

**Nos. 04-2590 & 05-1836
(Consolidated)**

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

**BOSTON EDISON COMPANY,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**FEDERAL ENERGY REGULATORY COMMISSION,
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**ON PETITION FOR REVIEW OF ORDERS OF THE
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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Whether the Commission reasonably interpreted various agreements involving Boston Edison Company (“Boston Edison” or “BECo”) and Concord Municipal Light Plant of the Town of Concord, Massachusetts (“Concord” or “CMLP”) as contractually deeming Concord to be directly connected to Pool Transmission Facilities (“PTF”) for PTF transactions, as defined in the Restated NEPOOL Agreement (“RNA”), and thus exempt from separate Local Network Service (“LNS”) charges, up to 26 MVA, for such transactions.

2. Whether the Commission reasonably interpreted various agreements involving Boston Edison and Wellesley Municipal Light Plant (“Wellesley” or “WMLP”) as contractually deeming Wellesley to be directly connected to PTF for PTF transactions, as defined in the RNA, and thus exempt from separate LNS charges, up to its contract use rights, for such transactions.

COUNTERSTATEMENT OF JURISDICTION

Boston Edison failed to raise certain objections in its Application for Rehearing before the Commission. Hence, those objections are jurisdictionally barred under the Federal Power Act (“FPA”). *See* 16 U.S.C. § 825l(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”).

Objections that Boston Edison failed to raise on rehearing include:

(a) That the Commission never attempted to explain “why parties would convey 14 kV Use Rights with such painstaking, meticulous detail, but convey 115 kV use rights without explicit reference either to the use rights or to the facilities,” Brief at 33. Contrary to Boston Edison’s cites, *see id.* (referring to R 89 at 10-11, 18, 20), its Application for Rehearing did not clearly raise that specific argument.

(b) That the Commission acted arbitrarily in primarily relying on Article IV of the Settlement Agreement, *see* Brief at 36-40.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

I. INTRODUCTION

Faced with ambiguous contracts and agreements, the Commission reasonably analyzed and interpreted those documents in their entirety and in context to conclude that requiring Concord and Wellesley (collectively, the “Towns”) to pay LNS charges, as Boston Edison proposed in its FPA § 205 filing of unexecuted Service Agreements, is unjust and unreasonable.

The Service Agreements seek to assess the Towns for LNS costs pursuant to Boston Edison’s open access transmission tariff (“OATT”). *See Boston Edison Co.*, 104 FERC ¶ 63,031 at P 1 (2003) (“Initial Decision”), A-2 at P 1.¹ Asserting that the proposed Service Agreements fail to reflect their respective contractual rights, the Towns individually protested the filing. *See id.* at P 2, A-2 at P 2. Concord maintained that it has a contractual right to receive 26 megavolt amperes (“MVA”) of transmission service without LNS charges based on a 1980 Antitrust Settlement Agreement (“Settlement Agreement”) involving Boston Edison and the Towns and on a 1993 Interconnection Agreement (the “1993 IA”) between Boston

¹ “A-” refers to the Addendum to Initial Brief of Petitioner Boston Edison Company. “P” refers to the internal paragraph number within a FERC order.

Edison and Concord. *See id.* Wellesley similarly objected, alleging that it has contractual rights to transmission without LNS charges based on the Settlement Agreement, a 1992 Agreement for the Purchase and Sale of All Requirements Service (“ARA”) between Boston Edison and Wellesley, and a 1998 Transmission Services Agreement (“TSA”) between Boston Edison and Wellesley. *See id.*

After hearing, the administrative law judge’s (“ALJ”) detailed decision reasonably found that the Settlement Agreement, as reaffirmed and perpetuated in the subsequent agreements, granted the Towns contractual entitlements to a direct PTF connection, which exempted them from the LNS costs sought by the proposed Service Agreements. *See id.* at PP 33-78 & 84. The Commission affirmed the ALJ’s decision, *see Boston Edison Co.*, 107 FERC ¶ 61,248 at P 1 (2004) (“Affirming Order”), A-17 at P 1, and later denied Boston Edison’s application for rehearing, *see Boston Edison Co.*, 108 FERC ¶ 61,276 at P 1 (2004) (“Rehearing Order”), A-25 at P 1. Even if Boston Edison’s strained reading of the various ambiguous agreements may have some plausibility, the Commission’s own reading, adopting the ALJ’s rationale, was more reasonable. *See Rehearing Order* at PP 7-8, A-26 at PP 7-8.

II. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the FPA, 16 U.S.C. § 824, grants FERC jurisdiction over transmission and wholesale sales of electric energy in interstate commerce. All

rates for such transmission and sales must be just and reasonable and not unduly discriminatory. *See* FPA § 205(a) & (b), 16 U.S.C. § 824d(a) & (b); *see also Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988) (“All filed rates must be ‘just and reasonable.’”). Section 205(d) further provides that unless FERC orders otherwise, “no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days’ notice to the Commission and to the public.” 16 U.S.C. § 824d(d).

Under FPA § 206, 16 U.S.C. § 824e, the Commission may, after hearing upon its own motion or upon complaint, find a rate, charge, or classification for jurisdictional transmission service or sale to be unjust or unreasonable. *See id.* § 824e(a). In that case, the Commission shall establish a refund effective date. *See id.* § 824e(b). “In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period.” *Id.*

III. STATEMENT OF FACTS

A. Preliminary Background

In 1971, various utilities in New England formed the New England Power Pool (“NEPOOL”) to facilitate the pooling of power and the coordination of construction and maintenance of generating facilities. *Central Maine Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001). NEPOOL serves as a voluntary organization of transmission and generation owners, suppliers, publicly-owned entities, and end-users. *ISO New England Inc.*, 106 FERC ¶ 61,280 at P 5, *order on reh’g*, 109 FERC ¶ 61,147 (2004). It initially operated as a tight power pool: a single, unified regional network with coordinated operations covering the bulk power facilities subject to its control (both generation and transmission). *Id.*

From its inception, NEPOOL was “governed by the New England Power Pool Agreement . . . which establishe[d] a ‘comprehensive interconnection and coordination arrangement’ among its members in order ‘to achieve greater reliability and economies in the production of electricity.’” *Northeast Util. Serv. Co. v. FERC*, 993 F.2d 937, 948 (1st Cir. 1993) (quoting *Groton v. FERC*, 587 F.2d 1296, 1298 (D.C. Cir. 1978)). But in 1997, the Commission accepted the Restated NEPOOL Agreement (“RNA”), which together with the NEPOOL Open Access Tariff restructured NEPOOL. The RNA provided a pool-wide, regional network service (“RNS”) at a single, pool-wide “non-pancaked” transmission rate.

Boston Edison Co., 80 FERC ¶ 61,165 at 61,714 (1997). Also in that year, “NEPOOL obtained FERC approval for the creation of an ‘independent system operator,’ ISO New England, Inc. (‘ISO-NE’), a non-profit company that manages New England’s power grid and wholesale electricity marketplace pursuant to a contract with NEPOOL.” *Central Maine Power*, 252 F.3d at 38 n.1.

