UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Town of Norwood, Massachusetts v. National Grid USA, New England Electric System, Massachusetts Electric Company, and Narragansett Electric Light Company	Docket Nos. EL03-37-002 and EL03-37-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued February 22, 2006)

1. In this order, the Commission addresses again the calculation of a Contract Termination Charge (CTC) applicable to the Town of Norwood, Massachusetts (Norwood) as the result of its early termination of a full requirements electric service contract with New England Power Company (New England Power)[1] so that Norwood could obtain electric power from another supplier. As discussed below, the Commission finds that the terms of the CTC must be applied as approved by the Commission in orders that have been affirmed by the courts. Norwood's position, if adopted, would alter the terms of the CTC itself.

2. In an order issued July 22, 2005,[2] the Commission affirmed in part and modified in part an Initial Decision issued by the Presiding Administrative Law Judge (ALJ) addressing the calculation of the CTC.[3] At issue was whether the CTC was unjust,

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[1] New England Power has been renamed National Grid USA Service Company, Inc. (National Grid) following the merger of its corporate parent. However, throughout this order, the company is referred to as New England Power.

[2] *Town of Norwood, Massachusetts v. National Grid USA*¸112 FERC ¶ 61,099 (2005).

[3] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 (2004).

unreasonable, unduly discriminatory, or preferential under section 205 of the Federal Power Act (FPA).[4] In the July 22, 2005 Order, the Commission pointed out that it previously had accepted the CTC formula, but had not accepted the individual components in New England Power's calculation. In modifying the Initial Decision, the Commission concluded that the amount owed by Norwood is $71,881,517 plus interest rather than the approximately $16.9 million calculated by the ALJ.

3. Both Norwood and New England Power filed requests for rehearing of the July 22, 2005 Order. As discussed below, the Commission denies Norwood's request for rehearing and grants New England Power's request for rehearing.

4. On August 3, 2005, New England Power submitted a compliance filing as required by the July 22, 2005 Order. Norwood filed objections to the filing. As discussed below, the Commission rejects the compliance filing because it is granting New England Power's request for rehearing.

I. Background

5. The lengthy background of this proceeding prior to issuance of the ID is thoroughly recounted in the ID[5] and the July 22, 2005 Order[6] and will not be repeated here. In the July 22, 2005 Order, the Commission adopted the findings of the ALJ to the extent the Commission affirmed the ID.

6. The CTC formula at issue here is as follows: CTC = (R-M) x L, where "R" is New England Power's annual revenues from Norwood, "M" is the estimated market value of Norwood's released capacity, and "L" is the remaining length of the contract obligation, in this case, from April 1, 1998, through October 2008 in accordance with Norwood's decision to terminate its service from New England Power. As discussed below, there is also a cap on the amount that Norwood is required to pay New England Power.

7. More specifically, the "R" factor is the amount of revenue that New England Power was receiving from Norwood at the time of the termination under Commission-approved rates. That revenue reflects a credit for the transmission services that Norwood

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[4] 16 U.S.C. § 824d (2000).

[5] *Town of Norwood, Massachusetts v. National Grid USA,* 107 FERC ¶ 63,041 at P 1-14 (2004).

[6] *Town of Norwood, Massachusetts v. National Grid USA,* 112 FERC ¶ 61,009 at P 5-8 (2005).

bought from Boston Edison Company (Boston Edison). New England Power determined "R" based on the revenue it received from Norwood during the 12 months immediately preceding the early termination date.

8. The "M" factor used by New England Power is the market value of the power it was supplying to Norwood at the time of the early termination. The CTC formula includes a table of kilowatt hour (kWh) prices to be used in this calculation for the years 1998 through 2007 and provides that prices for 2008 and thereafter will be the prices for 2007 escalated at two percent annually. The released load factor used by New England Power is the annual average of kWh that Norwood bought from New England Power during the 12 months preceding the early termination.

9. In the Initial Decision, the ALJ adjusted the Revenue Factor "R" component of the CTC formula, which represents the revenues New England Power was receiving from Norwood under approved rates at the time Norwood terminated the contract, less a credit for transmission payments that Norwood made to its transmission provider, Boston Edison.[7] Norwood and the Commission's Trial Staff (Staff) argued at the hearing that the total revenue component was too high because it failed to reflect a 28-percent reduction in revenues to reflect costs eliminated as a result of the divestiture of New England Power's non-nuclear generation assets. New England Power provided this reduction to its affiliated wholesale customers, Massachusetts Electric Company (Mass Electric) and Narragansett Electric Light Company (Narragansett), as the result of a settlement giving the affiliates' retail customers Standard Offer service (3.2 cents per kWh) and 1.5 cents per kWh as a CTC.[8] The ALJ reasoned that the 28-percent reduction to the "R" factor attributable to the non-nuclear divestiture was "known and measurable" and thus could have been reflected at the time that New England Power sought Commission approval of its application for the Norwood CTC and that it was consistent with New England Power's pledge in the divestiture proceeding that it would share the proceeds of its non-nuclear generation facilities with its unaffiliated wholesale customers to reduce stranded costs.[9] Accordingly, the ALJ reduced the "R" factor by 28 percent and determined that, after deducting for the estimated Market Value "M" of the released capacity and energy, the Norwood CTC should be $16.9 million.[10]

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[7] *Id*. at P 13-31.

