

**Nos. 06-1658 & 06-2054 (Consolidated)
ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2006**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT,**

**NEW ENGLAND POWER COMPANY,
INTERVENOR.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**JOHN S. MOOT
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**MICHAEL E. KAUFMANN
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

NOVEMBER 13, 2006

Nos. 06-1658 & 06-2054 (Consolidated)
ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2006

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT,**

**NEW ENGLAND POWER COMPANY,
INTERVENOR.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

This case is the latest phase in an eight-year effort to bring finality to a contract termination dispute between a municipal utility and its wholesale electric supplier. After three prior decisions of this Court and a multitude of orders from the Commission and the Massachusetts state courts addressing various aspects of this long-running controversy, there remains a single issue to be decided: Whether

the Respondent, Federal Energy Regulatory Commission (“Commission” or “FERC”), consistent with the Federal Power Act (“FPA”) § 206, 16 U.S.C. § 824e, the Commission’s prior orders and this Court’s prior holdings, correctly calculated the compensation due from the Town of Norwood, Massachusetts (“Norwood”) to the New England Power Company (“New England Power”),¹ based on a previously-approved Contract Termination Charge (“CTC”) tariff formula, following Norwood’s decision to terminate its full requirements electric service contract with New England Power, before its expiration, so that it could change power suppliers.

COUNTERSTATEMENT OF JURISDICTION

As will be discussed in more detail in Section II, *infra*, Norwood’s challenge to the orders on review is based entirely on claims that have been previously adjudicated against it, before either the Commission, this Court or the Massachusetts state courts. This Court should therefore reject Norwood’s attempt to improperly relitigate these previously decided issues based on the doctrines of *res judicata* and *collateral estoppel*.

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

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

Norwood seeks review of the following three Commission orders: *Town of Norwood, Massachusetts v. National Grid USA et al.*, 112 FERC ¶ 61,099 (2005) (“Hearing Order”), JA 57, *reh’g denied*, 114 FERC ¶ 61,187 (2006) (“Rehearing Order”), JA 73, *reh’g and request for stay denied*, 115 FERC ¶ 61,396 (2006) (“Rehearing Order II”), JA 83. These orders stem from a complaint filed by Norwood regarding the calculation of compensation due from Norwood to New England Power triggered by Norwood’s 1998 early termination of its full requirements electric service contract with New England Power.

The complaint was Norwood’s latest of many challenges to the propriety of CTCs previously litigated and upheld by the Commission and this Court; in fact, this will be the fourth time this Court has been called upon to bring finality to this long-running contract dispute between these parties. *See Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (“*Norwood I*”) (sustaining FERC’s orders accepting the CTC tariff formula); *see also Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (“*Norwood II*”) (generally rejecting Norwood’s antitrust and

breach of contract claims against New England Power related to the CTC tariff); *Town of Norwood v. FERC*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001) (“*Norwood III*”) (upholding FERC’s determination of effective dates of the CTCs).

This Court previously determined that the Commission, in its 1998 orders, (*see New England Power Co.*, 83 FERC ¶ 61,174 (1998) (“CTC Order”), JA 16, *reh’g denied*, 84 FERC ¶ 61,175 (1998) (“CTC Rehearing Order”), Add. 29)² “has merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations.” *Norwood I* at 400. In other words, the Commission and this Court upheld the lawfulness of the CTC tariff formula itself, leaving the *application* of the formula and the *calculation* of the actual amounts due to New England Power for another time. *See id.* at 397 n.1, 400. This Court then offered the following invitation to Norwood: “FERC suggested in its initial order that Norwood could file a section 206 complaint . . . challenging the substance of the contract termination charge . . . and presumably it can still do so. . . .” *Id.* at 401 (internal citations omitted). However, this Court cautioned Norwood that, in order to sustain any future objection to the calculation, it would have to demonstrate that the charges were either

² “Add.” Refers to the Addendum attached to this Brief.

“*miscomputed or unsupported.*” *Id.* (emphases added).

Norwood responded and filed the complaint in this case, ostensibly to confirm the calculation of the actual CTC amounts due. Now, after a full hearing of the issues, and applying the previously-approved CTC tariff formula, the Commission found that Norwood owes New England Power CTCs and interest amounts totaling \$68,749,414 for the period ending December 31, 2005.³ Rehearing Order at P 53 and Attachment A, JA 81-82. The Commission also found that Norwood owes New England Power an additional \$20.4 million in CTC payments for the years 2006 through 2008, plus 18% annual interest on any late payments. *See id.*; Rehearing Order II at PP 21-27, JA 86-87.

The Commission had hoped that these two long-feuding parties could reach a mutually satisfactory accommodation that would avoid further litigation, and the Commission offered its assistance toward that end:

The Commission always favors settlements in contested proceedings, and it particularly encourages Norwood and New England Power to develop a payment plan to resolve this proceeding. The Commission offers a variety of Alternative Dispute Resolution procedures to assist the parties if they so desire.

Rehearing Order II at P 36, JA 88. Alas, no such compromise has been found.

Norwood petitioned for review of the Hearing and Rehearing Orders in Case

³ Norwood had already paid New England Power \$20,356,994.35 in CTCs and interest. *See* Rehearing Order at P 13, JA 75.

No. 06-1658. Norwood petitioned for review of Rehearing Order II in Case No. 06-2054. The cases were consolidated pursuant to this Court's Order of July 14, 2006.

STATEMENT OF FACTS

1. Background

Having ruled on three prior occasions on various aspects of this long-running contract dispute, this Court by now is well aware of the serpentine history of these proceedings. *See Norwood I, II & III*. In brief, the CTC arose out New England Power's transitioning to customer choice and market-based rates in New England. As part of that transition, New England Power arranged a divestiture of its non-nuclear generation, which the Commission approved. *See New England Power Co.*, 82 FERC ¶ 61,179 (1998) ("Divestiture Order"), JA 1, *reh'g denied*, 83 FERC ¶ 61,275 (1998) ("Divestiture Rehearing Order"), Add. 20.

New England Power also entered into Commission-approved settlements with its affiliated distribution companies that allowed for early termination of their wholesale power supply agreements upon the payment of termination charges; these settlements were designed to dovetail with state laws (not applicable to municipal utilities like Norwood) that required the New England Power affiliate distributors to offer "Standard Offer Service" to their retail customers who elected not to change suppliers during the transition period. *See New England Power Co.*,

81 FERC ¶ 61,281 (1997) (“Affiliate Settlement Order”), Add. 11, *reh’g denied*, 83 FERC ¶ 61,265 (1998) (“Affiliate Settlement Rehearing Order”), Add. 14; *Norwood I* at 403.