Today, ISO-NE controls the operations of various New England transmission-owning companies’ PTF. *See* Initial Decision at P 8, A-3 at P 8. ISO-NE PTF represent transmission facilities operating at 69 kV or higher that essentially perform as the main highways for electricity in the New England market. *See* Affirming Order at P 1 n.2, A-17 at P 1 n.2. Their costs are recovered through RNS rates. *See* Initial Decision at P 9, A-3 at P 9.

RNS rates do not include costs for LNS, which is provided over non-PTF transmission facilities. *See* Initial Decision at P 10, A-3 at P 10. “Boston Edison’s LNS facilities are 115 kV, non-pool transmission facilities (non-PTF) radial transmission lines, related equipment and substations to load.” Rehearing Order at P 1 n.1, A-25 at P 1 n.1. They provide access between certain low-voltage, 14 kV subtransmission facilities, including those of Concord and Wellesley, and PTF. *See id.* According to Boston Edison, the LNS facilities “are, figuratively speaking, the access ramps between the 14 kV feeder roads and the NEPOOL PTF main electricity highway.” Affirming Order at P 1 n.2, A-17 at P 1 n.2. Section 16.3 of

ISO-NE's RNA stipulates that the costs of rendering service over each transmission-owning company's LNS facilities are to be recovered through its OATT. *See* Initial Decision at P 10, A-3 at P 10.

B. Events Leading To Petitions

Until May 31, 2002, Concord and Wellesley took bundled generation and transmission from Boston Edison under individually negotiated agreements.² Affirming Order at P 2, A-18 at P 2. On June 1, 2002, after retail restructuring, the Towns began receiving generation service from Constellation Power Services, Inc. ("Constellation"); transmission service over PTF under ISO-NE's RNS rates; and LNS from Boston Edison. *See id.*; *see also* Initial Decision at P 11, A-4 at P 11.

On June 20, 2002, Boston Edison proposed under FPA § 205, 16 U.S.C. § 824d, to charge Concord and Wellesley for LNS under unexecuted Service Agreements pursuant to Boston Edison's OATT. *See* Initial Decision at P 1, A-2 at P 1. Boston Edison also requested waiver of FERC notice requirements to allow the unexecuted Service Agreements to take effect as of June 1, 2002. *See id.*

On July 18, 2002, Concord and Wellesley filed separate motions to intervene and protests, asserting that Boston Edison's unexecuted Service Agreements failed

² From the mid-1980s through October 31, 2003, the Towns also purchased small quantities of power from New York Power Authority, for which Boston Edison provided the transmission. *See* Affirming Order at P 2 n.3, A-18 at P 2 n.3. In addition, Concord made purchases from Hydro-Quebec. *See* Initial Decision at P 11, A-4 at P 11.

to reflect Concord's and Wellesley's respective contractual rights. *See* Initial Decision at P 2, A-2 at P 2. Concord protested being charged for all LNS in the face of Concord's contractual right to receive 26 MVA of transmission service without LNS charges based on the Settlement Agreement and on the 1993 IA. *See id.* Wellesley objected to Boston Edison's proposed LNS charges for Wellesley's entire load as contravening Wellesley's rights under the Settlement Agreement, the TSA, and the ARA. *See id.* & P 25, A-2 at P 2 & A-6 at P 25.

The Commission did not act on Boston Edison's filing by August 20, 2002, at which time the 60-day notice period prescribed by FPA § 205 expired. *Id.* at P 3, A-2 at P 3. As a result, the two unexecuted Service Agreements became effective on August 20, 2002.

Nevertheless, the Commission on August 22, 2002, issued an "Order Instituting Investigation and Establishing Hearing and Settlement Judge Procedures" after finding that Boston Edison's two unexecuted Service Agreements may not be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *See id.* at P 4, A-2 at P 4. That order initiated an FPA § 206 investigation of the justness and reasonableness of the Service Agreements. *Id.* Notice of the order instituting the investigation and proceeding was published in the *Federal Register* on September 16, 2002, thereby triggering a refund effective date of November 15, 2002, under

FPA § 206(b). *See* Affirming Order at P 4, A-18 at P 4. The Commission-established settlement procedures proved unproductive, so the proceeding advanced to hearing before an ALJ. *See* Initial Decision at P 4, A-2 at P 4.

C. The Rulings On Review

The ALJ's Initial Decision reasonably concluded that requiring Concord and Wellesley to pay LNS charges as proposed under the unexecuted Service Agreements was unjust and unreasonable. *See id.* at P 89, A-16 at P 89. After discussing the positions of Boston Edison and the Towns, *see id.* at PP 7-32, A-3 to A-8 at PP 7-32, the ALJ methodically addressed, in turn, germane agreements before concluding that the Towns' contractual entitlements to a direct PTF connection exempted from most LNS charges, and made Boston Edison's proposed requirement to pay such charges unjust and unreasonable, *see id.* at PP 33-78 & 84, A-8 to A-15 at PP 33-78 & 84. The ALJ found the unexecuted Service Agreements were inconsistent with the exemption from LNS charges provided in the Settlement Agreement, as reaffirmed and perpetuated in subsequent agreements. *See id.* Consequently, the ALJ directed refunds of all LNS payments made by Concord and Wellesley in excess of the lawful charges from the earliest possible refund date. *Id.* at P 89, A-16 at P 89.

The Commission affirmed the ALJ's decision. *See* Affirming Order at P 1, A-17 at P 1. After first noting that many of Boston Edison's exceptions to that

decision had been raised at hearing, considered, and decided by the ALJ, the Commission ruled that “the determinations made by the presiding judge are reasonable and supported by the record of this proceeding,” *id.* at P 14, A-20 at P 14, and adopted the ALJ’s conclusions that the Towns were entitled to an exemption from LNS charges in excess of transitional phase-down LNS amounts, *id.* at P 15, A-20 at P 15; *see also id.* at P 14 n.16 (noting ALJ as having addressed Boston Edison’s arguments), A-19 at P 14 n.16. Among other things, the Commission also directed Boston Edison to make refunds of overcollections of LNS charges during the statutory refund period and to make a compliance filing: (1) acknowledging the Towns’ contractual right to be deemed to be directly connected to PTF for PTF transactions, as defined in the RNA, notwithstanding a physical gap (filled by Boston Edison’s 115 kV non-PTF) between the Towns’ use rights and the PTF facilities; (2) authorizing the billing of LNS phase-down costs under RNA Section 16.3(iii) from August 20, 2002 through February 28, 2003, subject to Concord’s exemption of 26 MVA and Wellesley’s exemption of its contract use entitlements; and (3) providing from the date of issuance of the Affirming Order, that the Towns should not be billed any separate charge for the use of Boston Edison’s 115 kV, non-PTF transmission facilities. *See id.* at 62,062, A-23.

