at 206.

The rationale articulated by the Appellate Division in the Micro-Cable case applies in the present proceeding to the lack of certified stenographic transcripts of the hearings conducted by respondents as required by N.J.A.C. 14:18-11.10. The requirement of a stenographic transcript on its face is intended to prevent abuses at the municipal level.

A strict application of this regulation is especially appropriate in the area of CATV regulation because the Board has decided to act like a reviewing court when evaluating the record of municipal consent proceedings, setting aside local determinations only if there is a clear
abuse of discretion by the municipality, or if the local decision is arbitrary, capricious, or unreasonable. In re Meadowlands Communications Systems, Inc., 175 N.J. Super. 53, 64 (App. Div. 1980), citing Kramer v. Sea Girt Bd. of Adj., 45 N.J. 268 (1965). The absence of a stenographic transcript frustrates the Board's "appellate" review of municipal consent proceedings. The typing by a municipal employee of a tape recording made at a public hearing is not sufficient to meet the Board's requirement of a certified transcript. As petitioner argues, such minutes, which do not constitute a verbatim record of the proceedings, are subject to the interpretation of the municipal stenographer concerning what should be included and do not allow the Board to review what transpired at the municipal level in lieu of a de novo hearing.

This conclusion is also supported by the principles articulated in cases involving review of local land use decisions. In a recent case interpreting a section of the Municipal Land Use Law governing appeals to the governing body from the Board of Adjustment, the Law Division held that N.J.S.A. 40:55D-17(b), which requires that a stenographic record be made of all hearings on appeal to the governing body, was meant to be strictly followed. Carbone v. Weehawken Tp. Planning Bd., 175 N.J. Super., 584 (Law Div. 1980). The court reasoned that since no prior enactment in earlier zoning laws had such a requirement, the Legislature's action in adding it was significant. Although the present case does not involve a statutory provision requiring a stenographic transcript, the fact that the CATV Act gives broad regulatory jurisdiction to the CATV Office and requires that municipal consents should not be issued unless all such regulations are followed, mandates that the rationale of Carbone be applied. This is especially true in light of the Legislature's reasons for enacting the CATV Act. See, Micro-Cable, supra.

There is authority for the proposition that a failure to comply with the requirement of a stenographic recording, in the absence of a statutory or other rule, is not fatal if the minutes taken of the proceeding in question sufficiently detail what transpired at the hearing. Carbone, supra, at 587, citing Kuhlman v. Evesham, 122 N.J. Super., 78 (Law. Div. 1973). A review of the transcript of the minutes taken at the May 8, 1980 hearing in Penns Grove demonstrates that they are sketchy at best and not sufficiently detailed to constitute a factual record upon which the Board can review respondent's action. For example, the transcript notes that petitioner's attorney objected to Penn Communications' application because it was incomplete but
does not detail the objections. The minutes also state that the representative of petitioner "explained the rates" that Tri-County would charge. The minutes contain a similar discussion of petitioner's questions concerning the financial ability of intervenor to operate the CATV system it proposes. The entire "transcript," which consists of three pages, contains such summary discussions of the questions posed by the members of the Borough Council and the responses elicited.

I FIND that the typed transcript of the minutes taken at the public hearing conducted by Penns Grove on May 8, 1980, do not sufficiently detail what transpired at the hearing and therefore do not provide a sufficient factual record upon which to review Penns Grove's action.

Penn Communications' argument that the lack of stenographic transcripts constitutes a minor procedural error concerning a "new regulation" is without merit. The regulation in question was in effect for almost two years at the time of the hearings. Sufficient time had passed for municipalities, including respondents, to be knowledgeable concerning the regulations relating to CATV procedures.