[8] *Id*. at P 19, 28, and n.32.

[9] *Id*. at P 16.

[10] *Id*. at P 71.

10. In the July 22, 2005 Order, the Commission reversed the ID with respect to the 28-percent reduction to the "R" factor. The Commission did so because the reduction was not consistent with the approved CTC formula.[11] The Commission pointed out that the Norwood CTC formula specifically provides for certain types of adjustments, but does not provide for an adjustment to reflect the divestiture of certain facilities.[12] Accordingly, the Commission determined that the correct "R" factor should be \$196,270,432, less \$124,824,796 for the estimated Market Value "M" of the released capacity and energy, resulting in a CTC of \$71.9 million.[13]

11. In the July 22, 2005 Order, the "R" factor also was at issue in the determination of the CTC Cap, which is the maximum CTC that Norwood can be obligated to pay.[14] Specifically, the CTC Cap requires that the difference between the adjusted revenues "R" under the contract and the estimated Market Value "M" of the released capacity and energy cannot exceed the departing customer's contribution to New England Power's fixed power supply costs under its tariff.[15] The Norwood CTC formula calculates the customer's contribution as the difference between the departing customer's Total Revenue minus the Transmission Revenue and minus New England Power's average fuel costs multiplied by the customer's monthly kWh purchases during the period over which Total Revenue is determined.[16] The ALJ calculated \$25,403,742 as the appropriate CTC Cap, based on a *pro rata* share of New England Power's estimated remaining fixed costs after divestiture of the non-nuclear facilities.[17] However, the Commission calculated the CTC Cap based on the CTC formula and reflecting Norwood's \$14,927,508 per year contribution to New England Power's fixed costs under approved tariff rates, or \$158 million over the more than 10 years remaining in the term of the service

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[11] *Id*. at P 32.

[12] *Id*. at P 33.

[13] *Id.* In fact, the difference between the \$16.9 million CTC calculated by the ALJ and the \$71.9 million CTC established in the July 22, 2005 Order (\$55.0 million) is equal to the total revenue of \$196.3 million times 28 percent.

[14] *Id*. at P 57.

[15] *Id*. at P 60.

[16] *Id.*

[17] *Id*. at P 108.

agreement.[18] Because the $158 million was greater than Norwood's CTC of $71.9 million, the Commission determined that the CTC Cap would not lower Norwood's CTC.[19]

12. New England Power contended that Norwood should be required to pay interest at the rate of 18 percent per year on the unpaid CTC amount from the date of the original CTC bill in May 1998.[20] Norwood disagreed, contending that the CTC requires use of the prime rate.[21] Norwood maintained that the 18-percent rate is established in a tariff provision applicable to delinquent customer bills, but not applicable to a case such as this. However, the ALJ ruled that the Massachusetts Appeals Court had rejected Norwood's position, and she found the outcome of the Massachusetts litigation to be controlling on this issue.[22] On exceptions, Norwood argued that the CTC provides that interest must be determined under 18 C.F.R. § 35.19a, and the tariff affords the customer payment schedule options.[23] In the July 22, 2005 Order, the Commission reversed the ID, concluding that the CTC establishes that the interest rate must be calculated in accordance with 18 C.F.R. § 35.19a, *i.e.*, the prime rate.

13. While the ID was pending before the Commission on exceptions, Norwood sought to conclude the litigation by sending New England Power a check for $20,356,994.35 on July 22, 2004.[24] However, in the July 22, 2005 Order, the Commission ordered Norwood to pay the difference between $71,881,517 and the amount already paid to New England Power, plus interest.[25] The Commission also directed New England Power to file a report reflecting the amount of the CTC due from Norwood with interest calculated in accordance with 18 C.F.R. § 35.19a.

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[18] *Id*. at P 75.

[19] *Id*. at P 75.

[20] *Id*. at P 76.

[21] *Id.*

[22] *Id.*

[23] *Id*. at P 77.

[24] *Id*. at n.13. The amount includes $2,349,623.35 of interest from April 1, 1998, through June 30, 2004.

[25] *Id*. at P 94.

II. Compliance Filing And Responsive Pleadings

14. On August 3, 2005, New England Power submitted its compliance filing in response to the July 22, 2005 Order) Notice was published in the *Federal Register* (70 Fed. Reg. 48,698 (August 19, 2005)), with interventions, comments, and protests due on or before August 22, 2005. On August 22, 2005, Norwood filed objections to the compliance report. On September 6, 2005, New England Power filed an answer to Norwood's objections. On September 16, 2005, Norwood filed a motion to reject New England Power's answer.