Boston Edison sought rehearing, which the Commission denied. *See* Rehearing Order at P 1, A-25 at P 1. The Commission observed that “[t]he basic issue on rehearing is whether, under the 1980 Settlement Agreement and the subsequent agreements, the Towns at certain locations are PTF-connected (and thus exempt from full LNS charges and subject to RNA phase-down/phase-put), as the [Affirming] Order concluded, or non-PTF connected (and thus subject to full LNS charges), as Boston Edison continues to assert.” *Id.* at P 6, A-26 at P 6. Finding Boston Edison’s approach would render the purpose of the Settlement Agreement “meaningless,” the Commission “continue[d] to believe that the [Affirming] Order, adopting the presiding judge’s rationale as [its] own, is the more reasonable reading of the agreements.” *Id.* at P 7, A-26 at P 7; *see also id.* at P 4 n.8 (noting Boston Edison’s arguments as having been addressed in the Initial Decision and in the Affirming Order), A-26 at P 4 n.8.

SUMMARY OF ARGUMENT

The Commission's interpretation of the Settlement Agreement and subsequent agreements receives deference because those documents are subject to FERC regulation and their understanding is enhanced by FERC's expertise and experience with industry conditions and practices. When, as here, the agreements in question are ambiguous, the Commission's interpretation is examined under the deferential "reasonable" standard, which has been satisfied here.

Applying its expertise, the Commission reasonably interpreted the Settlement Agreement and the subsequent reaffirming agreements to conclude that the Towns should not have to pay the LNS charges as proposed by Boston Edison. Cognizant of the circumstances surrounding the Settlement Agreement, the Commission applied an interpretation that reasonably gave effect to all the articles of that Agreement, particularly Article IV. Under the Commission's reasonable interpretation, Article IV was given effect consistent with the purpose of the Settlement Agreement, as granting the Towns the right to utilize for PTF transactions their shares of the capacities of those facilities without payment of an LNS charge for use of Boston Edison's 115 kV non-PTF. Boston Edison's reading would render Article IV redundant in light of the other articles, particularly Article II. Furthermore, Boston Edison's reading is inconsistent with Article IV's premise: to provide the Towns a PTF interconnection. In addition, Boston Edison

cannot explain why the Settlement Agreement, if it declines to give the Towns use rights to 115 kV non-PTF, does not mention that point.

Subsequent agreements reaffirm FERC's interpretation by perpetuating the LNS exemption provided under the Settlement Agreement. Article 9.2 of the 1993 IA expressly states that for purchases of up to 26 MVA, Concord continues to receive an exemption from LNS charges. Boston Edison's argument that the exemption applies only to purchases from Pool-Planned Units ("PPU") rings hollow as Boston Edison proffers neither language nor rationale to support such a restriction. The 1993 IA maintained the use rights established in the Settlement Agreement, which contained no such limitation.

As the 1993 IA does for Concord, the ARA and the TSA both reaffirm and perpetuate the LNS charge exemption for Wellesley. The ARA's definition for "Delivery Point" specifically notes that Wellesley will be deemed to be a 115 kV customer at NEPOOL PTF; that is, Wellesley will have PTF customer status at the points where it interconnects with Boston Edison. Similarly, the TSA basically states that Wellesley maintains the use rights set forth in the Settlement Agreement and the ARA. Since the TSA does not enhance or diminish any rights in the Settlement Agreement or ARA, the language in those TSA articles, coming after the ARA and its statement that Wellesley will be deemed to be a 115 kV customer at NEPOOL PTF, was reasonably read as offering Wellesley PTF customer status.

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* 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 Util. Serv.*, 993 F.2d at 943.

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) (*BECo 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.*, this Court suggested in *BECo I* that even in matters of law, like the meaning of contracts, some 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.*

Boston Edison Co. v. FERC, 233 F.3d 60 (1st Cir. 2000) (*BECo II*), endorsed that suggestion by holding that FERC is indeed entitled to deference in construing contracts governing sales subject to FERC regulation. *Id.* at 66.

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 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).

II. APPLYING ITS EXPERTISE, THE COMMISSION REASONABLY CONCLUDED THAT REQUIRING THE TOWNS TO PAY THE PROPOSED LNS CHARGES WAS UNJUST AND UNREASONABLE.

The Commission affirmed the ALJ’s careful assessment to conclude that the Towns’ use rights in Boston Edison’s subtransmission facilities specified in the Settlement Agreement and subsequent agreements, and for which they paid Boston Edison, entitled the Towns to be considered directly connected to PTF. That contractual right means the Towns are exempt from full LNS charges even though in certain locations Boston Edison’s 115 kV, non-PTF lines make the actual physical connection between the Towns’ use rights and PTF. *See* Affirming Order PP 16-17, A-20 at PP 16-17; Rehearing Order at PP 6-7, A-26 at PP 6-7. “[T]he

Towns received the right to purchase power in a qualified PTF transaction up to the stated capacities, pay the applicable PTF charges, and have it wheeled to them by Boston Edison without paying Boston Edison an additional transmission fee” Initial Decision at P 34, A-8 at P 34; *see also* Affirming Order at P 17, A-20 at P 17; Rehearing Order at P 10, A-27 at P 10.

The Commission also agreed with the ALJ that Boston Edison’s contrary interpretations are strained and that “the cumulative effect of Boston Edison’s proposed interpretations is to rewrite the various agreements and to present [the Commission] and the Towns with new contracts purporting to authorize LNS charges when the contracts on file with [FERC] do not.” Affirming Order at P 17, A-20 at P 17; *see also* Initial Decision at P 36 (characterizing Boston Edison’s argument as strained), A-8 at P 36.

A. The Commission Reasonably Read The Settlement Agreement To Provide An Exemption From LNS Charges.

Under the Settlement Agreement, “the Towns purchased outright certain subtransmission facilities within the Town’s borders and also purchased use rights in certain Boston Edison subtransmission facilities located mainly outside the Towns’ borders, for lump-sum capital payments and monthly payments for operation, maintenance, and tax (OMT) expenses.” Rehearing Order at P 2, A-25 at P 2. Articles 2.1 and 2.3 of the Settlement Agreement cover Concord’s and Wellesley’s rights, respectively, to purchase outright ownership of subtransmission

facilities located wholly within the towns. *See* Initial Decision at P 38, A-9 at P 38. Articles 2.2 and 2.4 concern Concord's and Wellesley's rights, respectively, to purchase use rights in certain other Boston Edison subtransmission facilities listed in Appendix A (Concord) and Appendix B (Wellesley) for lump-sum capital payments and the obligation to make monthly payments for operation, maintenance and tax expenses. *See id.* Articles 3.2 and 3.3 provide that if Concord and Wellesley complete the arrangements in Articles 2.1, 2.2, 2.3, and 2.4, each will be deemed to be a 115 kV customer as to its share of the capacity of the facilities set forth in Appendices A and B, respectively. *Id.* at P 39, A-9 at P 39. In Article IV,³

³ Article IV of the Settlement Agreement reads:

ARTICLE IV

POOL TRANSMISSION FACILITY TRANSACTIONS

Concord or Wellesley may utilize for PTF transactions, as defined in the NEPOOL Agreement, their shares of the capacities of the facilities as set forth in Appendix A or B with respect to which they have made lump-sum payments under Articles 2.2. and 2.4 and such shares of the capacities of the facilities with respect to which they have made lump sum payments under Article 2.5 without payment of a PTF interconnection charge; provided that the total of the purchases under PTF transactions for each Town does not exceed its capacity in megavolt amperes of the facilities connected to PTF with respect to which the Town has made lump-sum payments. If PTF transactions for Concord or Wellesley exceed that amount, Edison may file with the Commission such rate schedules or changes in schedules as it deems appropriate to recover its cost of service for the portion of the PTF transactions which is in excess of the capacity of such facilities. Concord and Wellesley reserve their full rights to contest the rate levels and the terms and conditions of any such filings.

the Towns received “the right to ‘utilize for PTF transactions’ their shares of the capacities of those facilities ‘without payment of a PTF interconnection charge.’”