Respondents did not comply with the requirement of stenographic transcripts at all public hearings concerning Tri-County and Penn Communications' applications, which requirement should be strictly construed, and the only available typed transcript, that of the May 8, 1980 hearing in Penns Grove, does not constitute a sufficient record for review by the Board. I, therefore, CONCLUDE that the failure of respondents to comply with the Board's regulation concerning stenographic transcripts constitutes a fatal procedural error and an arbitrary denial of a municipal certificate to Tri-County. In the Carbone case, the court cited the rule that when an agency record is so inadequate that the reviewing court cannot determine the validity of the agency's actions, a remand must be ordered. Carbone, supra, at 586. In this instance, in light of the fact that the Board acts as a reviewing authority over municipal actions, a similar result must follow. The Board should remand the question of the application of Tri-County for de novo proceedings at the municipal levels in accordance with the requirements of the CATV Act as well as Board regulations.

WRITTEN REPORTS

A municipal governing body must make a decision concerning a CATV application within 30 days after the conclusion of the hearings and must issue a written report of its decision detailing the reasons

On June 25, 1980, Carney’s Point decided to award a municipal consent to Penn Communications; and on September 4, 1980, filed with the Board written findings concerning the June 25th decision. As noted previously, the hearings concluded on June 4, 1980, which would have required the issuance of a written report of its decision by Carney’s Point no later than July 4, 1980. Penns Grove’s hearings concluded on June 3, 1980; a written report should therefore have been issued no later than July 3, 1980. On August 13, 1980, the Penns Grove Borough Council filed written findings concerning the applications of Tri-County and Penn Communications. The parties stipulated the issue to be whether or not these findings constituted a written report, pursuant to *N.J.S.A.* 48:5A-23(d) and *N.J.A.C.* 14:1811.12.

Respondents’ written findings are not dated. Assuming that they were issued on the dates filed with the CATV Office, they did not issue within 30 days of the close of the hearings. In light of the tendency of the courts to strictly apply provisions of the CATV Act and the Board’s regulations implementing it, I CONCLUDE that respondents failure to timely issue written reports, for the reasons discussed in relation to the lack of certified transcripts, constitutes an arbitrary refusal by respondents to issue municipal consents to petitioner. See also, *Clear Tel*, supra (the refusal of a governing body to timely file an application for municipal consent and hold hearings was held to be an arbitrary withholding of consent within the meaning of *N.J.S.A.* 48:4A-17(d)).

Even if issued timely, I FIND, for the reasons hereinafter discussed, that the written findings issued by respondents do not sufficiently detail the reasons for their decisions as required by *N.J.S.A.* 48:5A-23(d) and *N.J.A.C.* 14:18-11.12.

Penns Grove submitted to me copies of the written findings which it filed with the CATV Office. By a letter, dated September 4, 1980, Carney’s Point submitted its written findings with the CATV Office, which in turn, forwarded a copy of this letter and the findings to the Office of Administrative Law when it transmitted the cases for determination as contested cases.

Neither the CATV Act nor the Board’s regulations specify the degree of detail which must be included in a written report of a
municipal body, and there are no cases addressing this question. In
light of the fact that the Board has adopted the stance of a reviewing
court in evaluating municipal consent decisions, the case law appli-
cable to the sufficiency of administrative findings in the land use and
other areas when before a reviewing court is relevant.

In reviewing an application for a certificate, the Board is required
to consider the public convenience and necessity, the suitability and
character of the applicant, the applicant’s financial responsibility and
the applicant’s ability to efficiently perform the proposed service.
indicates that they considered the financial and technical ability and
the character of Penn Communications in reaching their decisions to
grant intervenor municipal consents. The findings state that the fact
that intervenor offers a system including “PRISM” and agrees to
establish a local office, at which it would employ local residents, were
also factors in respondents’ decisions.