15. On August 19, 2005, both Norwood and New England Power filed requests for rehearing of the July 22, 2005 Order. On August 31, 2005, Norwood filed a notice and request to respond to New England Power's request for rehearing. On September 6, 2005, New England Power filed an answer to Norwood's request for rehearing. On September 12, 2005, Norwood filed an answer to New England Power's answer to Norwood's request for rehearing. On September 16, 2005, Norwood filed a motion to submit recent authority. On September 28, 2005, New England Power filed an answer to Norwood's motion to submit recent authority.

III. Discussion

A. Procedural Matters

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or to a request for rehearing unless otherwise ordered by the decisional authority. In this case, the Commission is not persuaded to accept the responsive pleadings filed by New England Power and Norwood in either docket addressed by this order.

B. Requests for Rehearing

1. Norwood's Request for Rehearing

17. According to Norwood, the FPA does not allow for charges that exceed New England Power's actual contract losses.[26] However, argues Norwood, the Commission derived the "R" and "M" factors inconsistently and incorrectly applied the CTC Cap, resulting in a CTC that exceeds New England Power's actual costs.

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[26] Norwood cites *Acker v. United States*, 298 U.S. 426 (1936); *El Paso Natural Gas Company v. FPC*, 281 F.2d 567 (5th Cir. 1960); *Midwestern Gas Transmission Company. v. FPC*, 388 F.2d 444 (7th Cir. 1968).

18. Norwood asserts that the Commission did not compute the CTC components correctly when it failed to account for New England Power's sale of the electric generating plants supporting the service to Norwood. Additionally, Norwood argues that the Commission should have used actual market prices in calculating the CTC formula. It maintains that the market values of released capacity and energy have been above the contract price that was effective when it terminated service.

19. Further, states Norwood, the Commission erroneously rejected the ALJ's adjustment to the "R" factor, basing its ruling on its finding that the CTC does not provide for such an adjustment, as well as on the fact that Norwood failed to settle with New England Power and, therefore, is not entitled to the same CTC treatment. Norwood asserts that this is incorrect because New England Power was willing for it to depart, but only on terms that would require Norwood to pay substantially more than New England Power's affiliates. However, continues Norwood, the Commission has the authority to make an adjustment to preclude unjust, unreasonable, discriminatory, or preferential rates.[27] According to Norwood, "The *fundamental* theory of Commission ratemaking is that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the costs to be incurred."[28] Norwood further points out that, in Order No. 888,[29] the Commission stated that, "If a stranded cost claim involves divestiture of assets, the amount of stranded costs would be the book value less the sale price."

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[27] Norwood cites 16 U.S.C. §§ 824d, 825h; *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

[28] Norwood cites *Northern States Power Company,* 64 FERC ¶ 61,324 at 63,379 (1993) (emphasis in original); *Indiana & Michigan Mun. Distribs. Ass'n v. Indiana Michigan Power Company*, 59 FERC ¶ 61,260 at 61,956 (1992); *Alabama Elec. Coop. v. FERC,* 684 F.2d 20, 27-29 (D.C. Cir. 1982).

[29] Norwood cites *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,785, 31,790-91, 31,842 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048, *order on reh'g*¸Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC,* 535 U.S. 1 (2002), *order on reh'g*, Order No. 888-C ¶ 61,046 (1998).

Norwood contends that, because the CTC formula is derived from and parallels Order No. 888's stranded cost formula, the Commission erred when it found that the CTC formula does not permit consideration of New England Power's asset divestiture revenue.

20. Norwood challenges the Commission's determination that New England Power was not required to offer Norwood the same settlement package that New England Power offered to its affiliates. Additionally, Norwood argues that New England Power's willingness to accept revenue reductions from its affiliates is a clear admission that New England Power is receiving compensation through the plant sale revenues and that the "R" factor applied to Norwood is overstated. Norwood contends that its witness testified that the standard offer service given to New England Power's affiliates is approximately 40 percent lower than the frozen rates offered Norwood.[30] Thus, Norwood reasons that the ALJ's 28-percent reduction in the "R" factor is necessary to achieve just and reasonable rates under the CTC and to avoid undue preference and discrimination.

21. Norwood submits that, if the "R" factor is not reduced, the Commission must either adjust the "M" factor or reduce the CTC Cap to account for market values. Norwood claims that New England Power's market value estimates were not made in accordance with Order No. 888, so they do not represent actual market sales prices and must be rejected. According to Norwood, given the lack of a testable New England Power market study and Norwood's inability to protect itself by marketing the released power itself, the most sensible approach would be to base the "M" component on actual market conditions. According to Norwood, by considering the sale value of Norwood's plants, the use of an "M" factor that reflects market conditions would eliminate the CTC charges.[31] In the alternative, continues Norwood, use of the purchaser's forecast price of generation for the "M" factor would reflect future expectations relating to the output of the purchased assets and would reduce the CTC (without interest) to $19.5 million.[32]

22. Norwood next contends that the purpose of the CTC Cap should be to prevent the CTC from exceeding New England Power's actual costs. Norwood argues that it should not be treated as having contributed to fixed power supply costs for facilities that New England Power sold at a profit, and further, that New England Power's divestiture of the non-nuclear generation and power supply contracts and the eventual divestiture or closure of the nuclear units meant that New England Power no longer had fixed power supply costs relating to these facilities. Indeed, Norwood asserts that New England Power's

[30] Norwood cites Exh. NOR-1 at 14.