New England Power also entered into settlements with unaffiliated distribution companies, wishing to terminate their wholesale agreements early, that also required the payment of CTCs in proportion to those paid by New England Power’s affiliate distributors. JA 644-45. The non-affiliate settlements were similar, but not identical, to those reached with New England Power’s affiliates because only the affiliates were subject to the state laws that required investor-owned utilities to permit its competitors to sell to retail customers in their service territories and to offer a retail standard service to customers who elected not to switch providers. *See* Mass. Gen. Laws ch. 164 § 47A; *Norwood I* at 401-03.

2. Norwood’s Early Termination of Its Contract

In 1983, Norwood entered into a wholesale requirements electric power contract with New England Power under New England Power’s Tariff No. 1. In 1990, Norwood opted to extend the effective date of its power supply agreement through October 2008. *Norwood I* at 397; *see generally Norwood III*. Despite its contract’s requirement that tariff customers could not switch suppliers except upon seven years’ advance notice, on March 4, 1998, Norwood informed New England Power that it was terminating its contract as of April 1, 1998 and would, thereafter,

obtain its wholesale power from Northeast Utilities. *Norwood I* at 397, 399.

3. The Contract Termination Charge Tariff

In response, on March 18, 1998, New England Power filed a tariff amendment to give a new option to New England Power's wholesale customers, like Norwood, that would permit them to terminate their wholesale power contracts upon only 30 days' notice in order to give them earlier access to new suppliers. Under the tariff amendment, in order to exercise the early termination option, the terminating wholesale customer had to pay a CTC that would permit New England Power to recover the revenues that it would have collected had the terminating customer continued to pay the fixed tariff rate through the end of the contract term, less the expected costs avoided by not providing service. *Norwood I* at 397.⁴

4. Approval of the CTC Tariff

Norwood intervened in the FERC CTC tariff amendment case, but did not request a hearing. *See* CTC Order at 61,723, JA 18. FERC accepted the CTC tariff amendment (*see* CTC Order, JA 16, and CTC Rehearing Order, Add. 29) and, in consolidated appeals, this Court confirmed the Commission's orders upholding the asset divestiture, the affiliated settlement agreements and the legality

⁴ In its simplest expression, the CTC formula is $CTC = (R-M) \times L$, where R equals Annual Revenues under the sales contract, M equals the Market Value of the released power and L equals the Length of the contract term remaining after termination. Hearing Order at PP 10-12, JA 58-59.

of the tariff CTC formula rate. *Norwood I* at 395-98.

5. Norwood's Multiple Attacks on the CTC Tariff and the State Litigation

Norwood has brought numerous direct and indirect challenges to FERC's orders, which this Court, whenever it has had jurisdiction, ultimately rejected. *See generally Norwood I, II & III.*

In December 1998, after Norwood did not pay the CTC bills tendered, New England Power brought a breach of contract collection action in the Massachusetts Superior Court to collect overdue CTC and late payment charges from Norwood. *See* Rehearing Order at PP 46-47, JA 80. The Massachusetts state court granted New England Power's motion for summary judgment against Norwood. *New England Power Co. v. Town of Norwood*, Case 01-P-1467, 2001 WL 292974 (Mass. Super. 2001); *New England Power Co. v. Town of Norwood*, 2001 WL 543172 (Mass. Super. 2001). Norwood appealed this ruling and lost. *New England Power Co. v. Town of Norwood*, 59 Mass. App. Ct. 1106, 797 N.E.2d 26 (Mass. App.), JA 55-56, *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 541 U.S. 1073 (2004). Norwood later sought relief from the judgment, which was also denied. *New England Power Co. v. Town of Norwood*, 66 Mass. App. Ct. 1108, 847 N.E.2d 366 (Mass. App.), *pet. for further review denied*, 447 Mass. 1105, 850 N.E.2d 584 (Mass. 2006).

6. The Complaint Case on Review

While the contract action was wending its way through the state courts, this Court, in *Norwood I*, ruled that the CTC tariff formula was, *per se*, lawful. *Norwood I* at 397 n.1, 400. This Court then indicated that Norwood could file a complaint at FERC challenging the actual computation of the CTC. *Id.* at 401. However, this Court cautioned Norwood that, in order to sustain any future objection to the calculation, it would have to demonstrate that the charges were either “*miscomputed or unsupported.*” *Id.* (emphases added).

Norwood then filed the instant complaint against New England Power at the Commission on December 23, 2002, alleging that the CTC was unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful under the FPA. *See* Norwood Complaint, JA 91; *see also* *Town of Norwood Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 13 (2003) (“Order Setting Hearing”), JA 20. In its complaint, Norwood asserted thirteen separate claims against New England Power and the legality of the CTC. *See id.*

The Commission dismissed eight of these claims at the outset because it determined that they had already been conclusively adjudicated. Order Setting Hearing at PP 19-21, JA 23. The Commission set the remaining five issues for hearing because, facially, they “relate[d] to the way in which [New England Power] calculates the CTC” and the Commission understood that “[w]hile the

court of appeals upheld the Commission’s orders, it noted that Norwood could bring a complaint regarding the way in which [New England Power] has calculated the CTC.” *Id.* at P 18 & n.20, JA 23 (citing *Norwood I* at 401). The Commission also stated that Norwood bore the burden of proof on “each and every element of these claims.” *Id.* at P 18, JA 23.

7. The ALJ Initial Decision

After a thorough hearing, a FERC administrative law judge (“ALJ”) issued her Initial Decision, finding that, among other things, the Massachusetts Appeals Court decision was *res judicata*; the ALJ therefore set the late payment interest rate at 18%.⁵ *Town of Norwood Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at PP 109-110 (2004) (“Initial Decision”), JA 25. The Initial Decision also made a 28% reduction to New England Power’s proposed revenue “R” component to reflect the effects of New England Power’s fossil fuel plant divestiture. *Id.* at P 62-71, JA 37-39. The Initial Decision thus calculated the CTC to be \$16,925,796 (*id.* at P 142, JA 52), plus the 18% annualized interest, totaling \$20,356,994, which Norwood paid to New England Power (without prejudice). *See* Rehearing Order Attachment A, JA 82; Rehearing Request at 2, JA 420.

⁵ The actual tariff language calls for a 1.5% monthly charge on late payments, but for simplicity’s sake, it will be referred to herein as an 18% annual late payment charge.

8. The Hearing Order

In its Hearing Order, the Commission modified the Initial Decision in two significant respects. First, it rejected the ALJ's 28% reduction of the "R" factor, finding that the adjustment did not comply with the as-approved CTC formula. Hearing Order at P 32, JA 62. Second, the Commission rejected the ALJ's finding that 18% was the correct interest rate to be applied to late payments. *Id.* at PP 81-82, JA 70-70. The Commission then calculated the CTC to be \$71,881,517. *Id.* at P 94, JA 72.

9. The First Rehearing Order

Next, Norwood sought rehearing of the Hearing Order (JA 419), but the Commission denied all of Norwood's arguments on rehearing, ultimately finding Norwood's contentions to be nothing more than reprises of its claims that it had litigated previously and lost; the Commission then affirmed the rejection of the ALJ's 28% "R" factor adjustment as inconsistent with the as-approved CTC tariff. Rehearing Order at PP 29-42, JA 77-79.