Respondents have considered the technical and financial ability of
Penn Communications, as well as its impact on the local community.
These considerations, although given a rather short discussion in the
findings, come within the factors which must be considered by the
Board and, therefore, are appropriate for consideration by the munici-
pality. The weight given to the intentions of Penn Communications
to operate a local office was proper. Meadowlands Communications,
supra, at 67. I, therefore, find them to be sufficient statements on their
face setting forth the reasons for respondents’ decisions to award
municipal consents to intervenor. I do not find the fact that the
findings do not specifically state why respondents decided to deny
municipal consents to petitioner to be material. An inference can be
made that the fact that intervenor would provide a CATV system
including PRISM and would employ local residents in the construc-
tion and operation of the systems were reasons for respondents’ deci-
ding to grant municipal consents to Penn Communications rather than
to Tri-County. A statement of reasons is insufficient if it merely
parrots the terms of an applicable statute or regulation in con-
The detail required in the report issued by a municipality in this
context, however, should be tempered by the fact that unlike land use
cases, no property right is at stake in a municipal consent proceeding.
Micro-Cable, supra, at 207. The statement of reasons therefore need
not be as comprehensive and detailed as might be necessary in another
proceeding.
A comparison of the findings issued by respondents demonstrates that they are identical except for the change in names of the municipalities. The fact that respondents issued identical findings of fact raises the inference that they were viewed as mere formalities designed to meet the minimum requirements of the CATV Act and not to promulgate a bona fide consideration of each applicant's merits and the reasons pertaining to the decisions made. In addition, the absence of stenographic transcripts of all public hearings results in a lack of a record on which the Board can determine if there was sufficient evidence before the municipality to support the conclusions discussed in the written findings. Although each of the written reports on their own on their face meets the requirements of a written report, in the context of this proceeding, since they are identical and they resulted from hearings of which there were no stenographic transcripts, I CONCLUDE that they do not meet the requirements of the CATV Act nor the Board's regulations and therefore would constitute arbitrary denial of petitioner's applications even if they were timely issued.

ADDITIONAL ALLEGATION

Subsequent to the prehearing conference, petitioner submitted a letter alleging that individuals associated with intervenor had ex parte telephone conversations with the Mayor of Penns Grove prior to the Borough's decision, in violation of N.J.A.C. 14:18-11.4.² Penns Grove denies this allegation and asserts that the Mayor did not vote on the decision. It appears from the documents submitted that the Mayor did not, in fact, vote.

Because this allegation was raised subsequent to the time set for closing the record pertaining to the issuance of a summary decision, I determined that it would not be considered at this time. However, if the allegation were proven by petitioner, it would provide an additional basis for concluding that Penns Grove's action in denying a municipal consent to Tri-County constituted an arbitrary denial. If the Board should determine not to remand the proceedings to respondents but to instead institute hearings, this allegation would properly be considered at those hearings. If, instead, the Board should determine to remand the matters to respondents for de novo proceedings, the allegation becomes moot.

²See footnote 1, supra.
OBJECTOR ALLEGATIONS

The CATV Act provides that upon the receipt of an application for a certificate, the Board shall, within 30 days, either grant the certificate or schedule a hearing upon the application. If the Board receives a complaint from any person "claiming to be aggrieved by the issuance of the certificate, the Board may not issue it without a hearing if it finds that there is a reasonable basis for the complaint." N.J.S.A. 48:5A-16(b). As noted previously, both Tri-County and Penn Communications raise objections pursuant to this provision.

A municipal consent must be granted by a municipality by resolution and ordinance of the governing body. N.J.S.A. 48:5A-22 and -24. Although Carney's Point submitted a draft ordinance to the CATV Office on September 8, 1980; and Penns Grove, on August 15, 1980, respondents have not yet issued ordinances granting municipal consents to Penn Communications. The Board cannot issue certificates to Penn Communications until the municipal consents are issued. See, N.J.S.A. 48:5A-17(a) and -22. The question presented is whether the allegations raised by petitioner and intervenor pursuant to section 17(b) of the CATV Act are ripe for determination at this time.

Tri-County alleges that Penn Communications does not have the financial capacity to operate the CATV systems it proposes to install in Penns Grove and Carney's Point pursuant to N.J.S.A. 48:5A-23(c). Petitioner also raises allegations concerning the conduct of the hearings conducted by respondents. Tri-County argues that it was not given the opportunity to question Penn Communications' witnesses, that it did not receive copies of the financial documents submitted to respondents by Penn Communications and that Penn Communications did not submit the required financial documents to respondents within the required time periods.