Id. at P 33, A-8 at P 33.

Boston Edison argues that the plain language of the Settlement Agreement, including Article IV, does not give the Towns rights to service, free or otherwise, over Boston Edison’s 115 kV non-PTF. *See* Brief 22-35. Boston Edison’s claim of plain language is belied by the sheer number (14) of pages attempting to clarify its interpretation. *See id.* Not only does such length cast doubt on the alleged unambiguous denial of use rights to the 115 kV non-PTF, but also the circumstances surrounding execution of the Settlement Agreement and of the various subsequent agreements reaffirm the LNS charge exemption. Indeed, those circumstances and subsequent agreements strengthen the Commission’s finding, amidst ambiguity, that Boston Edison and the Towns did not intend to limit the Towns’ ability to use Boston Edison’s 115 kV non-PTF without a separate LNS charge.

1. The Commission’s Reading Gives Effect to Article IV While Boston Edison’s Reading Does Not.

The Settlement Agreement did not arise in a vacuum, but resolved several years of litigation between the parties. *See* Initial Decision at PP 7 n.19 & 37, A-3 at P 7 n.19 & A-9 at P 37; Rehearing Order at P 12 (“Boston Edison ignores the multiplicity of issues resolved in the 1980 Settlement Agreement, including nine

Commission dockets and the dismissal of a federal anti-trust court proceeding involving the Towns and Boston Edison.”), A-27 at P 12. The Towns’ use rights under Article II of the Settlement Agreement principally sought to eliminate the Towns’ “S” rate charges for low voltage service.⁴ *See* Initial Decision at P 40, A-9 at P 40. But if the elimination of those charges was the entirety of the settlement’s reach, there would have been little purpose in adopting Article IV, much less treating it as a significant article. *See id.* at P 41, A-9 at P 41. Article II by itself eliminates the “S” rate charges by specifying that the Towns would not have to pay (except for the capital contributions and the monthly OMT charges) for utilizing the referenced subtransmission facilities up to the specified capacities. Article III assures that in the future the Towns would be deemed to be 115 kV customers and not have to pay additional subtransmission charges, up to those capacities. *See id.* Article IV deals with NEPOOL PTF transactions, not with transmitting power at 13.8 kV under the “S” rate. Thus, “the inclusion of Article IV signified that the Towns’ status with regard to PTF transactions was a significant consideration in the [Settlement] [A]greement, in addition to the projected savings on paying for the use of the subtransmission facilities.” *Id.* at P 42, A-9 at P 42. The ALJ’s interpretation adopted by the Commission, *see* Affirming Order at P 15, A-20 at P 15, therefore, gives independent meaning to all provisions.

⁴ The “S” rate was implemented in 1970 and represented a surcharge for taking power at 13.8 kV. *See* Initial Decision at P 12, A-4 at P 12.

“It is hornbook law that an interpretation which gives effect to all the terms of a contract is preferable to one that harps on isolated provisions, heedless of context.” *Blackie*, 75 F.3d at 722. The whole of an integrated agreement should be considered to determine the meaning of any individual part. *See id.*

Although Boston Edison’s reading of Article IV in isolation may be plausible, albeit strained, *see* Initial Decision at P 36, A-8 at P 36, it fails to give effect to all the terms of the Settlement Agreement. Boston Edison’s narrow reading⁵ would limit the Towns’ rights to the low-voltage, subtransmission facilities. Such a reading would transform Article IV into mere surplusage, as it would do no more than restate Article II by repeating that the Towns have rights to the subtransmission facilities. *See* Initial Decision at P 41, A-9 at P 41. By failing

⁵ Boston Edison only reads provisions narrowly where convenient. For example, in arguing that Article IV’s “provided that” clause is dispositive, *see* Brief at 25, Boston Edison maintains that the Towns’ use rights capacity must be “directly connected to PTF,” i.e., physically connected, for an exemption to apply even though Article IV never once mentions the terms “directly” or “physically.” Indeed, Boston Edison’s position overlooks the obvious: if the Towns’ use rights were directly connected to PTF, there would be no need for LNS and, thus, no reason for an exemption. Consequently, FERC’s reading that “the 1980 Settlement Agreement Article IV’s exemption does not require a direct physical connection to PTF,” Affirming Order at P 17, A-20 at P 17, is reasonable.

Interestingly, Boston Edison concedes that “Concord’s 1980 Settlement Use Rights up to 26 MVA was *directly connected to PTF* (thereby allowing it to avoid 115 kV non-PTF charges since it would not use the 115 kV non-PTF facilities)” Brief at 47 (emphasis added). Thus, with respect to Concord, even under Boston Edison’s narrow reading, the Town does not have to pay for LNS charges under the Settlement Agreement. At the same time, the concession fails to explain why, if only directly connected facilities were intended to receive an exemption, Article IV refers to specified facilities that are not directly connected.

to give any independent basis for Article IV, Boston Edison's reading would deny the importance of PTF-connection status to the Towns, in contravention of the parties' intent at the time of the Settlement Agreement to give the Towns connection to PTF without payment of a separate charge. *See* Rehearing Order at P 7 ("Under Boston Edison's approach . . . the Settlement's purpose of providing the Towns a PTF interconnection would be meaningless and the Settlement's exemption, as continued in the IA, RNA, and TSA, would likewise be meaningless."), A-26 at P 7.

Boston Edison purports to give meaning to Article IV in two ways. *See* Brief at 31-32. First, Boston Edison argues that, under its reading, Article IV consolidates the stated ground rules for PTF transactions. *See id.* at 31. But that claim fails to override the redundancy between Article IV and Article II, *see* Rehearing Order at P 7, A-26 at P 7; quite the opposite, Boston Edison admits, under its reading, Article IV "duplicate[s] several aspects of Articles II and III," *see* Brief at 31.⁶ Boston Edison's second imparted meaning views "the 'right to use' phrase in Article IV as enabling a Town to designate the wheeling of its PTF purchases through the portion of its Use Rights capacity that [i]s directly connected to PTF." *See* Brief at 31-32. That reading makes no sense on at least two levels.