However, the Commission accepted New England Power's rehearing arguments (JA 90) regarding the correct late payment interest rate to be applied and set the rate at 18%, consistent with the tariff. *Id.* at PP 49-51, JA 81. The Commission then confirmed New England Power's calculation of the monthly CTC to be \$599,971 times the 127 months that remained on the Norwood contract

as of the date of termination, for a total of \$76.2 million in CTCs due to New England Power (exclusive of late payment interest). *Id.* at P 44, JA 80.

Based on this calculation, and accounting for the one payment that Norwood had already made after the issuance of the Initial Decision, the Commission found that Norwood owes New England Power CTCs and interest amounts totaling \$68,749,414 for the period ending December 31, 2005, and an additional \$20.4 million in CTC payments for the years 2006 through 2008, plus 18% annual interest on any payments not made in a timely manner. Rehearing Order at P 53 and Attachment A, JA 81-82.

10. The Second Rehearing Order

Norwood then sought rehearing of the Rehearing Order (JA 550) regarding the 18% late interest charge, which the Commission denied (along with denying a stay pending further appeal). *See* Rehearing Order II at PP 21-27, 30-36, JA 86-88.

11. The Petitions for Review

Thus, under the totality of the Commission's rulings, Norwood became liable to pay New England Power CTCs calculated according to the FERC-approved tariff formula. When Norwood did not pay the CTC bills submitted to it in a timely manner, Norwood also became responsible to pay New England Power 18% annual late payment charges as provided in Section J (Billings and Payments)

of its wholesale tariff. *See* Rehearing Order at PP 43-51 & n.64, JA 80-81; Rehearing Order II at PP 21-27, JA 85-86. Norwood filed these petitions for review as well as a motion for stay pending appeal.⁶

SUMMARY OF ARGUMENT

After eight years of FERC and state litigation over this contract dispute, and three prior appeals to this Court that included the same parties and stemmed from the very same controversy, the only issue left open in this case is a narrow one – whether the Commission accurately calculated the payments due under the previously-accepted CTC tariff formula. In this appeal, however, Norwood improperly attempts to expand the scope of this case and resurrect arguments and issues that were previously adjudicated against it.

Norwood now brings five central claims as to why it should be relieved from its established obligation to pay the CTCs: (1) The CTCs are not just and reasonable; (2) This is so because the CTC tariff formula contains no after-the-fact true-ups to adjust for post-termination cost changes; (3) The CTC formula is

⁶ In its August 21, 2006 Order, this Court granted in part and denied in part Norwood's request for a stay pending appeal. This Court stayed Norwood's obligation to make any past-due CTC payments pending further order of the Court; however, Norwood must begin making CTC payments starting with the first monthly bill following the issuance of the Order.

inconsistent with FERC Order No. 888;⁷ (4) The CTCs are unduly discriminatory because other customers paid less pursuant to settlement agreements with New England Power; and (5) The interest charge added to late CTC payments is not just and reasonable. However, none of these claims is novel. Norwood has previously litigated and lost each of them in one forum or another (including before this Court). The doctrines of *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion), both of which apply to the circumstances here, preclude further litigation of the issues Norwood now raises.

Even assuming jurisdiction, the law, the record, the Commission's prior holdings, the tariff language and this Court's prior holdings all support the Commission's determinations that: (1) The CTC formula tariff rate is just and reasonable because formula-based rates are acceptable, post-termination adjustments are not required, and the individual CTC components were reasonable; (2) There was no undue discrimination because Norwood was not similarly

⁷ *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, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

situated to New England Power's affiliate customers; (3) By Norwood's own admission, Order No. 888 is not controlling in this dispute; and (4) The late payment interest was properly applied and calculated in accordance with the filed tariff.

ARGUMENT

I. STANDARD OF REVIEW

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). That standard requires the Commission to “examine the relevant data and articulate a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* FPA § 313(b), 16 U.S.C. § 825l(b). In applying the arbitrary and capricious standard, this Court “give[s] great deference to the Commission's decision.” *Northeast Utils. Serv. v. FERC*, 993 F.2d 937, 943 (1st Cir. 1993)

In addition, this Court has also “accorded deference to agency expertise in contract interpretation cases where the agency's interpretation ‘has a reasonable basis in the contract terms, the [relevant] Act's policies and the Board's expertise. . . .’” *Boston Edison Co. v. FERC*, 856 F.2d 361, 363 (1st Cir. 1988) (“*Boston Edison I*”) (quoting *NLRB v. C.K. Smith & Co.*, 569 F.2d 162, 167 (1st

Cir. 1977)) (alteration in original). Although agency decisions based on pure questions of law may ostensibly be reviewed *de novo*, *id.*, deference should be accorded to the administrative agency whose understanding of the documents involved is enhanced by its technical knowledge of industry conditions and practices. *Id.* See also This Court, in *Boston Edison Co. v. FERC*, 233 F.3d 60, 66 (1st Cir. 2000) (“*Boston Edison II*”) (FERC is entitled to deference in construing contracts governing sales subject to FERC regulation).

Likewise, courts afford deference to the Commission’s reasonable interpretation of its tariffs on file, “even where the issue simply involves the proper construction of language.” *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks omitted).⁸ See also *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992); *Long Island Lighting Co. v. FERC*, 20 F.3d 494, 497 (D.C. Cir. 1994).

If a contract unambiguously addresses a matter, then the language of that agreement controls to give effect to the unambiguously expressed intent of the parties. See *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003). But if a contract is ambiguous, then the Commission’s interpretation is examined under

⁸ *Koch* involved the Natural Gas Act, but courts have applied interpretations of Natural Gas Act provisions to their counterparts in the Federal Power Act because “the relevant provisions of the two statutes are in all material respects substantially identical.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

the deferential “reasonable” standard. *Id.* “[A] contract is ambiguous only when its terms lend themselves to more than one reasonable interpretation.” *Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir. 1996).

As explained below, based on this Court’s prior holdings and the Commission’s prior orders, the Commission’s implementation of the CTC tariff and its calculation of Norwood’s CTC liability, as well as its decision not to permit relitigation of issues previously decided, were lawful, reasonable, responsive to the arguments of the various parties, and supported by substantial evidence in the record.

II. NORWOOD’S CLAIMS ARE BARRED BY THE DOCTRINES OF *RES JUDICATA* AND *COLLATERAL ESTOPPEL*

In this appeal, Norwood is attempting to resurrect issues that have already been decided against it; its arguments, therefore, are barred by the doctrines of *res judicata* and *collateral estoppel*. Indeed, this is Norwood’s fourth appeal to this Court of rulings against it in this dispute. Except for Norwood’s argument respecting the applicability of the 18% tariff late charge, these arguments are well known to this Court as it has previously ruled on their merits (against Norwood). As will be seen, even though this Court has not previously ruled on the applicability of the 18% late charge, that issue was previously adjudicated before the Massachusetts state courts and should also be precluded.