[31] Norwood cites Exh. NOR-38 at 7-8.

[32] Norwood cites Exh. NOR-9 at 24; Exh. NOR-14 at 1.

plant sale is what led Norwood to terminate its contract. Norwood claims that, under New England Power's existing rate, adjusted to eliminate fixed costs of the divested plant, Norwood's contribution to New England Power's remaining fixed costs would be $18.3 million in as-billed dollars, equivalent to a capped contribution of $12.5 million as of April 1, 1998.[33]

23. Norwood also argues that two other errors should be corrected in applying the CTC formula. First, Norwood states that the rate of return in the "R" component should be adjusted to reflect the fact that New England Power was earning a return far above the allowed return. Norwood also submits that the ALJ's higher recommended transmission adjustment of $1,390,785 to the "R" factor should have been used to offset the amounts that it was required to pay Boston Edison for transmission service. Norwood asserts that the transmission adjustment in the CTC formula and in Order No. 888's stranded cost formula is intended to account for the fact that jurisdictional companies can continue to collect transmission costs when customers leave their transmission systems. However, Norwood contends that power from the divested plants continues to be sold, and the transmission systems of New England Power and Boston Edison continue to be used. Thus, Norwood maintains that the Commission should deduct the full amount of transmission costs allocable under New England Power's tariff so that the CTC reflects only displaced generation costs.

24. Norwood states that there is no dispute that New England Power has been made whole; therefore, the result of the July 22, 2005 Order is unreasonable under the FPA. According to Norwood, although that order states that it permits New England Power to recover the revenues it would have collected had Norwood continued to pay the fixed tariff rate through the contract term,[34] the charge does not reflect actual service provided and any actual costs (or losses) attributable to Norwood's departure from the system.

25. Norwood contends that the Commission's only stated issue in this case is the justness and reasonableness of the CTC components filed by New England Power; therefore, the Commission need not go outside of the CTC formula.[35] However, Norwood asserts that, because the CTC components are based on estimates, the Commission should consider whether New England Power actually suffered economic

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[33] Norwood cites Exh. NOR-30 at 12-16; Exh. NOR-32.

[34] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,009 at P 2, 9 (2005).

[35] *Id.* at P 8-9, 56, 74.

harm or whether the "R" factor reflects actual revenues and market conditions.[36] Norwood also complains that the Commission refused to update New England Power's estimates and interpreted past decisions as not permitting examination of whether the results are consistent with actual cost incurrence and lost revenues. According to Norwood, the July 22, 2005 Order implies that, if the results of the Commission's order can be derived from the tariff, the Commission need not consider whether those results are reasonable, justifiable, or consistent with the facts presented.

26. Norwood claims that the Commission must consider contrary evidence that is introduced, as well as the magnitude of the disparity between expectations and reality. For example, Norwood points out that the Court of Appeals for the First Circuit has made it clear that a regulator is not rigidly bound to test-year formulas when later information reveals that the estimates based on those figures are likely to be seriously in error.[37] Norwood further claims that, if it can be shown that the imposition of a tariff formula will conflict with basic statutory requirements, the statute takes preference. Norwood maintains that the Commission has not provided a rational explanation for its departure from its own regulations, procedures, and precedents.

27. Norwood also contends that the Commission's May 15, 1998 Order accepting the CTC amendment simply gave Norwood an option to terminate its service by paying an exit fee equal to the revenues that it would have paid under its contract, less the market value of its power.[38] However, claims Norwood, the Commission is not barred from making certain that the components of the formula make New England Power no more than whole. Norwood also states that the Commission may depart from prior orders where necessary to reach correct results or even to change its policy.[39]

28. Finally, while it concedes that the Commission has the authority to interpret jurisdictional contracts, Norwood points out that it is not a jurisdictional public utility under the FPA, so the Commission does not have the authority to order it to issue a

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[36] *Id*. at P 32, 55.

[37] Norwood cites *Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1220, *vacated on other grounds*, 751 F.2d 20 (1st Circuit 1984).

[38] Norwood cites *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,009 at P 33 (2005).

[39] Norwood cites *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F2d 1074, 1078-80 (D.C. Cir. 1987).

check.[40] According to Norwood, even if the Commission can order it to pay money to New England Power, this authority would be limited to ordering payments that are not in excess of New England Power's actually-incurred damages from Norwood's termination of a jurisdictional contract, *i.e.*, amounts equal to contract damages, but no more.[41]

2. Commission Analysis

29. The Commission denies Norwood's request for rehearing. Norwood raises issues on rehearing that have been resolved by the Commission and the courts or otherwise have no merit. Norwood's request for rehearing is simply a collateral attack on those earlier decisions.