⁶ Moreover, Boston Edison's reading of Article IV as consolidated PTF rules supports the view that Article IV gives the Towns important rights concerning PTF, rather than being limited to subtransmission rights as Boston Edison argues at other points.

Boston Edison does not explain why a Town would need “enabling” language to allow it to use its own use rights capacity. Nor does Boston Edison explain, if the meaning of Article IV is to enable the Towns to use “directly connected” facilities, the reference to “Appendix A or B,” which include non-directly connected facilities. In short, Boston Edison’s strained reading of Article IV conveys no real substance to that provision.

2. Boston Edison’s Reading of Article IV Is Inconsistent with That Article’s Purpose.

Besides failing to give any meaningful effect to Article IV, Boston Edison’s reading is inconsistent with the premise of that article. Article IV, as its title states, specifically involves “Pool Transmission Facility Transactions,” and its text negates payment of a PTF interconnection charge for such transactions. The sole facilities to which a PTF interconnection charge may apply, in conjunction with the facilities listed in Appendices A and B, are Boston Edison’s 115 kV non-PTF. *See* Rehearing Order at P 10, A-27 at P 10. In light of that, it is difficult to argue, as Boston Edison does, *see* Brief at 22-23, that Article IV does not apply to the Towns’ use of Boston Edison’s 115 kV non-PTF. Indeed, “Boston Edison does not explain, how, in fact, a Town could take advantage of its Settlement use rights to engage in a PTF transaction (and achieve PTF access) without using known 115 kV, non-PTF facilities that bridge the gap.” Rehearing Order at P 10, A-27 at P 10. FERC’s logical and reasonable explanation that Article IV implicitly provides

use of the 115 kV non-PTF without payment of a PTF interconnection charge, contrary to Boston Edison's assertion, *see* Brief at 24, reads the article as a whole in a manner that supports the intent of Article IV.

Furthermore, if the Settlement Agreement withheld rights to use the 115 kV non-PTF, as Boston Edison argues, *see id.* at 22, then there surely would have been some recognition of that in the comprehensive Settlement Agreement, *see* Initial Decision at P 43, A-9 at P 43. It would also appear illogical to have an exemption for payment of PTF interconnection charges if such service were not available. The ALJ found the parties to the Settlement Agreement were aware of physical gaps between PTF and each of the Towns' use rights which were filled by the 115 kV non-PTF. *See id.* Given that awareness, it was reasonable to read Article IV, as the ALJ and FERC did, to exempt payment of interconnection charges for PTF transactions by the Towns for the rights capacity in the Appendices A and B facilities.

3. The Commission's Interpretation Does Not Conflict with Other Articles of the Settlement Agreement.

Perhaps recognizing that case law requires an integrated approach to interpret the Settlement Agreement, *see Blackie*, 75 F.3d at 722, Boston Edison asserts other articles in the Settlement Agreement conflict with the Commission's interpretation, *see* Brief at 24, 26-28. According to Boston Edison, the Commission's reading of Article IV is unreasonable because Articles 3.2 and 3.3

of the Settlement Agreement state that upon purchase of the use rights in the Settlement Agreement, each Town would “be deemed to be a 115 kV customer,” not a “115 kV PTF customer.” *Id.* at 24. But the fact that those articles state “115 kV customer,” instead of “115 kV PTF customer,” does not mean that the Towns did not receive PTF-connected status under the Settlement Agreement. *See* Rehearing Order at P 4 n.8 (referring to Initial Decision’s dismissal of “115 kV customer” argument), A-26 at P 4 n.8; *see* Initial Decision at PP 68-69, A-13 at PP 68-69; *cf.* Rehearing Order at P 8 (“The lack of reference to ‘115 kV, not PTF’ in Settlement Article IV does not negate the Settlement’s express exemption from LNS charges (in contrast to what Boston Edison claims)”), A-26 at P 8.

Similarly unavailing is Boston Edison’s reliance on Article VII⁷ and the *Mobile-Sierra/Memphis* rule as allegedly conflicting with the Commission’s interpretation of Article IV. *See* Brief at 26-28. Comparison with 18 C.F.R. § 35.1(d)(2), (cited in Brief at 11 & 54), specifying language for a *Memphis* clause, shows Article VII is materially different from that regulation and does not give

⁷ Article VII provides:

Edison will furnish firm and non-firm transmission services pursuant to its firm and non-firm transmission tariffs, as they are in effect from time to time under the Federal Power Act. The parties have been unable to agree on the price and the terms and conditions for the provision of transmission services, and the Towns reserve their rights, at any time after July 1, 1980, to contest the applicability and the provisions of the said tariffs.

Boston Edison *Memphis* rights to file unilateral rate changes. Nor does Boston Edison's reliance on Opinion No. 729 for the argument that the "115 kV non-PTF facilities at issue in this appeal were 'transmission' and that the service provided over those facilities was transmission service," Brief at 27, covered under Article VII assist its cause. Opinion No. 729 did not involve a PTF interconnection charge or LNS exemption, but concerned Boston Edison's S-1 full requirements rates for bundled generation and transmission rates. *See Municipal Light Bds. v. Boston Edison Co.*, 53 FPC 1567 (1973), *aff'd*, Opinion No. 729, 53 FPC 440 (1975). Hence, that opinion has no direct bearing on this matter, and the Commission was reasonable to "reject as strained Boston Edison's assertion that Settlement Article VII invalidates Settlement Article IV's exemption" Rehearing Order at P 8, A-27 at P 8.

4. Irrelevant Past Practice Does Not Obviate Contractual Rights.

With both its piecemeal and allegedly integrated approaches to contract interpretation unable to establish the unreasonableness of the Commission's reading, Boston Edison next turns to its past recovery of LNS costs through rates for other services to argue that rate recovery of LNS costs related to PTF service was not exempted under the Settlement Agreement and subsequent agreements. *See* Brief at 34. But "Boston Edison's history of rolling-in LNS costs with other network transmission costs is immaterial to Boston Edison's contractual

authorization to charge for full LNS costs.” Affirming Order at P 26, A-22 at P 26. Those rolled-in rates, pursuant to which Boston Edison recovered LNS costs, did not involve PTF transactions that would have qualified for the Settlement Agreement’s exemption. *See id.* (discussing why Concord’s past payments of LNS costs as part of rolled-in rates are irrelevant); Initial Decision at P 60 (same), A-12 at P 60. Indeed, Concord never sought a reduction in those other rates involving non-PTF transactions LNS, and thus, those rates cannot undo the exemption from full LNS charges that pertains to PTF transactions. *See* Affirming Order at P 26, A-22 at P 26.

In sum, Boston Edison’s arguments that the Commission unreasonably read the Settlement Agreement are without merit. The Settlement Agreement’s “LNS charge exemption for the Towns’ contractually connected load was part of the overall Settlement . . . which benefited both Boston Edison and the Towns.”⁸ Rehearing Order at P 12, A-27 at P 12.