1. The Preclusion Doctrines

a. *Res Judicata*

“The doctrine of res judicata bars all parties and their privies from relitigating issues which were raised or could have been raised in a previous action, once a court has entered a final judgment on the merits in the previous action.”

Aunyx Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 6 (1st Cir. 1992) (citing *United States v. Alky Enterprises, Inc.*, 969 F.2d 1309, 1314 (1st Cir. 1992)). “Normally, decisions of administrative agencies are entitled to res judicata effect when the agency acted in a judicial capacity.” *Aunyx Corp.*, 978 F.2d at 7 (citing *University of Tenn. v. Elliott*, 478 U.S. 788, 797-798 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966)).

“The essential elements of res judicata, or claim preclusion, are (1) a final judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action in both the earlier and later suits.” *Aunyx Corp.*, 978 F.2d at 6. All of these elements are satisfied here.

b. *Collateral Estoppel*

The doctrine of *collateral estoppel* precludes the relitigation of issues where “(1) the issue sought to be precluded must be identical to that in the prior litigation; (2) the parties actually must have litigated the issue; (3) the judgment regarding the issue must have been binding and valid; and (4) the issue’s determination must have been essential to the judgment.” *Rutanen v. Baylis (In re Baylis)*, 217 F.3d

66, 71 (1st Cir. 2000). Even if this Court does not find that *res judicata* strictly applies because the Court invited the complaint on review, the elements of issue preclusion have certainly been satisfied in this case.

c. Applicability of Preclusion to Administrative Decisions

Res judicata does not necessarily apply to rate orders because an agency can always institute a new proceeding to change a rate based on evidence showing that the rate is no longer reasonable in light of changed circumstances. *See Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000). However, “[i]ssue preclusion might nonetheless be applicable....” *Tesoro*, 234 F.3d at 1290. Indeed, it has long been the Commission’s policy that, absent evidence of changed circumstances, there is no reason to refrain from applying the doctrines of *res judicata* and *collateral estoppel* to Commission determinations. *See Alamito Co.*, 43 FERC ¶ 61,274 at 61,753 (1988); *accord Central Kansas Power Co.*, 5 FERC ¶ 61,291 at 61,621 (1978).

The Commission’s policy is fully consistent with court precedent. “A party may not relitigate in court any issue settled by prior agency proceedings which resulted in an order affirmed in the court.” *Springfield Television Corp., v. FCC*, 609 F.2d 1014, 1019 (1st Cir. 1979) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 476 (1952)); *accord Chippewa & Flambeau Improvement Co. v. FERC*, 325 F.3d

353, 356 (D.C. Cir. 2003); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079 (D.C. Cir. 1987).

Indeed, regarding the application of *collateral estoppel*, the Supreme Court noted:

We have previously recognized that it is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity. . . . “Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”

Tennessee v. Elliott, 478 U.S. at 797-98 (citing *Utah Construction*, 384 U.S. at 421-22).

[G]iving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties’ interest in avoiding the cost and vexation of repetitive litigation and the public’s interest in conserving judicial resources is equally implicated whether fact-finding is done by a federal or state agency.

Id. at 798 (internal citation omitted). The Court went on to highlight the bedrock necessity of applying these doctrines when warranted:

As one respected authority on administrative law has observed:

The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm – something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as

much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions – a very great extent – the law worked out for courts does and should apply to agencies.

Id. at n.6 (quoting 4 K. Davis, *Administrative Law Treatise* § 21.9, at 78 (2d ed. 1983)). Stressing the doctrines' applicability to administrative decisions when the situation so demands, the Court continued:

Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

Id. at n.6 (quoting *Restatement (Second) of Judgments* § 83 (1982)).

d. Applicability of Preclusion to State Court Decisions

Finally, federal courts also give preclusive effect to issues decided in prior state proceedings. “It is well-settled that a proceeding in a state court collaterally estops inconsistent arguments in a later federal action” *Baez-Cruz v. Municipality of Comerio*, 140 F.3d 24, 28-29 (1st Cir. 1998).

2. Norwood's Repeated Claims

In this case, Norwood re-asserted the following arguments before the Commission and again in its opening brief (“Br.”) here:

- The CTC is not “just and reasonable” under the FPA because:
 - New England Power has suffered no economic losses from Norwood's contract termination (Br. at 14-17, 20-29);

- New England Power sold its generation at a profit (Br. at 14-17, 20, 29-38);
- New England Power's affiliates got credit for New England Power's plant sales, but Norwood did not (Br. at 17, 30-32, 34-37);
- The CTCs are akin to contract damages, but here there are no damages in light of prevailing market rates (Br. at 12, 14-17, 38-45);
- The CTCs are inconsistent with "stranded cost" recovery under FERC's Order No. 888 (Br. at 8, 11, 15-16, 26, 32-33, 35, 39, 41-42, 44-49); and
- The 18% tariff late charge is arbitrary and punitive (Br. at 14, 16-17, 49-57).

Norwood attempts to justify the relitigation of these issues, claiming that *Norwood I* permits Norwood to again "challenge the justness and reasonableness of New England Power's CTC components and their application." Br. at 26. However, Norwood's contention is a distortion of the plain import of this Court's opinion.

While it is true that the Commission and this Court contemplated that Norwood could bring a challenge respecting the *application* of the formula and the

calculation of the actual amounts due to New England Power (*see* Order Setting Hearing at P 18, JA 23; *Norwood I* at 397 n.1, 400), neither ever invited Norwood to relitigate the justness and reasonableness of the CTC formula itself because that issue had already been determined with finality.

To the contrary, this Court explicitly cautioned Norwood that, in order to sustain any future objection to the CTC calculation, it would have to demonstrate that the charges were either “*miscomputed or unsupported.*” *Norwood I* at 401 (emphases added). In this Norwood failed. It presented no evidence in the complaint case suggesting that the calculation of the bills to Norwood according to the CTC formula (which the Commission had already approved and this Court upheld) was either miscomputed or unsupported by the evidence in the case. Nor did Norwood present any evidence of changed circumstances.

In fact, given its arguments, the only outcome that would satisfy Norwood would have been for the Commission to ignore its own rulings, this Court’s directions and the plain meaning of the CTC tariff when it applied the CTC formula and calculated the amount Norwood owed based on the record. Thus, Norwood’s current challenge amounts to an impermissible collateral attack on the underlying justness and reasonableness of the CTC formula itself that this Court should not countenance.