30. The United States Court of Appeals for the First Circuit foreclosed many of the arguments Norwood raises here when the court affirmed the Commission's orders accepting the CTC.[42] First, the court determined that the Commission's stranded cost regulations did not preclude the Commission from approving the tariff amendment that affords New England Power a similar recovery whenever a customer terminates an existing contractual obligation, as Norwood did when it unilaterally terminated its service agreement with New England Power so that it could obtain service from another provider.[43] Further, the court pointed out that Norwood was not being asked to pay more for past purchases than provided by the tariff in effect at the time of the purchases; rather that the CTC gave Norwood an option to terminate the contract that it did not have before.[44]

31. Norwood also argued before the court that New England Power had not supplied data to show that it is just and reasonable to require Norwood to pay a CTC that could amount to as much as $78 million, a sum Norwood calculated by projecting the

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[40] Norwood cites 16 U.S.C. § 824 (f) (2000).

[41] Norwood cites *United Gas Pipeline Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Town of Norwood v. FERC*, 202 F.3d 392, 400 (2000); *Arkansas Louisiana Gas Company v. Hall*, 455 U.S. 571, 578-9 (1981).

[42] *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000).

[43] *Id*. at 398-99.

[44] *Id*. at 399-400.

termination charges from April 1, 1998, through the expiration of the contract term. However, the court emphasized that the CTC was merely a formula-driven charge to cover certain projected losses to New England Power based on rates already approved by the Commission. The court observed that Norwood had not demonstrated that the charges were miscomputed or unsupported. Further, the court recognized that, even though the Commission had not established a hearing concerning the CTC, Norwood could file a complaint, as it has done in this proceeding.[45]

32. Additionally, the court affirmed the Commission's holding that differences in circumstances justified a different CTC for Norwood than for New England Power's affiliates. The court agreed with the Commission that the CTC was not unjust or unreasonable merely because it differed from the CTCs applied to entities that settled. The court pointed out that Norwood declined the opportunity to settle its CTC. Indeed, in its March 15, 1998 filing, New England Power stated that it would be willing to negotiate termination agreements on terms other than those provided in this CTC amendment.[46] The court further pointed out that New England Power explained that the settlement CTCs were based on disputable estimates, while the Norwood CTC was based on more readily calculable figures relating to estimated purchases under the contract, less estimated avoided costs.[47]

33. Addressing Norwood's contention that its CTC was unjust and unreasonable because Norwood was not offered the standard offer rates offered to the affiliates, the court emphasized that New England Power's affiliates were obligated to offer retail standard offer rates to their customers and consequently required dovetailed wholesale standard offer rates from their supplier. The court explained that Norwood was not similarly situated because it had no comparable obligation.[48]

34. The Commission points out that the court's decision indicates that Norwood itself recognized that the CTC would amount to approximately $78 million,[49] which seems

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[45] *Id.* at 401.

[46] New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000 (March 18, 1998).

[47] *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392, 401-02 (1st Cir. 2000).

[48] *Id.* at 402-03.

[49] *Id*. at 401. *See also Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 10 n.13 (2003).

inconsistent with Norwood's present assertion that the CTC of approximately $72 million plus interest is excessive. Further, while Norwood now expresses concern with the monetary effect on its individual customers, Norwood has failed to present its arguments in a timely or persuasive manner at appropriate junctures through the years since New England Power filed the CTC. The Court of Appeals was not reticent about chiding Norwood in this regard.[50]

35. Most importantly, the court found that the Norwood CTC is derived merely from the application of a formula. Thus, if Norwood wished to challenge the formula, it should have done so at the time New England Power filed the CTC amendment in 1998. While Norwood filed a motion with the Commission asking it to reject the original CTC filing, Norwood did not request a hearing where it would have had the opportunity to test the justness and reasonableness itself, instead preferring to rest its hopes on the federal judicial system, which ultimately ruled against it.[51] All of the previous Commission proceedings and court decisions addressing Norwood's departure as a customer and the CTC applicable to it are final and non-appealable.

36. In the July 22, 2005 Order, the Commission correctly found that the ALJ's 28-percent adjustment to the "R" factor, which would reflect the divestiture of the facilities, is not an element of the Norwood CTC formula.[52] That finding is consistent with the court's determination that calculation of the Norwood CTC is accomplished by application of the formula set out in the CTC amendment.[53]

37. Moreover, the Commission properly rejected Norwood's claim that it was not afforded the same opportunity to settle its CTC as were the affiliates. The Commission cited the court's recognition that New England Power had offered to negotiate a similar

[50] *See, e.g., Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401-02, 403 n.8, 404 and n.9, 405 (1st Cir. 2000); *Town of Norwood, Massachusetts v. New England Power Co*., 202 F.3d 408, 412 n.2, 415, 417, 421, 422 (1st Cir. 2000); *Town of Norwood, Massachusetts v. FERC*, 217 F.3d 24, 27-28 (1st Cir. 2000).

