

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts

DTE 01-31- Phase II
(Track B)

**AT&T'S OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO STRIKE
PORTIONS OF AT&T'S REPLY BRIEF**

AT&T Communications of New England, Inc. ("AT&T") opposes the motion of the Attorney General ("AG") to strike three lines of AT&T's argument on page 12 of its Reply Brief and the academic authority relating to that argument.

In support of his motion to strike a 1987 article by three economists that was attached to AT&T's reply brief and the reference to the article in the text of the brief, the AG makes two arguments. First, he contends that the academic authority attached to AT&T's Reply Brief is "evidence" and thus subject to the requirements in 220 CMR 1.11(7) and 1.11(8) that, after the record is closed, parties seeking to put in additional evidence must move for the record to be reopened. Second, he claims that other parties have been prejudiced. For the reasons set forth below, both of the AG's arguments are wrong.

Background

In Section III of its Reply Brief (pages 11-13), AT&T argues that Dr. Gabel incorrectly advocates that the Department allocate the cost of the local loop among all services that depend on the loop, rather than allocating that cost to the service allowing the customer access to the network (*i.e.*, dial tone service). In the AT&T text challenged by the AG's motion to strike,

AT&T argues that Dr. Gabel's proposed course of action will "leave the Department in the position of continuing to make decisions about how much of the loop cost to load on to basic telephony with no economic guideposts to go by." As part of its argument, AT&T refers the Department to "How Arbitrary is 'Arbitrary'? – or, Toward the Deserved Demise of Full Cost Allocation," an article by three professors of economics, William J. Baumol, Michael F. Koehn, and Robert D. Willig, and published in the *Public Utilities Fortnightly* on September 3, 1987 ("Baumol article"). AT&T also cites for this proposition pages 13 to 15 of the rebuttal testimony of Dr. William E. Taylor in this proceeding.

Argument

I. THE BAUMOL ARTICLE IS NOT EVIDENCE.

AT&T's citation and submission of the Baumol article properly refers the Department to academic authority supporting AT&T's argument. Such literature is not "evidence"; it is rather in the nature of a law review article, which can be cited as part of argument.

There is no empirical information in the article upon which the validity of its conclusions for this case depends. The Baumol article contains no empirical data or factual conclusions that necessitate cross examination or rebuttal evidence. In this critical respect, the Baumol article is distinctly different from the three publications AT&T moved into evidence that provide empirical studies and factual conclusions about own price elasticities of basic exchange service. See Exh. ATT-3 (Handbook of Telecommunications Economics, Vol. 1, Chapter 4, pp. 126-129); Exh. ATT-4 (Who Pays for Universal Service, Robert W. Crandall and Leonard Waverman, pp. 90-104); and Exh. ATT-5 (Targeted and Untargeted Subsidy Schemes: Evidence from Postdivestiture Efforts to Promote Universal Telephone Service, Ross Eriksson, David L. Kaserman, and John W. Mayo, Journal of Law and Economics, October 1998, Volume 41, Number 8, pp. 477-502).

Consistent with the notion that academic articles, journals and books are in the nature of law review articles that can be cited as part of argument and informed discussion, the Department regularly cites to academic authority not in the evidentiary record to support statements in its decisions. For example, the Department's *Phase I Order* in this docket points to numerous academic authorities not in the record to support its decision:

- p. 38 support for the relevance of specific criteria for determining whether Verizon has market power (G.J. Stigler);
- p. 43 organization of the Department's analysis of barriers to entry into four categories (Browning and Zupan);
- p. 47 support for the use of non-price barriers to entry as a factor in determining whether the Massachusetts retail business markets are competitive (Browning and Zupan);
- p. 58 support for the use of barriers to entry, expansion, and exit as a means of determining whether there is sufficient competition in Massachusetts retail markets (Salvatore); and
- p. 60 support for the use of certain prerequisites for determining whether the Massachusetts retail market is contestable (Salvatore).

See also, Phase I Order, at p. 37, n.19; p. 59, n.34; p. 65; pp. 101-102, n.62.

In fact, in the *Phase I Order*, the Department relies upon two extra-record articles by William J. Baumol (other than the Baumol article challenged by the AG here). The Department cites these Baumol articles for the proposition that it is impractical for regulators to determine demand elasticity for any specific service, and for the range within which prices in an efficient market will be found. *Id.*, at 101-102, n. 62 (citing William J. Baumol and J. Gregory Sidak, *Toward Competition in Local Telephone* (1994); William J. Baumol, "Maximum and Minimum Pricing Principles for Residual Regulation," 5 E. Econ. J. 245 (Jan/Apr 1979)).

If the Department can rely on such extra-record academic authority without any discussion of them during the proceeding in support of its reasoning to reach a decision, then

surely the parties can point the Department to them in their briefs. Therefore, contrary to the allegations of the AG in his motion to strike, AT&T violated no Department regulations or precedent in citing and submitting the Baumol article as academic authority for AT&T's Reply Brief argument.

II. NO PARTY WAS PREJUDICED BY AT&T'S REFERENCE TO THE ARTICLE BECAUSE IT CONSTITUTED ONLY ADDITIONAL ARGUMENT IN SUPPORT OF A PROPOSITION THAT WAS ADVANCED IN THIS PROCEEDING WELL BEFORE THE HEARINGS.

AT&T and the authors of the Baumol article contend that regulators should not utilize full cost allocation because of its arbitrariness. The AG alleges that he is prejudiced by AT&T's use of this argument and article at this point in the proceeding. AG Motion to Strike, at 2. Verizon's Dr. Taylor, however, makes the very same argument on pages 13 to 15 of his rebuttal testimony, stating that allocation of the cost of the loop to different services "gets us down the slippery slope of having to ... use arbitrary allocators that have no economic justification..." *Id.* at 14. The AG therefore had notice of the argument on page 12 of AT&T's Reply Brief and in the Baumol article on September 18, 2002, when Dr. Taylor's rebuttal testimony was filed – over a month before the hearings on October 22-24, 2002. The AG could have presented contradictory authority or testimony on this point, could have cross-examined Dr. Taylor or Dr. John Mayo about this argument, or could have addressed the argument on brief. The AG failed to contest the argument by these appropriate methods and now, improperly, attempts to strike an argument already in the record of this proceeding. AT&T's Reply Brief argument should stand.

The AG's argument that he is somehow prejudiced because he cannot test "the accuracy of the data" in the Baumol article is similarly without merit. AG Motion to Strike, at 3. As noted above, the Baumol article contains no empirical data or factual conclusions that necessitate

cross examination or rebuttal evidence.¹ The Baumol article differs in this critical respect from the three publications AT&T moved into evidence that provide empirical studies and factual conclusions. The AG is not prejudiced by the inability to test empirical data that does not exist.

Conclusion

The Department should deny the AG's motion to strike. The Baumol article is not evidence; it is, rather, academic authority in the nature of a law review article. AT&T's citation to, and submission of, such academic authority is entirely consistent with the Department's own practice of citing academic authority in its decisions, even though such authority is never discussed on or off the record as part of the proceeding. Moreover, no party was prejudiced by AT&T's reference to the Baumol article, because it was merely a reiteration of the same argument that had been advanced by Verizon over a month before the hearings.

Respectfully submitted,

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¹ There are "numbers" in the Baumol article but they relate to other industries and are used for illustrative purposes only.