3. The Commission's Response to Norwood's Collateral Attack

The Commission denied Norwood's most recent challenges to the level of the CTCs because, in large measure, they merely attempted to resurrect arguments that the Commission previously rejected in orders that were later affirmed by this Court. *See* Rehearing Order at P 29, JA 77 (rejecting Norwood's FPA just and reasonable arguments); *id.* at PP 41-42, JA 79 (rejecting Norwood's argument that *Norwood I* required the CTC to be limited to actual trued-up losses); *id.* at P 38, JA 79 (rejecting Norwood's claim that Order No. 888 was controlling); and Order Setting Hearing at P 19, JA 23 (rejecting Norwood's claim of discrimination).

4. Norwood's Arguments Are Barred by Preclusion

a. The CTC Has Been Deemed Just and Reasonable Under the FPA

The Commission previously found the CTC formula rate to be reasonable (*see* CTC Order at 61,723, JA 18) and this Court rendered a final decision confirming that the CTC formula was just and reasonable under the FPA. *See Norwood I* at 401. Accordingly, the Commission determined that Norwood could not use the complaint proceeding to re-argue its prior challenges to the justness and reasonableness of the CTC formula. Hearing Order at P 32, JA 62; Rehearing Order at PP 30-35, JA 77-78. Also, in refusing to allow Norwood to relitigate the reasonableness of the CTC formula, the Commission acted within its discretion and that decision is due respect. *See Dvareckas v. Secretary of Health and Human*

Servs., 804 F.2d 770, 771 (1st Cir. 1986); *Truck Drivers and Helpers Local No. 728 v. NLRB*, 415 F.2d 986, 988 (D.C. Cir. 1969).

b. The Commission and This Court Confirmed That Post-Termination Events Are Not Relevant to the CTC Calculation

Similarly, Norwood repeats its claims that the CTC is larger than the amount New England Power could have recovered in a breach of contract action, and is therefore unjust and unreasonable. Br. at 14-17, 20-29. This is so, claims Norwood, because (1) the CTC formula contains no credit to reflect New England Power's cost reduction associated with the sale of its generating assets (Br. at 14-17, 20, 29-38) and (2) the CTC does not provide for a "true-up" mechanism to reflect actual post-contract termination market rates (Br. at 12, 14-17, 38-45).

The CTC formula, as approved by the Commission (*see* CTC Order at 61,723, JA 18), makes no provision for the kinds of credits and post-event true-ups that Norwood seeks. This Court thus rendered a final decision confirming the legality of the CTC tariff components and dispensing with Norwood's contract damages claim. *See Norwood I* at 399-401.

In the complaint case, the Commission, relying on its prior orders and *Norwood I*, properly determined that adjusting the CTC tariff formula would not be appropriate. Hearing Order at P 32, JA 62; Rehearing Order at PP 30-35, JA 77-79. This Court should now confirm the Commission's rejection of this impermissible collateral attack.

c. This Court Has Confirmed that FERC Order No. 888 Is Not Controlling in This Controversy

Norwood again argues at length that it should not be bound by the CTC tariff because it does not strictly comport with the stranded cost recovery mechanism set forth in Order No. 888. *See* Br. at 8, 11, 15-16, 26, 32-33, 35, 39, 41-42, 44-49. However, the Commission thoroughly explained in its prior orders why, although instructive, Order No. 888 is not directly controlling in the CTC tariff calculation. *See* CTC Order at 61,723, JA 18; Hearing Order at PP 33, 74, JA 62, 69; Rehearing Order at P 30, JA 77.

This Court then upheld the Commission's determination:

[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.

Norwood I at 399 (emphasis in original). In its brief, Norwood acknowledges that this Court has so found. Br. at 48. The Commission properly declined to accept Norwood's continued urgings to reverse itself and allow this issue to be relitigated. Rehearing Order at P 38, JA 79. This Court should decline as well.

d. This Court Has Confirmed That the CTC Is Not Unduly Discriminatory or Preferential

Similarly, Norwood reargues that because New England Power's affiliates received a credit for New England Power's plant sales, but Norwood did not, the CTC must be unduly discriminatory and preferential (Br. at 17, 30-32, 34-37).

However, the Commission earlier resolved this issue, finding that New England Power's affiliates were not similarly situated and that Norwood, in any event, had been offered a termination agreement on terms similar to those offered the affiliates. CTC Order at 61,723 n.13, JA 18.

This Court then affirmed the Commission's finding of no discrimination:

Under these circumstances, we think that the mere disparity in Norwood's contract termination charge vis a vis that of other companies that settled is not a per se violation of the "undue preference" prohibition. Norwood passed up the opportunity to settle with New England Power regarding termination . . . and argued to FERC that the contract termination charge approved in the settlement proceeding was too high. It seems to us that at least where a party has been offered the same settlement and refused it, a claim based simply on an abstract right to be treated the same as settling companies has much less force – and to recognize it would subvert the public interest in promoting settlements.

Norwood I at 402 (internal citation omitted). Based on these prior adjudicated findings, the Commission appropriately declined to set this issue for hearing in the complaint case. Order Setting Hearing at P 19, JA 23. Norwood now admits that the issue of discrimination may be "foreclosed." Br. at 37. Norwood has raised no discrimination issues beyond those it already litigated in the CTC case and in *Norwood I*. Based on the foregoing, this Court should indeed foreclose the discrimination issue.

e. The Challenge to the Late Payment Interest Rate Should Also Be Barred by the Preclusion Doctrines

In a breach of contract action filed by New England Power arising out of the same dispute, the Massachusetts Superior Court considered and rejected Norwood's challenges to the propriety of the 18% late payment interest rate applicable to late CTC payments by Norwood, and its ruling was not disturbed on appellate review. *See New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 n.5 (Mass. App. Ct.), JA 56, *further appellate review denied*, 440 Mass. 1108, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 541 U.S. 1073 (2004).

Norwood did not raise the issue of the appropriate level of late payment interest in its complaint. *See* Hearing Order at P 13, JA 22. The first time it raised the issue in the complaint case was in its post-hearing Initial Brief, dated April, 29, 2004, Record No. 70, Add. 32. At this point in time, however, Norwood did not challenge the justness and reasonableness of the 18% late payment charge. It only argued that the wrong tariff provision was being applied and that 18% exceeded New England Power's costs. *See* Norwood Initial Brief at 22-23, Add. 32-35.

The Massachusetts Court of Appeals stated, regarding the granting of summary judgment below in the Massachusetts Superior Court:

The judge indicated that the calculation was based on the liquidated sum of \$615,674 per month, plus contractual interest in the amount of 18 percent per year, computed from May 1998, the first month that the CTC was billed.

Initial Decision at Attachment C, n.5, JA 56 (quoting state court decision).

The FERC ALJ explained that the Massachusetts court had fully heard and rejected Norwood's arguments regarding late payment interest:

As the Massachusetts Appeals Court noted in its unpublished decision:

We have also considered Norwood's arguments with respect to mitigation of damages and the inclusion of an improper interest rate in the calculation and conclude that they lack merit.