⁸ Hence, any argument about the Towns receiving “free” wheeling service on the 115 kV non-PTF, *see* Brief at 28, 32-33, is also without merit. “Under the settlement, Boston Edison agreed to permit the Towns to purchase subtransmission facilities and use rights that gave the Towns the right to a direct contract connection to PTF without payment of a separate PTF interconnection charge. This was an express, bargained-for exemption.” Affirming Order at P 20, A-20 at P 20. “The exemption from LNS charges is one element of the overall Settlement.” Rehearing Order at P 12 (discussing how the Settlement Agreement resolved a number of issues arising from protracted litigation involving Boston Edison and the Towns), A-27 at P 12.

B. Subsequent Agreements Reaffirm And Perpetuate The LNS Exemption.

Subsequent agreements to the Settlement Agreement bolster the reasonableness of the Commission's interpretation of that agreement as granting an LNS exemption to the Towns. After the Settlement Agreement, the parties entered into agreements that "shed further light on this matter" and "lead to the inescapable conclusion that the agreements intended to exempt the Towns from Boston Edison's local transmission fees for PTF transactions utilizing the Use Rights facilities up to the stated shares of capacity, notwithstanding that these facilities themselves may not have provided a direct connection between the Towns and PTF." Initial Decision at P 36, A-8 to A-9 at P 36. Boston Edison's reading fails to properly account for those subsequent agreements, which was another reason for its rejection by the Commission. *See id.*

1. The 1993 IA Reaffirms and Perpetuates the LNS Charge Exemption.

Boston Edison and Concord entered into the 1993 IA pursuant to which interconnection facilities were to be constructed to replace both the use rights facilities that Concord had purchased in the Settlement Agreement and additional use rights that Concord had purchased in a letter agreement dated June 19, 1985. *See* Initial Decision at P 44, A-10 at P 44. Under the 1993 IA, the parties sought "to provide Concord with 60 MVA firm capacity at 115 kV at Maynard (Station

416).” Affirming Order at P 7, A-18 at P 7. Concord agreed to pay for the construction of those interconnection facilities to replace the subtransmission facilities use rights Boston Edison simultaneously bought back. *See id.*

Article 9.2 of the 1993 IA provides in pertinent part that “[s]ince the facilities between Station 342 and Station 416 are not considered PTF facilities by NEPOOL, the wheeling of these purchases from Station 342 through Station 416 could be subject to a radial transmission charge when these purchases exceed 26 MVA, the level of transmission use rights purchased in the 1980 Settlement Agreement. For purchases up to 26 MVA, for [Concord], Station 416 will be treated as a PTF facility for [Concord]’s obtaining electric power.” *See also* Initial Decision at P 45, A-10 at P 45. Thus, “[o]n its face, Article 9.2 seems to be consistent with the view that the 1980 Settlement Agreement had exempted Concord from paying interconnection charges on PTF transactions utilizing the Use Rights facilities by its statement that ‘Station 416 will be treated as a PTF facility’ for ‘up to 26 MVA,’ Concord’s share of the capacity of the Use Rights under that agreement.” *Id.* at P 46, A-10 at P 46. Indeed, Boston Edison “failed to offer any reason why, other than to perpetuate the arrangement under the 1980 Settlement Agreement, Boston Edison would grant an exemption for interconnection charges and why it would be in the same amount of 26 MVA as in that prior agreement if that were not the purpose.” *Id.* at P 48, A-10 at P 48.

Boston Edison seeks to obscure the validity of the ALJ's reading treating Station 416 as a PTF facility, by claiming the remaining sentences of Article 9.2 suggest a narrower interpretation limiting the LNS exemption to purchases from PPUs.⁹ *See* Brief 40-47. But contrary to Boston Edison's argument, *see* Brief at 40-42, the first paragraph of Article 9.2 does not limit the exemption from 115 kV non-PTF charges for the first 26 MVA to PPU purchases. The sentence "For purchases up to 26 MVA, for [Concord], Station 416 will be treated as a PTF facility for [Concord]'s obtaining electric power" makes no allusion to PPU purchases and is not restricted to such purchases. *See* Initial Decision at P 49, A-

⁹ Article 9.2 reads entirely as follows:

The Interconnection Facilities are intended to replace 13.8 kV facilities that connect the CMLP system to the Edison transmission system and to the New England transmission grid. In the event CMLP is no longer receiving Full Requirements Service from Edison as defined in the 1993 Power Agreement, CMLP may purchase from Pool-Planned Units, in which case under current NEPOOL rules CMLP would pay EHV and LV PTF charges billed by NEPOOL. Since the facilities between Station 342 and Station 416 are not considered PTF facilities by NEPOOL, the wheeling of these purchases from Station 342 through Station 416 could be subject to a radial transmission charge when these purchases exceed 26 MVA, the level of transmission use rights purchased in the 1980 Settlement Agreement. For purchases up to 26 MVA, for CMLP, Station 416 will be treated as a PTF facility for CMLP's obtaining electric power.

Purchases may be made by CMLP from units other than Pool-Planned Units or from any other source, in which case those purchases shall be wheeled by Edison under its FERC-approved Firm Transmission or Non-Firm Transmission tariffs or successor transmission arrangements for its system, so long as such arrangements have received the required regulatory approvals.

10 at P 49. Furthermore, the sentence in the first paragraph of Article 9.2 referring to PPU purchases merely reflects that, in the absence of full requirements service from Boston Edison, Concord would be allowed to purchase from other generators (PPUs) on NEPOOL, and pay NEPOOL PTF charges. *See id.* “That would have been the only PTF transaction applicable to Concord to replace the all requirements service at the time, and the sentence merely state[s] what was the reality at that time.” *Id.*

Likewise, Boston Edison’s reliance on the second paragraph of Article 9.2, *see* Brief at 43-45, is unavailing. That paragraph “does no more than the sentence in the first paragraph that refers to PPU’s, by observing the reality of the day, that other than on purchases of PPU’s, Concord’s purchases of power that would be wheeled by Boston Edison would be subject to Boston Edison’s transmission charges.” Initial Decision at P 50, A-10 at P 50. The second paragraph (like the sentence in the first paragraph referring to PPU’s) does not limit the scope of Concord’s exemption from interconnection charges to PPUs despite recognizing the situation in 1993 that PPU purchases were the only qualified PTF transactions applicable to Concord to replace Boston Edison’s all requirements service. *See id.*

Furthermore, Boston Edison’s fails to proffer any rationale for “restrict[ing] the exemption to PPU’s, rather than apply[ing] it to all PTF transactions.” *See id.* at PP 48 & 51, A-10 at P 48 & A-11 at P 51. “[T]here is no justification for

limiting the exemption from LNS charges to only PPU's . . . because there is no such limitation in the 1980 Settlement Agreement" *Id.* at P 54, A-11 at P 54. Indeed, Boston Edison's contention that the Settlement Agreement grants no exemption at all, *see* Brief 22-35, undercuts Boston Edison's argument here that it granted a very, and inexplicably, limited exemption to PPU's in the 1993 IA, *see* Initial Decision at P 54, A-11 at P 54. In short, the 1993 IA reaffirms and perpetuates the LNS exemption provided in the Settlement Agreement for all qualifying PTF transactions, and Boston Edison's arguments based on Article 9.2 of the 1993 IA are without merit. *See* Rehearing Order at P 4 n.8, A-26 at P 4 n.8

Similarly, Boston Edison erroneously contends that the 1993 IA's Articles 7.1¹⁰ and 7.2¹¹, pursuant to which Boston Edison bought back the facilities listed in the Settlement Agreement, extinguish any Concord claim to an LNS charge exemption. *See* Brief at 38-39. Although the use rights in the listed physical

¹⁰ Article 7.1 of the 1993 IA reads:

Edison agrees to buy back CMLP's use rights in the facilities described in Article VII, paragraph 2.2 of the 1980 Settlement Agreement.