[51] *New England Power Co*., 83 FERC ¶ 61,174 at 61,723, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *affirmed, Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000).

[52] *Town of Norwood, Massachusetts v. FERC*, 112 FERC ¶ 61,099 at P 32 (2005).

[53] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401 (1st Cir. 2000).

termination agreement with Norwood, which Norwood had declined.[54] As stated above, the court rejected the notion that Norwood was the victim of undue discrimination because the affiliates obtained standard offer service.[55]

38. Likewise, the Commission properly affirmed the ALJ's calculation of the "M" factor.[56] Norwood errs in claiming that, because the market value estimates were not made in accordance with Order No. 888, they do not represent actual market sales prices and must be rejected. Order No. 888 does not control.[57] As stated above, the CTC formula was established in New England Power's March 18, 1998 filing, which the Commission accepted, and the court affirmed the Commission's orders. Norwood's belated challenge to the CTC formula must be rejected.

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[54] *Town of Norwood, Massachusetts v. FERC*, 112 FERC ¶ 61,099 at P 51-53 and n.80 (2005).

[55] *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392, 401-402 (1st Cir. 2000).

[56] *Town of Norwood, Massachusetts v. FERC*, 112 FERC ¶ 61,099 at P 40-41, 51-56 (2005).

[57] The court accepted the Commission's position that Order No. 888 does not apply in this case:

> [T]here is a separate (although parallel) justification for stranded cost recovery in the present case: Norwood as a requirements-contract customer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. *New England Power Co.*, 83 FERC ¶ 61,174 at 61,722-23 (1998). In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. *See* Order No. 888, 61 Fed. Reg. at 21662 (reserving the possibility of stranded cost recovery in other situations. . . .
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> [T]he restrictions in Order No. 888 are no more than conditions on stranded cost recovery under that order and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation.
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> *Town of Norwood v. FERC*, 202 F.3d 392, 399 (1st Cir. 2000).

39. The Commission also correctly modified the ALJ's calculation of the CTC Cap, finding that she had not calculated it in accordance with the CTC formula. Again, the Commission relied on the CTC formula accepted by the Commission and affirmed by the court. In the July 22, 2005 Order, the Commission determined that the CTC Cap is $157,982,793, and because that amount is higher than the CTC amount of $71,881,516, the cap would not lower Norwood's CTC.[58]

40. Norwood's challenge to the rate of return also lacks merit. As the Commission determined in the July 22, 2005 Order, the ALJ sufficiently addressed this issue;[59] therefore, the Commission affirmed the ALJ's determination. On rehearing, Norwood raises no new arguments relating to the rate of return. Similarly, Norwood fails on rehearing to demonstrate that the Commission erred in summarily affirming the ALJ's application of the proper factor in determining the deduction for transmission revenues.

41. Norwood contends that New England Power should not be entitled to recover from the CTC more than its actual losses. However, for a variety of reasons including rate certainty, cost-based ratemaking is not limited to recovery of actual cost and the CTC formula accepted by the Commission and affirmed by the Court of Appeals does not include such a limitation. The court recognized that "[i]t is a formula-driven charge to cover certain projected losses to New England Power caused by not supplying electricity after preparing to do so, calculated based on rates already approved by FERC."[60] The Commission has ample discretion to accept a rate formula.[61] Both the Commission

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[58] *Town of Norwood, Massachusetts v. National Grid USA,* 112 FERC ¶ 61,099 at P 74-75 (2005).

[59] *Town of Norwood, Massachusetts v. National Grid USA,* 107 FERC ¶ 63,041 at P 76-79 (2004).

[60] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401 (1st Cir. 2000).

[61] *See, e.g., Public Utilities Commission of the State of Callifornia v. FERC,* 254 F.3d 250, 254 (D.C. Cir. 2001) ("It can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule'. . . .' *Transwestern Pipeline Co. v. FERC*, 283 U.S. App. D.C. 116, 897 F.2d 570, 578 (D.C. Cir. 1990).")

and the court have found the Norwood CTC formula to be just and reasonable,[62] and Norwood has not demonstrated that the Commission failed to follow the formula in determining the CTC. Balanced against Norwood's desire to terminate the contract several years in advance of the expiration of the contract term and the fixed, predictable nature of the formula, the fact that the CTC might, as Norwood claims, exceed New England Power's actual monetary losses does not render the CTC unjust and unreasonable. The Commission concludes that Norwood, as the complainant, has not met the burden of proof necessary to demonstrate that the CTC is unjust and unreasonable.

42. Finally, Norwood contends that the Commission does not have jurisdiction to require Norwood to pay the CTC to New England Power. This argument clearly has no merit. The Court of Appeals left no doubt that the Commission did not err in adopting the Norwood CTC and that Norwood is obligated to comply with it.