Initial Decision at P 109, JA 47 (quoting *New England Power Co.*, Case 01-P-1467, slip op. at 6, JA 56, *further appellate review denied*, 440 Mass. 1108, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 541 U.S. 1073 (2004)). The ALJ further quoted the Massachusetts court:

In a footnote to this sentence, the Massachusetts Appeals Court continues:

We similarly have reviewed all the supplemental filings, as well as the recent decision of the FERC that relates to this case. *See Norwood v. National Grid USA*, 104 FERC ¶ 61,030 (2003). Norwood's assertions to the contrary, we find nothing in the FERC Order that warrants a conclusion other than the affirmance of the Superior Court

Initial Decision at P 109, JA 47 (quoting *New England Power Co.*, Case 01-P-1467, slip op. at 6 n.6, JA 56). The ALJ then expressed her opinion that, because the Massachusetts courts had already decided the matter, the interest rate issue was beyond the scope of the agency complaint proceeding and thus barred by *res*

judicata. Initial Decision at P 110, JA 47.

Thus, Norwood and New England Power have already fully litigated the issue of what interest rate should be applied to Norwood's late payments. The Massachusetts decisions are now final. Indeed, Norwood conceded in the complaint case that its challenges to the 18% late payment interest rate represented a collateral attack on the state court determination. *See* Hearing Order at P 77, JA 70. For the reasons stated *supra*, this issue, as well as the others raised in Norwood's Brief, are properly barred under the doctrines of issue preclusion and claim preclusion.

III. THE COMMISSION'S UNDERLYING DETERMINATIONS RESPECTING THE CTCs WERE LAWFUL, REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

As discussed *supra*, given the prior holdings in the CTC Orders and *Norwood I*, Norwood's repeated challenge to the justness and reasonableness of the CTC tariff should be precluded under the doctrines of *res judicata* and *collateral estoppel*. Assuming jurisdiction, Norwood's claims still lack merit.

1. The Approved CTC Tariff Formula Is Just and Reasonable

a. Formula-Based Rates Are Acceptable

When it affirmed the Commission's acceptance of the CTC tariff formula, this Court understood that the CTC "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." `

Norwood I at 401. That approved formula was itself the rate that the Commission found to be just and reasonable under the FPA. *See* CTC Order at 61,723, JA 18; *accord Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993).

The Commission's use of formula-based rates has been consistently upheld. As the Commission here explained:

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.” [Citing *Norwood I* at 401] The Commission has ample discretion to accept a rate formula. *See, e.g., Public Utilities Commission of the State of California 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*, [] 897 F.2d 570, 578 (D.C. Cir. 1990).”).

Rehearing Order at P 41 & n.61, JA 79. The Commission continued:

Both the Commission and the court have found the *Norwood* CTC formula to be just and reasonable, 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.

Id. at P 41, JA 79 (footnote omitted). *See also id.* P 35, JA 78 (noting that Norwood did not request a hearing on the justness and reasonableness of the CTC formula when it had the opportunity to do so).

b. The CTCs Require No True-Ups

i. The Revenue Factor Was Reasonable

Much of Norwood’s criticism of the CTCs is that they are not just and reasonable because they do not reflect adjustments to reflect post-termination cost data, including the offsets related to the divestiture of generation and the impact of actual market rates. Br. 21-25, 29-34. Assuming jurisdiction, this claim also lacks merit.

The CTC formula was designed to “recover the revenues lost over the existing seven-year notice term, less an *estimate* of the market value of the released capacity and energy.” CTC Order at 61,723, JA 18 (emphasis added). In turn, the lost revenues in the CTC formula were based on New England Power’s previously-approved contract rates to Norwood. *See* Initial Decision at P 63, JA 37; *see also* Exh. NEP-1, JA 627. Had Norwood thought that those existing contract rates were unreasonable, “it could have, and should have, filed a complaint under [FPA] Section 206 to decrease its rates” before it terminated its contract with New England Power. Initial Decision at 63 & n.129 (citing Order No. 888-A at 30,427), JA 37. It did not. Acting well with its discretion, the Commission found that the

proper application of the CTC formula prohibited the use of the kinds of adjustments Norwood requested. Hearing Order at P 32, JA 62; Rehearing Order at PP 29-41, JA 77-79.

Norwood's insistence on post-termination adjustments contradicts precedent and the Commission's wide discretion over the manner in which it determines the justness and reasonableness of jurisdictional rates. *See Boston Edison II*, 233 F.3d at 68 ("FERC has reasonably broad powers to regulate the substantive terms of filings that it accepts and allows to become effective, whether they are ordinary tariffs or contracts") (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 777-80 (1968)).

Moreover, the use of cost projections in setting rates is a common practice at the Commission. *See, e.g.*, 18 C.F.R. § 35.13(d)(2) (estimated costs to be submitted as "Period II" data); *see also Indiana Mun. Elec. Ass'n v. FERC*, 629 F.2d 480, 483 (7th Cir. 1980) ("[I]f a utility always had to adjust its [cost] projections because of actual experience . . . the Commission would be forced to return to historic cost even though Congress did not so intend."); *Indiana & Michigan Mun. Dist. v. FERC*, 659 F.2d 1193, 1198 (D.C. Cir. 1981) ("[T]he Commission rightly does not require that history prove the accuracy of the utilities' estimates, but rather that the utility prove that the estimates were reasonable when made.").

Furthermore, at the time it originally accepted the CTC tariff formula, the Commission had already approved New England Power's generation divestiture. *See* Divestiture Order, JA 1; Divestiture Rehearing Order, Add. 20. Therefore, Norwood cannot reasonably claim that the Commission was not aware of the potential effects of that sale when it accepted the CTC tariff formula that included no corresponding adjustments.

Thus, the Commission rightly rejected, as being beyond the terms of the CTC tariff formula, both the 28% reduction in the "R" factor (Hearing Order at P 32, JA 62; Rehearing Order at PP 29-42, JA 77-79) and the parallel adjustment to the CTC cap. *See* Hearing Order at P 74, JA 69; Rehearing Order at P 39, JA 79.

ii. Norwood Failed to Demonstrate that the CTC Tariff Market Projections Were Unreasonable

Norwood's challenges to the market price projections used in the CTC tariff formula (Br. at 38) were also rightly rejected:

It is important to note from the outset that while Norwood challenged virtually every other aspect of NEP's Tariff amendment in Docket No. ER98-2233 [the CTC tariff amendment docket], it did *not* challenge the reasonableness of the forecasted market prices that NEP used in the CTC Formula.

Initial Decision at P 38, JA 32. *See also id.* at n.8 ("Nowhere in Norwood's 72-page rehearing request in that proceeding (Ex. NEP-47) did Norwood contend that the Market Price Estimate values were unreasonably low.") Nevertheless, the ALJ allowed Norwood to challenge the New England Power market price estimate in

the complaint case. *Id.* at PP 38, 39, JA 32. All the same, Norwood failed to carry its burden of proof on this issue:

[T]he undersigned Presiding Judge finds that Norwood . . . h[as] failed to establish that the POLARIS forecast Market Price Estimates adopted by NEP renders the Market Price Estimate in the CTC Formula unjust and unreasonable under the facts of this case.