¹¹ Article 7.2 of the 1993 IA states:

CMLP's use rights in facilities of Edison pursuant to the 1980 Settlement Agreement cease after both of the following events have occurred: 1) the Interconnection Facilities are placed In Service; and 2) CMLP has given Edison written notice that the distribution lines and station equipment serving CMLP loads cease to support the CMLP system.

facilities were surrendered, “the right to a free interconnection to PTF, which had derived only in part from the use of those facilities, was not.” Initial Decision at P 58, A-12 at P 58. The ALJ found his conclusion supported by inclusion of Article 9.2 of the 1993 IA. *See id.* That article preserves Concord’s right to free interconnection to PTF regardless of gaps in direct physical connection. *See id.* “While the Use Rights in the physical facilities listed in the 1980 Settlement Agreement were surrendered and replaced by the interconnection facilities, the right given by the 1980 Settlement Agreement to a contract connection to PTF was reaffirmed, preserved, and perpetuated by Article 9.2 of the 1993 IA.” *Id.*

2. The ARA and the TSA Reaffirm and Perpetuate the LNS Charge Exemption.

Like Concord, Wellesley entered into various agreements with Boston Edison after the Settlement Agreement. And as with the 1993 IA, Wellesley’s subsequent agreements, the ARA and the TSA, both affirm the existence and grant of an LNS charge exemption to Wellesley (and Concord).¹²

Under the ARA, executed in 1992, Boston Edison agreed to furnish Wellesley, from June 1, 1992, through May 31, 2002, with all its electric power

¹² “Neither Town’s individual agreements with Boston Edison can be ignored in interpreting the other Town’s rights under the 1980 Settlement Agreement” Initial Decision at P 62, A-12 at P 62. Hence, the ARA and TSA offer evidence of Concord’s right to an LNS exemption, and the 1993 IA can be considered in determining whether Wellesley received an LNS exemption from Boston Edison.

supply at a stated monthly demand rate. *See* Affirming Order at P 9, A-19 at P 9.

Exhibit A to the ARA defines “Delivery Point” as follows:

“Delivery Point” means BECo’s transmission interconnections with WMLP under which WMLP will be deemed to be a 115 kV customer at NEPOOL PTF (“Pool Transmission Facilities”) including, but not limited, as set forth in Appendix B, page 2 of the 1980 Settlement Agreement.

The Commission reasonably affirmed the ALJ’s conclusion that this definition of “Delivery Point” “interpret[s] the Settlement Agreement, which was attached and incorporated into the 1992 ARA, as granting Wellesley PTF customer status at its transmission interconnections with Boston Edison and reaffirm[ing] that status, much as the 1993 IA did with regard to Concord and its interconnections with Boston Edison under the 1980 Settlement Agreement.” Initial Decision at P 64, A-13 at P 64. In addition, the ALJ noted that the “ARA provide[s] that after its termination the 1980 Settlement Agreement shall continue to be in effect and that Wellesley shall continue to retain the Use Rights facilities existing at the time the ARA is terminated.” *Id.* (citing ARA ¶ 9); *see also* Affirming Order at P 24, A-21 at P 24. In other words, Wellesley’s PTF customer status at its transmission interconnections with Boston Edison continues in effect, notwithstanding Boston Edison’s argument that such status ended when the ARA expired, *see* Brief at 57-58.

Moreover, the TSA reaffirms the ARA's and the Settlement Agreement's understanding that Wellesley has PTF customer status and is exempt from LNS charges. After Boston Edison divested its non-nuclear generation assets, Boston Edison and Wellesley executed the TSA and amended their ARA. *See* Affirming Order at P 10, A-19 at P 10. The parties agreed to unbundle Wellesley's power supply from the delivery service provided under the ARA and the Settlement Agreement. *See id.* The TSA addresses Boston Edison's subsequent unbundled transmission service for Wellesley. "The stated purpose of the TSA was to set forth the [sic] each party's rights and obligations in connection with the transmission and subtransmission facilities which were the subject of the 1980 Settlement Agreement, the 1992 ARA, and a 1994 Letter Agreement that had expanded Wellesley's capacity to use Boston Edison's facilities." Initial Decision at P 65, A-13 at P 65. The TSA was intended to maintain the status quo regarding the earlier agreements. *See id.*; *see also* Rehearing Order at P 7 n.12 (discussing TSA Article 1.1, which provides that "neither Party's rights or obligations under the 1980 Settlement Agreement, the 1992 [ARA], and the 1994 Letter Agreement shall neither be enhanced nor diminished as a result of entering into this Agreement."), A-26 at P 7 n.12.

TSA Section 3.1 provides that Wellesley "has the use rights set forth in the 1980 Settlement Agreement and the 1992 [ARA] in . . . [Boston Edison's] sub-

transmission facilities . . . listed in Appendix B” to the TSA. TSA Section 3.2 further states: “WMLP through these Use Rights Facilities is entitled to 115 kV customer status. WMLP shall be able to utilize for PTF transactions and interconnection as defined in the NEPOOL Agreement its share of the capacity of the facilities as set forth in Appendix B.” The ALJ found it “inconceivable that this language [in TSA Sections 3.1 and 3.2], coming after the 1992 ARA (which [the TSA] incorporate[s]) [and which] define[s] Boston Edison’s interconnections with Wellesley as ones under which Wellesley ‘will be deemed to be a 115 kV customer at NEPOOL PTF,’ would have intended to offer Wellesley a PTF connection only if it could bridge existing physical gaps between Wellesley’s Use Rights facilities and PTF,” Initial Decision at P 67, A-13 at P 67, especially as Article 1.1 of the TSA expressly states that neither party’s rights under the ARA would be diminished, *see id.* at P 65, A-13 at P 65. Moreover, “[i]t is even less conceivable that not one of the agreements entered into by Concord or Wellesley with Boston Edison that referenced the 1980 Settlement Agreement, namely, the Concord 1993 IA, the 1992 Wellesley ARA, and the 1998 Wellesley TSA, would have mentioned a physical gap that must be bridged, if that had been the concept underlying the utilization of the Towns’ Use Rights for PTF.” *Id.* at P 67, A-13 at P 67.