Penn Communications asserts that Tri-County lacks standing to prosecute its claim because the application for municipal consents completed by petitioner showed the name "Tri-County Cable Tele-

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1 N.J.S.A. 48:5A-28(c) reads as follows:

An application for municipal consent must contain the following information: Sufficient evidence that the applicant company has the financial and technical capacity and the legal, character and other qualifications to construct, maintain and operate the necessary installations, lines and equipment and to provide the service proposed in a safe, adequate and proper manner.
vision Company” while the present proceeding was instituted in the name “Tri-County Cable, Inc.” Intervenor also argues that the application submitted by petitioner to Penns Grove was deficient because its filing was not authorized by an affidavit of an authorized representative of petitioner.

In his legal memorandum, petitioner’s attorney states that the name “Tri-County Cable, Inc.” on the application was an error made by his office, that the correct name of the corporation is Tri-County Cable Television Company, and that the same party appeared and participated in the municipal hearings, and seeks to amend the petition to correct the error. Concerning the alleged deficiency in the affidavits, he states that the applications were prepared by petitioner itself and submitted to the CATV Office and the municipal clerks simultaneously. He further states that petitioner inadvertently used the same affidavit with both applications and requests permission to supply a copy of the corporate resolution authorizing the Penns Grove application and a new affidavit to correct the inadvertent error. He finally alleges that this issue was never raised by intervenor at the municipal level.

Petitioner states in its brief that it is difficult to decide where these issues should properly be heard, but concludes that the allegations “go to the very heart of this process.” Penn Communications argues that these allegations should be considered by the Board as objections pursuant to section 16(b) of the CATV Act.

There is no statutory bar to an unsuccessful applicant, in this case Tri-County, contesting the issuance of a certificate to another applicant pursuant to both N.J.S.A. 48:5A-16(b) and simultaneously seeking a certificate from the Board on the basis of an arbitrary denial pursuant to N.J.S.A. 48:5A-17(d). In fact, if respondents had actually issued municipal ordinances pertaining to Penn Communications, the interests of both efficiency and judicial economy would require consolidation for hearing of all objections and Tri-County’s allegations concerning arbitrary denial. The issues are likely to be the same in both proceedings, making consolidation appropriate. In *Micro-Cable*, the Appellate Division noted without comment that the unsuccessful applicant had simultaneously filed a request to deny the successful applicant’s certificate and petition the Board pursuant to section 17(d), *Micro-Cable, supra*, at 203. Although it is not clear if this was a contested issue in that case, the court evidently did not find the procedure objectionable.

In this case, however, for the reasons previously discussed, the
objections raised by Tri-County and intervenor are, in my opinion, moot. The Board should remand the matters to respondents requiring that they begin anew their considerations of Penn Communications and Tri-County's applications.

If the Board should determine that hearings be held at this time rather than remanding the matter to respondents for de novo proceedings, the objections raised by Penn Communications and Tri-County should be considered at that time.

CONCLUSIONS

The Board can process Tri-County's application for a certificate administratively at this time without the prerequisite municipal consents pursuant to N.J.S.A. 48:5A-17(d). In fairness to Penn Communications, however, it is recommended that the Board not process any application by petitioner until new proceedings are completed by respondents. The CATV Act, on its face, envisions that most certificates will be granted after municipal consents have been issued and that the arbitrary denial provision will apply in exceptional cases.

A draft of an ordinance granting consent must be submitted for review to the CATV Office within 45 days of the municipality's decision indicating that it will grant such a consent to one or more applicants. After approval by the Office, the ordinance must be introduced at the next regularly scheduled municipal meeting and reintroduced for final consideration not more than 30 days after the initial reading. N.J.A.C. 14:18-11.18. Respondents appear to have not complied with these time limits. However, the parties made no stipulations concerning this question. One of the principal purposes of the CATV Act is to avoid delays in implementing CATV service. Micro-Cable, supra, at 206. In light of the fact that the deadlines for the issuance of a municipal ordinance have apparently passed and in order not to delay the proceedings any further, respondents should be ordered to begin de novo proceedings on the two applications within 30 days. If respondents do not do so, the Board should process Tri-County's petitions for certificates pursuant to N.J.S.A. 48:5A-17(d) and should consider Penn Communications' objections to petitioner's petitions administratively pursuant to N.J.S.A. 48:5A-16(b).