Id. at P 39, JA 32; *see also* Hearing Order at PP 40, 41, 51-56, JA 63-64, 66; Rehearing Order at P 38, JA 79.

In fact, Norwood's own replacement power contract bolstered the finding that the CTC formula market price projection was reasonable. Had the power prices contained in Norwood's replacement contract with Northeast Utilities been used in the CTC formula instead of New England Power's projections, (the Commission had determined that they could be used as a reasonable proxy for testing the reasonableness of the CTC formula market price projections), Norwood's CTC responsibility would have been even *larger* than it is now. Initial Decision at PP 44-48, JA 33-34; Hearing Order at P 55, JA 66; Rehearing Order at P 38, JA 79.

Therefore, the Commission correctly upheld the ALJ's finding that "the fact that the price forecast New England Power used in 1998 did not perfectly predict subsequent energy prices does not satisfy Norwood's burden to prove that the Market Price Estimate in the CTC Formula is unjust and unreasonable." Hearing Order at P 51, JA 66; *see also* Initial Decision at P 41, JA 33.

iii. Norwood’s Contract Damages Claim Is Contrary to the Holding in *Norwood I*

Norwood makes the claim (Br. at 46-48) that this Court’s ruling in *Norwood I* requires that the CTC be adjusted for post-termination changes “because the charge is akin to contract damages from early termination.” Br. at 47 (citing *Norwood I* at 399-400). However, *Norwood I* stands for precisely the opposite proposition. This Court affirmed the Commission’s acceptance of the CTC formula without any post-termination adjustments. *Norwood I* at 401.

Now, Norwood cobbles together two different passages of this Court’s opinion to bolster its claim. As set forth in Norwood’s brief:

[FERC] has merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations. . . . [A]bsent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law’s remedy if Norwood had no option but simply breached the existing contract.

Br. at 47 (quoting *Norwood I* at 399-400). However, a closer examination of the opinion reveals that the first part of the quote actually accompanied the Court’s *rejection* of Norwood’s earlier claim that the Commission had violated its “practice of deferring to the courts on matters of contract and deprive[d] Norwood of the chance to counter a contract breach claim by showing that New England Power breached the contract first.” *Norwood I* at 400.

The second part of the quoted passages actually comes from a different part

of this Court's opinion rejecting Norwood's claim that the CTC tariff violated the *Mobile-Sierra* and filed rate doctrines. *Id.* The entire passage actually reads (with the portion Norwood now cites highlighted):

In a sense, the addition of the express option to terminate earlier (at a specified price) can be viewed as modifying the contract. But from Norwood's vantage, the option merely gives it something that it did not have before; it remained free to insist that New England Power continue to supply power under the contract until expiration. The termination charge is certainly a detriment but, **absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract.**

Id.

Thus, the plain reading of the opinion is not that this Court was inviting Norwood to come forward in the future to demonstrate that the CTC formula was in fact worse than contract damages. To the contrary, this Court found that Norwood *had already failed to demonstrate* that this was the case and that the CTC formula, as approved by the Commission, was in fact just and reasonable even without the inclusion of post-termination adjustments.

2. Norwood's Discrimination Claims Lack Merit

The Commission also properly rejected Norwood's claim (repeated now, Br. at 30-31, 35-37) that the CTCs it was required to pay under its tariff formula were unduly discriminatory because Norwood was not offered standard offer service while New England Power's affiliates were. Significantly, Norwood admits in

brief that in *Norwood I*, this Court had already upheld the Commission’s rejection of this claim. Br. at 35; *Norwood I* at 401-404.

Despite its admission, Norwood insists that it can bring this challenge once more because now it is addressing “the *application* of the CTC,” as opposed to challenging the CTC itself. Br. at 35 (emphasis in original). This assertion amounts to a distinction without a difference. As explained in Section II.2., *supra*, the sole purpose of the complaint case was to determine whether the CTCs were either “*miscomputed* or *unsupported*.” *Norwood I* at 401 (emphases added). It was never intended to be a retrial of the legality of the CTC formula itself.

In any case, Norwood’s argument fails simply because Norwood was not similarly situated to New England Power’s affiliates. *See Norwood I* at 402-03 (citing Mass. Gen. Laws ch. 164, § 47A); Order Setting Hearing at P 19, JA 23; Hearing Order at P 33, JA 62. As this Court summarized the issue:

Norwood, being a municipal system, is not subject to these wheeling obligations and has no obligation to offer retail standard offer rates as a backup for its retail customers. . . . Norwood was not similarly situated because it had no similar obligation.

See Norwood I at 403. Nothing has changed since this Court so decided. While Norwood now claims that it was never offered a corresponding settlement, the record belies this claim and it should be rejected. *See* Exh. NEP-1, JA 652 at lines 13-22; JA 658.

3. Order No. 888 Is Not Controlling

For the reasons set forth in Section II.4.c., *supra*, FERC Order No. 888, governing stranded cost recovery to open access power companies, is not controlling in this contract dispute. Norwood has admitted as much. *See* Br. at 48. No more need be said on the matter.

IV. THE COMMISSION'S APPLICATION OF THE 18% TARIFF CHARGE TO LATE-PAID CTC BILLS IS REASONABLE AND SUPPORTED BY THE RECORD

Assuming jurisdiction, Norwood's challenges to the 18% late payment charge also must fail. Norwood argues that the 18% Section J tariff provision (*see* Tariff No. 1, JA 506-08) is improper because: (1) The Commission applied the wrong tariff provision; (2) Norwood did not know the amount it owed; (3) 18% exceeds New England Power's cost of money; and (4) New England Power improperly used two different interest rates regarding the CTC. Br. at 49-58. None of these claims has any merit.

1. The Commission Applied the Correct Interest Rate Provision

Since the mid-1970s, New England Power's original tariff that was the subject of the CTC amendment has contained a Section J (Billings and Payment) that addresses billing issues and provides for a 1.5% monthly (18% annual) charge for bills not paid within 30 days. Rehearing Order II at P 14 & n.16, JA 85; Tariff No. 1, JA 506-08. Section J provides:

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 1½% 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.

Id.

Norwood contends that this provision only applies to power purchases and not to CTC bills. Br. at 51. However, the Commission, consistent with the plain language of the tariff, correctly rejected this argument. Rehearing Order II at PP 22-26, JA 86-87. Instead, the Commission found that the FERC interest rate used to calculate a monthly (as opposed to a lump-sum) CTC payment is a separate and distinct rate from the penalty charge rate that applied to late payments that were billed, but not paid on time; thus different interest rates were justified:

As the Commission held in the [Rehearing Order at P 49, JA 81], section J clearly addresses the interest that will accrue on billed amounts that remain unpaid for more than 30 days. Contrary to Norwood's assertion, there is no provision in the CTC formula that addresses the failure to pay billed amounts.

