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September 7, 2004

BY HAND

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: Fitchburg Gas and Electric Light Company, D.T.E. 04-48, Motion to Strike Portions of the Reply Brief of the Attorney General

Dear Secretary Cottrell:

Fitchburg Gas and Electric Light Company, ("FG&E" or "the Company"), hereby moves that the Department of Telecommunications and Energy ("Department") strike portions of the Reply Brief ("Reply Brief") of the Attorney General in this proceeding, pursuant to 220 C.M.R. §§1.04(5) and 1.11 (7) and (8). Specifically, FG&E moves that the Department strike the third, fourth and fifth sentences in the third paragraph of the Attorney General's Reply Brief, including the citations and footnotes, because they are assertions based upon alleged facts not in the record. As grounds for its Motion, the Company states:

The Department does not allow parties to testify in a brief to factual matters not supported on the record. See e.g. Western Massachusetts Electric Company, D.P.U. 86-8C-1, p. 23, n.5 (1986); AT&T Communications, D.P.U. 85-137, p.49 (1985); AT&T Communications, D.P.U. 91-79, pp. 5-11 (1991); Verizon Alternative Regulatory Plan, D.T.E. 01-31-Phase II, Hearing Officer Ruling Granting Motion Of Attorney General To Strike Portions Of AT&T's Brief, December 19, 2002. The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. §1.11(8). Except for updates of routine information already provided on the record, *e.g.*, property tax bills, a motion to reopen must be filed and granted before the testimony or exhibits are "thrust upon the trier of

fact," noting that "one cannot un-ring a bell." Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989).

Before making these assertions in its reply brief based on alleged facts not in the record, the Attorney General did not make a motion to reopen the record and admit additional facts in evidence, based on a showing of good cause. Rather, the Attorney General claims to incorporate by reference two post-hearing affidavits from a prior case to support his alleged facts. AG Reply Brief at 2, n.3 and 4. Citing facts in a brief that are not in the record unfairly prejudices the rights of other parties. As the Department has noted the "case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process." Fitchburg Gas and Electric Light Company, D.T.E. 98-51, p. (1998); New England Telephone and Telegraph Company, d/b/a NYNEX, D.P.U. 94-50 at 62 (1995).[1]

State administrative law requires that parties be given an opportunity to cross-examine witnesses and present rebuttal evidence. G.L. c. 30A, § 11(3). Allowing the Attorney General to cite, reference or otherwise rely upon extra-record evidence that the Company had no opportunity to cross-examine or rebut violates the Company's procedural rights and the Department rules and precedent. See MediaOne/New England Telephone, D.T.E. 99-42/43, p. 17-18 (1999); Boston Edison Company, D.P.U. 90-335, p. 7-8 (1992); Payphone Inc., D.P.U. 90-171, p. 4-5 (1991); see also G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8). Department precedent establishes that the proper procedure is to "strike extra-record evidence from a brief" and either require the offending party to file a conforming brief without reference to the excluded evidence or to disregard the offending portions of the brief. See Boston Edison Company v. Brookline Realty & Inv. Corp., 10 Mass.App.Ct. 63, 69 (1980); AT&T Communications, D.P.U. 91-79, p. 8 (1992), citing Service Publications Inc. v. Goverman, 396 Mass. 567,580(1986); Hull Municipal Light Plant, D.P.U. 87-19-A, p.7(1990); Boston Edison Company, D.P.U. 90-335, pp.7-9 (1992).

In his Reply Brief the Attorney General attempts to introduce new arguments and facts based upon affidavits the Attorney General submitted in another proceeding, but failed to offer as evidence prior to the close of the record in this case. AG Reply Brief at 2. The Attorney General had ample opportunity to present witnesses and evidence in this proceeding, but declined to offer as evidence the two affidavits he now attempts to "incorporated by reference" on brief. 220 C.M.R. §1.10 (3) allow a party to "offer in evidence" documents from the Department's records, but it does not allow a party to introduce extra-record evidence after the close of a record, absent approval by the Department of a motion to reopen the hearings and introduce new evidence.

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[1] Only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. See Payphone Inc., D.P.U. 90-1171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination).

Allowing the Attorney General to introduce the affidavits of his own witnesses after the close of the hearing would extremely prejudicial to FG&E because the Company did not have an opportunity to cross-examine the witnesses nor rebut the alleged facts.[2] Accordingly, the Department should strike the portion of the Attorney General's Reply Brief based upon extra-record evidence and/or disregard the portion of the Attorney General's Reply Brief not supported by the record in this case

For these reasons, the Department should grant FG&E's motion to strike a portion of the Attorney General's Reply Brief.

Respectfully submitted,

Fitchburg Gas and Electric
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Dated: September 7, 2004

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[2] In fact, it appears that the cited affidavits: 1) were introduced after the hearings and final order in D.T.E. 03-47-A; 2) address NSTAR's compliance filing (not the approved adjustment factor); and 3) were never subject to cross-examination or rebuttal in that proceeding.