All findings of fact and conclusions of law previously set forth are hereby incorporated as stated above. For the reasons previously discussed, respondents are hereby ORDERED to begin within 30 days de novo proceedings on Tri-County's and Penn Communications' ap-
plications and to advise the Board within 30 days concerning the efforts made to begin these proceedings. If respondents fail to begin de novo proceedings and to so advise the Board within 30 days, the petitions of Tri-County seeking certificates to operate CATV systems in Penns Grove and Carney's Point and Penn Communications' objections to these petitions shall be considered administratively by the Board.

After reviewing this Initial Decision the Board of Public Utilities on March 26, 1981, issued the following Final Decision:

The judge in this matter has found that Tri-County Cable was arbitrarily denied consent by both municipalities. Thus, she recommends that the Board remand the matter of these franchises to the municipalities for de novo hearings to be commenced within 30 days.

The findings of arbitrary action are based on (1) the failure of either municipality to have made a stenographic record of its proceedings as required by N.J.A.C. 14:19-11.10, and (2) the failure of either municipality to issue a written report detailing its reasons for choosing Penn Communications within 30 days after the conclusion of hearings as required by N.J.S.A. 48:5A-23(d).

Additional allegations as to (1) ex parte communications between Penn Communications and the Mayor of Penns Grove, (2) Penn Communications' failure to adequately prove its financial capacity to operate the CATV system it proposes, (3) the failure of either municipality to allow Tri-County to question Penn Communications' witnesses and (4) Penn Communications' untimely filing of required financial documents, were all found to have been moot in light of the judge's decision.

Upon review of the initial decision herein, in light of prior Board policy and decisions relative to arbitrary municipal action, we find that the judge erred in her finding of arbitrary municipal action. While the violations of N.J.A.C. 14:18-11.10 and N.J.S.A. 48:5A-23(d) are indeed serious when viewed within the context of our State-wide regulatory scheme, they do not reach the level of arbitrary action. We have always held that there is a presumption that a municipality has acted reasonably in the granting of a franchise. Nothing herein has overcome such a presumption. Thus, any finding or arbitrary action based on these violations cannot stand.

This does not mean that we condone such actions on the part of
any municipality. On the contrary, in situations such as this, we have, in the past, consistently denied certification to any company relying on tainted municipal proceedings as the basis of their consent. We will continue such policy herein. At such time as Penn Communications files an application for Certification in either of these municipalities, we will immediately commence procedures to deny same based on Judge Sukovich’s findings of fact. As to Tri-County’s allegations of arbitrary action, based on violations of N.J.A.C. 14:18-11.10 and N.J.S.A. 48:5A-23(d), we hereby deny same.

The four allegations found to be moot by the judge, if proven, would not change our determination herein. Rather, they would strengthen our findings that the municipal hearings in both municipalities were severely tainted.

While the judge recommends a 30 day remand to the municipalities, we feel that same is inappropriate as it would preclude any new applicant from filing an application to be heard in such remanded hearings. Neither Tri-County nor Penn Communications is entitled to such preferential treatment. Rather, each is free to reapply to each municipality and have a franchise hearing within 60 to 90 days of such an application. This procedure will ensure that the ultimate franchisee will provide cable television service consistent with local needs and desires. Same will be totally consistent with the regulatory framework established in the Cable Television Act.

To avoid a repetition of the mistakes made by each municipality, we feel it is appropriate that both Carney’s Point and Penns Grove have the guidance of the Office of Cable Television in any franchise hearing to be held. Thus, we hereby direct the Office to procedurally run the hearings for both municipalities. While we do not anticipate that the Office will make a decision for either Carney’s Point or Penns Grove, we will require an Office representative to be present at all municipal hearings and deliberations to ensure compliance with proper procedures and to answer any questions raised.

In accordance with the above, upon review of the record in this matter submitted by the administrative law judge, the Board HEREBY ADOPTS WITH MODIFICATIONS, as indicated above, said initial decision as its own. N.J.S.A. 52:14B-10.