3. <u>New England Power's Request for Rehearing</u>

43. New England Power contends that the Commission misread its tariff concerning interest on late payments. New England Power points out that, in addition to the tariff provision cited in the CTC, on which the Commission relied (Term N of New England Power's Tariff No. 1),[63] the tariff also requires Norwood to pay additional charges on late

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[62] In its order accepting the CTC, the Commission stated as follows:

> The proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity. Payment of the full demand charges over the remainder of the contract term would thus be avoided. Under the circumstances presented, we find the proposed amendment to be reasonable and therefore will accept it." (footnote omitted).

[63] New England Power Company, FERC Electric Tariff, Original Volume No. 1, Original Page No. 4 provides as follows:

> The Contract Termination Charge shall be payable in equal monthly installments of principal and interest, the first payment to be made within 30 days after the date of termination of service ("Early Termination Date"), over the remaining term of the Customer's notice period (or such shorter term, or in a single payment, as agreed by the Company and the Customer). The Customer's payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to

(continued)

payments (New England Power's Tariff No. 1, Schedule I at 7).[64]

44. New England Power explains that the CTC obligation of a customer terminating service early is first calculated as a lump sum amount under the CTC, as described above. Then, continues New England Power, the CTC formula provides for this lump sum amount to be stated on a net present value basis by discounting the difference between "R" and "M" by the refund interest rate in effect under the Commission's regulations on the date the customer terminated the service.[65] New England Power contends that the tariff formula also provides that, if a customer does not pay its total CTC obligation in one payment, New England Power will collect the CTC obligation in equal monthly installments, including carrying charges, over the remaining term of the customer's contract. New England Power emphasizes that the tariff formula converts the customer's lump sum obligation into equal monthly payments by using the same methodology that a bank uses to calculate equal monthly payments to amortize a loan and interest over a specified term. In Norwood's case, New England Power states that it calculated a monthly CTC payment of $599,971 payable from April 1998 through October 2008.[66]

45. New England Power states that it has billed Norwood $599,971 each month since April 1998, but, except for Norwood's one time payment of $20.4 million following issuance of the ID, Norwood has not paid any of these bills. New England Power explains that the CTC formula does not address the consequences of a customer's nonpayment of a bill reflecting a properly calculated CTC, but that this is unnecessary

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> section 35.19a of the Commission's regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

[64] Schedule I, page 7, section J (Billings and Payment), provides in part as follows:

> When all or part of any bill shall remain unpaid for more than thirty (30) days after the rendering thereof by the Company, interest at the rate of 1 ½% per month shall accrue to the Company from and after the rendering of said bill and be payable to the company on either: (1) such unpaid amount or (2) in the event the amount of the bill is disputed, the amount finally determined to be due and payable.

[65] New England Power cites Exh. NEP-1 at 36; Exh. NEP-2 at Schedule II-C at 2, § B; Exh. NEP-6. New England Power advises that the applicable refund interest rate as of Norwood's termination date, April 1, 1998, was eight percent and that the CTC amount of $71.9 million was discounted to $51,293,148 as of that date.

[66] New England Power cites Exh. NEP-6 at 1-2; Exh. NEP-1 at 20-21.

because the tariff already addresses that issue with no exclusion for CTC charges or any other type of bill. According to New England Power, this is consistent with a common business practice to have two separate interest rates, one applicable to a monthly payment and the other applicable to late payments.

46. New England Power points out that Norwood sought and failed to obtain relief from its CTC obligation from the Commission and the federal court. However, New England Power commenced an action in the Massachusetts Superior Court to recover the unpaid CTC bills, plus interest. New England Power emphasizes that, as the ALJ recognized,[67] the Massachusetts court granted New England Power's motion for summary judgment against Norwood,[68] and the Massachusetts Appeals Court affirmed the lower court's rulings.[69] New England Power argues that the July 22, 2005 Order fails to acknowledge the binding effect of these state court decisions and violates well-recognized principles of *res judicata*, which prevents re-litigation of an issue already resolved in an earlier action.

47. New England Power further contends that, after the state court decisions, Norwood first raised the interest rate issue in this proceeding in its post-hearing brief to the ALJ. However, New England Power asserts that the ALJ properly rejected the challenge, finding that the issue already had been litigated.[70]

48. New England Power also maintains that the Commission erred in reversing the ALJ's decision because the Commission failed to give New England Power notice that the issue was to be litigated and thus deprived New England Power of due process. Finally, New England Power asserts that the Commission improperly imposed a retroactive change to the tariff, as well as permitting a prospective change to the tariff without first finding that the existing late payment provision is unjust and discriminatory.

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[67] New England Power cites *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 109 (2004).

[68] New England Power cites *New England Power Company v. Town of Norwood*, 2001 WL 292974 (Mass. Super. 2001); *New England Power Company v. Town of Norwood*, 2001 WL 543172 (Mass. Super. 2001).

[69] New England Power cites *New England Power Company v. Town of Norwood*, 59 Mass. App Ct. 1106, 797 N.E. 2d 26 (2003), *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073 (2004).

[70] New England Power cites *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 109 (2004).