Rehearing Order II at P 24, JA 86.

Norwood continues to favor (Br. at 50) the only interest rate referenced in the CTC formula, Section 35.19a of the Commission's regulations, 18 C.F.R. § 35.19a. However, the Commission correctly granted rehearing on this point, because to do otherwise would stray from the relevant tariff provision:

The only interest provision in the CTC formula is that specified for use in the calculation of the net present value of the CTC and the

monthly payments due if a lump sum payment is not made. Thus, the Commission affirms its earlier determination that the section J interest rate of 18 percent per year applies to the interest on the billed amounts of CTC charges that are not paid within 30 days of billing.

Rehearing Order II at P 24, JA 86. In other words, the one tariff reference to Section 35.19a of the Commission's regulations is applicable only to the decision of the customer whether to terminate the contract early, and if so, whether to pay its CTC liability in a lump-sum or in monthly installments. Norwood made those choices in 1998. The reference to the Commission's regulations does not negate the relevance of the only tariff provision (Section J) applicable now.

Norwood relies (Br. at 50) on the Hearing Order, in which the Commission had rejected the 18% late payment interest rate. However, the Commission – belatedly, but permissibly – reached a different conclusion on rehearing. The purpose of rehearing is to provide the Commission with another opportunity to address the issues raised. *Ameren Servs. Co. v. FERC*, 330 F.3d at 499 n.8 (“The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny.”). *See also Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (rehearing “enables the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party’s objection is not well taken, which facilitates judicial review.”).

2. Norwood Cannot Claim Ignorance of the Amounts Owed

Next, Norwood argues that Section J cannot be applied to “undetermined CTC charges” because, before the issuance of the Rehearing Order in February 2006, the Commission had not yet determined the exact amount that was due to New England Power. Br. at 51. FERC properly dispensed with this assertion, demonstrating that Norwood knew the amount it owed (at least as to principle) all along:

As initially determined by New England Power, the discounted lump sum amount under the CTC formula was to be \$52,635,658 if Norwood chose to make a lump sum payment. In the alternative, and using the eight-percent interest rate, the CTC formula yielded a monthly payment due of \$615,674 for 127 months or total CTC charges of \$78,190,598 over the required notice period. This amount was trued-up to account for estimates that were used in the filing, and the monthly amount to be used in the billings was set at \$599,971. *In its request for rehearing of the Order on Initial Decision, New England Power stated that it has billed Norwood this amount each month since April 1998.*

Rehearing Order II at P 22, JA 86 (emphasis added). *See also id.* n.26 (“Norwood and New England Power do not dispute that use of the CTC formula produces this monthly payment. The issue here is what late payment interest rate should be applied to the monthly bills that Norwood failed to pay.”). Further:

Similarly, the [Massachusetts] Appeals Court determined that the 18-percent late payment interest rate applied to late CTC payments by Norwood, and its ruling was not disturbed on appellate review, which included denial of certiorari by the U.S. Supreme Court. Accordingly, Norwood knew in 2003 that the 18-percent rate would apply to CTC payments not made in a timely manner.

Id. at P 23, JA 86. Finally:

It is not a valid defense to assert that Norwood did not know with certainty the ultimate liability for CTC charges and thus had no obligation to pay the billed amounts while challenging the interest rate. New England Power's tariff does not support such a claim. Indeed, section J expressly provides for the accrual of late charges on disputed bills. Therefore, late payment interest charges have been properly applied pursuant to section J.

Id. at P 24, JA 86.

Indeed, Norwood itself had already calculated that it owed \$78 million in CTCs to New England Power when it brought its appeal in *Norwood I*.

Norwood says that New England Power has failed to supply data to show that it is "just and reasonable" to require Norwood to pay a contract termination charge allegedly amounting to \$78 million for the period from 1998 through 2008. *Norwood derives this figure by projecting the termination charges from April 1, 1998, through the expiration of the extended contract which Norwood has now disavowed.*

Norwood I at 401 (emphasis added). When the Commission determined the actual CTCs to be a remarkably similar number – \$76.2 million (exclusive of late payment interest) (Rehearing Order at P 44, JA 80) – Norwood could hardly claim surprise.

3. Norwood Did Not Carry Its Burden of Proof Respecting the Interest Rate

Norwood again claims that because the 18% interest rate is not cost based, it is unjust and unreasonable. Br. at 54-56. In this case, Norwood bore the burden of proof on "each and every element of these claims." Order Setting Hearing at P 18,

JA 23. *Accord Alabama Power Co.*, 993 F.2d at 1571 (“the proponent of a rate change under [FPA] § 206 . . . has the burden of proving that the existing rate is unlawful”).

As discussed in Section II.4.e., *supra*, Norwood never raised the issue of the justness and reasonableness of the 18% interest rate until after the hearing in this case was over and presented no evidence in the case to support this claim. The Commission thus rightly rejected this argument as well:

Neither New England Power nor the Commission bears the burden of justifying the interest rate in this complaint proceeding. If Norwood seeks to demonstrate that the late payment interest rate is unjust and unreasonable, it bears the burden of proof under FPA section 206. It has failed to carry that burden in this proceeding.

Rehearing Order II at P 25, JA 86-87. Also, Norwood ignores the Commission’s finding in this case that the cost of money is only part of the appropriate analysis:

A utility may also incur collection costs, including costs of litigation. Additionally, late payment charges may include an incentive for the debtor to make timely payments. Norwood has not addressed any of these factors or others that might have served as the basis for the Commission’s acceptance of the rate in Section J.

Id. at P 26, JA 87.

4. The Commission Did Not Apply Inconsistent CTC Interest Rates

Finally, Norwood avers that it was not proper for the Commission to apply one interest rate for discounting the CTC and another for late payments. Br. at 57. First, as previously mentioned, the Commission reasonably found that the FERC interest rate used to calculate a monthly (as opposed to a lump-sum) CTC payment

is separate and distinct from the penalty charge rate applied to late payments that were billed, but not paid on time; thus different interest rates were justified.

Rehearing Order II at PP 22-26, JA 86-87. Second, the single FERC case Norwood relies upon, *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993), is inapposite. There, the Commission rejected a portion of a utility's rate filing upon which it bore the burden of proof (under FPA § 205, 16 U.S.C. § 824d) and failed to meet it. Here, the burden was not on New England Power, but on Norwood.

Rehearing Order II at P 25, JA 86-87. Since Norwood failed to present any evidence on this issue the Commission reasonably found that Norwood had simply failed to meet its burden. *Id.*

CONCLUSION

For the foregoing reasons, the petitions for review should be denied in all respects.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Michael E. Kaufmann
Attorney
First Circuit Court of Appeals
Bar. No. 113949

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel. (202) 502-6295
Fax: (202) 273-0901

November 13, 2006