Boston Edison reprises an earlier assertion to argue that TSA Article 3.2 does not give Wellesley a blanket PTF interconnection charge exemption because TSA Article 3.2 only classifies Wellesley as a “115 kV customer,” not a “115 kV PTF customer.” *See* Brief at 49-50. According to Boston Edison, if TSA Article 3.2 were intended to establish that Wellesley is directly connected to PTF, the language “115 kV PTF customer,” should have been used. *See id.* at 50. Boston Edison further asserts that the second sentence of TSA Article 3.2 would have expressly conferred on Wellesley use rights in facilities that had a direct physical connection to PTF, rather than just stating that Wellesley “shall be able to utilize for PTF transactions and interconnection . . . its share of the capacity of the facilities set forth in Appendix B,” which allegedly do not all physically connect to PTF. *See id.* at 51.

Just as its argument regarding Articles 3.2 and 3.3 of the Settlement Agreement about “115 kV customer” is without merit, so too is Boston Edison’s same argument about TSA Article 3.2’s use of the term “115 kV customer.” *See* Initial Decision at PP 68-69, A-13 at PP 68-69; *see also supra* at 24-25 (addressing similar claim). “The first sentence provide[s] that Wellesley did not, at that time, have to pay subtransmission charges.” *Id.* at P 69, A-13 at P 69. It is a categorical statement that recognizes the situation in 1998 that Wellesley did not have to pay subtransmission charges. *See id.* The second sentence, on the other hand,

implicitly recognizes that Wellesley did not in 1998 engage in PTF transactions on which it would have an exemption from interconnection charges, but looks forward to prospective PTF transactions. *See id.* Consistent with all other agreements between Boston Edison and the Towns, the second sentence lacks any statement requiring any additional connection to PTF, which suggests that Wellesley is exempt from an interconnection charge on any future PTF transactions through the established pathways and up to the stated capacities. *See id.* “The condition implicit in the wording [of the second sentence] [i]s only that Wellesley engage in PTF-qualifying transactions, not that it further connect up its facilities to PTF, the latter condition being one that seasoned contract negotiators would have been sure to spell out in the agreements if it had existed and which they failed to do in any of the agreements in issue with either of the Towns.”¹³ *Id.*

Boston Edison’s harping on other isolated provisions of the TSA as support it may recover LNS costs from Wellesley is also unavailing. For example, Boston

¹³ Contrary to Boston Edison’s assertion, *see* Brief at 52 (citing R 52 at 881-82), the Wellesley witness did not clearly state that the RNA eliminated differences based on PTF versus non-PTF transactions. All that the witness said was that a PTF connection was a requirement under RNA 16.3(iii) for the phasedown. *See* R 52 at 881-82.

Edison contends that Article 2.3¹⁴ of the TSA is a *Memphis* clause, which gives Boston Edison the right to recover its LNS costs from Wellesley. *See* Brief at 54-57. The ALJ read TSA Article 2.3 as “recogniz[ing] an unconditional right to have RNS charges established on the termination of the agreement, . . . [while] recogniz[ing] only a conditional right to have LNS charges established, *i.e.*, only where they may be ‘applicable.’” Initial Decision at P 77, A-14 at P 77; *See* Affirming Order at P 14 n.16 (affirming ALJ on this point), A-27 at P 14 n.16. If Boston Edison were correct that LNS rates would be charged in all cases, there would be no need for the conditional phrase “as applicable” to modify Boston Edison’s right to seek a rate change for LNS. *See* Initial Decision at P 77, A-14 at P 77. Use of the conditional phrase fits with FERC’s view of LNS exemption

¹⁴ TSA Article 2.3 states:

Upon the termination of the 1992 Agreement, as amended, all transmission and transmission ancillary services charges shall be established from time to time by the Federal Energy Regulatory Commission for Regional Network Service, and Local Network Service, as applicable, or such comparable service that may be in effect in the future, under the NEPOOL Open Access Transmissions Tariff, the BECO Open Access Transmission Tariff, and any successor tariff or tariffs. It is understood that BECO has the right to initially establish such charges on a subject to refund basis through unilateral filings with FERC under the provisions of Section 205 of the Federal Power Act. Upon the termination of the 1992 Agreement, as amended, all generation ancillary services shall be the responsibility of WMLP. WMLP reserves its rights under Section 205 of the Federal Power Act to challenge such BECO rates and filings at FERC.

under the theory that the LNS charges “would be applicable to transmission that might exceed the stated Use Rights’ capacities, or simply out of lawyerly caution, to provide for any eventuality (rather than the certainty that is implicit in Boston Edison’s position).” *Id.* In other words, the use of the conditional phrase “as applicable” for LNS only makes sense if there is an exemption to LNS charges, contrary to Boston Edison’s position.

Similarly meritless are Boston Edison’s contentions that TSA Appendix A¹⁵ overrides the ARA delivery point status by revising “the delivery point provisions [to] pertain exclusively to ‘All Requirements Service,’” Brief at 58, and that under Article 2.1¹⁶ of the TSA those provisions apply only during the term of the ARA, *see id.* at 59. The Commission found that “ARA Exhibit A definition of delivery point survives termination of the ARA by virtue of its express incorporation into TSA Appendix A” Affirming Order at P 24, A-21 at P 24; *see id.* at P 22 n. 28 (ARA Appendix A), A-21 at P 22 n.28.

¹⁵ TSA Appendix A reads:

Delivery Points for All Requirements Service pertaining to WMLP shall be those that are set forth in the 1980 Settlement Agreement which is Attachment 2 to the 1992 Agreement and also as defined within Exhibit A of the 1992 Agreement.

¹⁶ TSA Article 2.1 states in pertinent part:

During the term of the 1992 Agreement [i.e., the ARA], as amended, BECO shall arrange for all transmission services required to deliver power purchased by WMLP to the Delivery Points identified in Appendix A to this Agreement.

As the ALJ noted, “Boston Edison misses the import of the [ARA] Delivery Point provisions.” Initial Decision at P 72, A-14 at P 72. They did not create Wellesley’s exemption from PTF interconnection charges; rather the delivery point provisions, the rest of the ARA, and other subsequent agreements “merely recognize[], affirm[], and perpetuate[] the exemption that already exist[s].” *Id.* “The [Settlement Agreement] is the source of Wellesley’s delivery point authority in . . . TSA Appendix A Wellesley’s contract path or connection to PTF th[r]ough the incorporated delivery points is not altered by the ARA’s termination and these delivery points remain available for Wellesley’s Constellation purchases.” Affirming Order at P 24, A-21 at P 24. To the extent there is any dispute over the Settlement Agreement’s meaning, the subsequent agreements including the delivery point provisions clarify that meaning, including Wellesley’s status as being deemed connected to NEPOOL PTF. *See* Initial Decision at P 72, A-14 at P 72.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the challenged orders upheld in all respects.

Respectfully submitted,

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September 29, 2005

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 10,193 words, not including the tables of contents and of authorities and any certificates of counsel.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d)(1), I hereby certify that I have, this 29th day of September 2005, served the Respondent's Brief by causing copies of it to be mailed to counsel listed below.

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