4. Commission Analysis

49. The Commission grants New England Power's request for rehearing. In the July 22, 2005 Order, the Commission found that the Norwood CTC addressed the calculation of Norwood's CTC;[71] however, the Commission failed to address the consequences of Norwood's failure to make its CTC payments in a timely manner. The Commission agrees with New England Power that the ambiguous tariff provision was taken out of context and that Section J should apply to any amounts that Norwood failed to pay when due.

50. The Commission finds that New England Power is correct that Section N of Schedule I of its tariff addresses only the interest or carrying charges applicable to Norwood's payment of the CTC over a period of time.[72] It does not address charges for late payment of the monthly obligation, which is subject to Section J of the tariff.[73]

51. The Commission disagrees with New England Power that the issue of interest was not set for hearing. Interest is an integral component of the CTC calculation, and all components of the CTC formula were set for hearing to determine whether New England Power's calculation was consistent with the accepted CTC formula.[74] The Commission recognizes that the amount of the CTC was in dispute; however, tariff section J states that, if the amount is disputed, the 18-percent interest rate will apply to "the amount finally determined to be due and payable."

B. Compliance Filing

52. On August 3, 2005, New England Power submitted its compliance filing as directed by the July 22, 2005 Order. In the compliance filing, New England Power states that the monthly CTC payment owed by Norwood is $599,971, plus applicable interest. Norwood filed objections to the compliance report, contending that New England Power incorrectly determined the applicable interest, overstating it by $6.1 million.

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[71] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 at P 81 (2005).

[72] *See supra* note 64.

[73] *See supra* note 65.

[74] *See Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 9 (2004).

53. Because the Commission is granting New England Power's request for rehearing as discussed above, the Commission will reject New England Power's compliance filing that calculates Norwood's monthly CTC obligation and interest in accordance with the July 22, 2005 Order. The Commission has recalculated the principal and late payment interest. The Commission calculates that Norwood owes New England Power $68,749,414 through December 31, 2005, including $33,309,106 of late payment interest. In addition, Norwood owes New England Power $20.4 million of CTC payments for the years 2006 through 2008, plus 18 percent interest on any payments that are not made in a timely manner.[75]

The Commission orders:

(A) As discussed in the body of this order, the Commission denies Norwood's request for rehearing and grants New England Power's request for rehearing.

(B) As discussed in the body of this order, the Commission rejects New England Power's compliance filing in Docket No. EL03-37-002.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[75] *See* Attachment A.

Attachment A

Town of Norwood, Massachusetts v. National Grid USA, et al.
Docket Nos. EL03-37-002 and 003 - Contract Termination Charge (CTC)

Yearly CTC and Late Payment Interest:

Year/Month	CTC Amount	Interest at 18 percent/yr.	Total CTC and Interest
Apr-Dec 98	$5,399,739	323,984	
Balance 12-98	$5,399,739		
1999	$7,199,652	1,565,924	
Balance 12-31-99	$12,599,391		
2000	$7,199,652	2,861,862	
Balance 12-31-00	$19,799,043		
2001	$7,199,652	4,157,799	
Balance 12-31-01	$26,998,695		
2002	$7,199,652	5,453,736	
Balance 12-31-02	$34,198,347		
2003	$,199,652	6,749,674	
Balance 12-31-03	$41,397,999		
2004	-13,157,342	6,518,837	
Balance 12-31-04	28,240,657		
2005	$7,199,652	5,677,289	
Balance 12-31-05	35,440,309		
Total 1998-2005	35,440,309	**33,309,106**	**68,749,414**
2006	$7,199,652		
2007	$7,199,652		
2008	$5,999,710		
Total 2006-2008	$20,399,014		

Monthly CTC	$599,971
	X 12
Annual CTC	$7,199,652

Detail of Calculations for 1998 & 2004:

Month	CTC Amount	Interest @ 1.5 percent/mo.
Apr-98	$599,971	
May-98	$1,199,942	$9,000
Jun-98	$1,799,913	$17,999
Jul-98	$2,399,884	$26,999
Aug-98	$2,999,855	$35,998
Sep-98	$3,599,826	$44,998
Oct-98	$4,199,797	$53,997
Nov-98	$4,799,768	$62,997
Dec-98	$5,399,739	$71,997
Total 1998	$5,399,739	$323,984
Balance 12-31-03	41,397,999	
Jan-04	41,997,970	620,970
Feb-040	42,597,941	629,970
Mar-04	43,197,912	638,969
Apr-04	43,797,883	647,969
May-04	44,397,854	656,968
Jun-04	44,997,825	665,968
Jul-04	45,597,796	674,967

Total	55,839,323	33,309,106	89,148,428	July 22, 2004	-$20,356,994	Payment
				July 31, 2004	25,240,802	
				Aug-04	25,840,773	378,612
				Sep-04	26,440,744	387,612
				Oct-04	27,040,715	396,611
				Nov-04	27,640,686	405,611
				Dec-04	28,240,657	414,610
				Total 2004		$ 6,518,837