

No. 07-2418

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NEW ENGLAND POWER COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

TOWN OF NORWOOD, MASSACHUSETTS,
INTERVENOR,

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF THE ISSUE

This appeal is the latest phase in an extremely protracted contract termination dispute between a municipal utility, the City of Norwood, Massachusetts (Norwood), and its former wholesale electric supplier, New England Power Company (New England Power). After several previous decisions by this Court, and numerous orders by respondent Federal Energy Regulatory

Commission (Commission or FERC), as well as decisions by the Massachusetts state courts addressing various aspects of this controversy, there remains a single narrow issue to be decided:

Whether the Commission properly complied with this Court's mandate in *Town of Norwood, Massachusetts v. FERC*, 476 F.3d 18 (1st Cir.), *cert. denied*, 128 S.Ct. 432 (2007) (*Norwood IV*), that the interest rate on refunds to be made by Norwood is effective from the time the bill was first rendered, rather than some later date.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

This appeal represents the latest chapter in the Commission's effort to determine the appropriate compensation that Norwood owes New England Power, arising from a previously-approved Contract Termination Charge tariff formula. The case arises from Norwood's 1998 decision to terminate its full requirements electric service contract with New England Power, prior to its scheduled expiration, so that Norwood could change power suppliers.

The Court's *Norwood IV* decision was but its most recent decision arising

from this matter. *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 Contract Termination Charge formula); *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 Contract Termination Charge 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 the proper notice for termination of the contract).

In *Norwood IV*, the Court largely agreed with the Commission that Norwood’s claims concerning the Contract Termination Charge were either without merit or barred by res judicata. 476 F.3d at 25-26. The Court found, however, that the Commission failed to justify its decision that an interest rate of 18 percent should apply to Norwood’s late payments to New England Power. *Id.* at 28. Thus, the Court remanded the case to FERC for further consideration solely on this issue. *Id.* at 29.

In so doing, the Court addressed “one other loose end as to interest,” rejecting Norwood’s contention that the rate of interest applicable to Contract Termination Charge late payments “should not be applied to payments due prior to

FERC's order of February 22, 2006,^[1] since before that point the [Contract Termination Charge] amount had not been determined.” 476 F.3d at 29. Rather, the Court concluded, under the terms of Section J of the Contract Termination Charge tariff, “whatever the figure FERC finds justified,” interest is due “from the time the bill was rendered.” *Id.*

New England Power now seeks review of the two Commission orders issued by the Commission on remand from *Norwood IV*: Order on Remand, *Town of Norwood, Massachusetts v. National Grid USA, et al.*, 119 FERC ¶ 61,148 (2007) (Remand Order), and Order Denying Motion for Clarification and Request for Rehearing, and Rejecting Compliance Filing, *Town of Norwood, Massachusetts v. National Grid USA, et al.*, 120 FERC ¶ 61,196 (2007) (Rehearing Order). (Copies of the contested orders are provided in Addendum B to this brief.)

In the Remand Order, the Commission determined that the 18 percent interest rate set by Section J was unreasonable, and should be replaced with the lower interest rate established by the Commission's regulations (referred to as the Revised Interest Rate). New England Power does not contest the level of the Revised Interest Rate itself, but solely the *timing* of the Revised Interest Rate. Specifically, New England Power appeals the Commission's decision on remand,

¹ *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 (2006) (February 2006 Rehearing Order), JA 185.

which followed the instruction of this Court in *Norwood IV*, that the Revised Interest Rate should be effective from the time the bill was first rendered, rather than from some later date.

STATEMENT OF FACTS

A. The Earlier Proceedings

As the Court is familiar with this long-running contract dispute, we will briefly recapitulate the facts solely to put this appeal in context.

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. *See Norwood I*, 202 F.3d at 397; *Norwood III*, 217 F.3d at 25-26. Despite the agreement'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 thence obtain its wholesale power from another supplier. *See Norwood I*, 202 F.3d at 397.

New England Power thereupon filed a tariff amendment which permitted its wholesale customers, like Norwood, to terminate their wholesale power contracts after only 30 days' advance notice, in order to give them earlier access to new

suppliers. Under this tariff amendment, in order to exercise the early termination option, the customer would have to pay a Contract Termination Charge by which New England Power could recover the revenues that it would have collected under the tariff absent termination, less the expected costs avoided by not providing service. *See Norwood I*, 202 F.3d at 397.

In *Norwood I*, the Court affirmed the Commission's orders, upholding, *inter alia*, the legality of the tariff's Contract Termination Charge formula rate. *Norwood I*, 202 F.3d at 398-404. The Court indicated, however, that Norwood could file a complaint at FERC challenging the actual computation of the Contract Termination Charge. *Id.* at 401.

In December 1998, New England Power brought an action in the Massachusetts Superior Court to collect overdue Contract Termination Charge and late payment charges from Norwood. New England Power received a judgment against Norwood in state court. *See New England Power Co. v. Town of Norwood*, 59 Mass. App. Ct. 1106, 797 N.E.2d 26 (Mass. App.), *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 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).

On December 23, 2002, Norwood filed with the Commission a complaint against New England Power pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, alleging once again that the Contract Termination Charge was unjust and unreasonable, as well as raising issues concerning its actual computation. After a hearing, a Commission administrative law judge issued a decision finding that, as relevant here, the Massachusetts state court decision was res judicata, and setting the late payment interest rate at 18 percent. *Town of Norwood Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at Paragraphs (PP) 109-110 (2004).

The Commission initially rejected the judge's determination that 18 percent was the interest rate to be applied to late payments. *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,009 at PP 81-82 (2005), JA 147, 179-180. In its February 2006 Rehearing Order, however, the Commission agreed with New England Power that 18 percent was the proper interest rate, consistent with Section J of the Contract Termination Charge tariff. February 2006 Rehearing Order, 114 FERC at PP 49-51, JA 203. On June 30, 2006, the Commission denied Norwood's request for rehearing on this and other issues. *Town of Norwood, Massachusetts v. National Grid USA*, 115 FERC ¶ 61,369 at PP

21-27 (2005), JA 207, 214-216 (June 2006 Rehearing Order).

In its subsequent appeal, Norwood challenged the Commission's orders on a number of grounds. As relevant here, Norwood argued that the 18 percent interest rate established by Section J of the tariff did not apply to Norwood's situation.

Alternatively, Norwood maintained that the Commission failed to explain how the 18 percent interest rate was consistent with agency policy established in *Connecticut Light & Power Co.*, 59 FPC 811 (1977), that an interest rate for a late payment should not be a penalty, absent special circumstances.

B. The *Norwood IV* Decision On The Interest Rate And Its Timing

In *Norwood IV*, the Court sustained the Commission's interpretation that Section J of the Contract Termination Charge tariff, providing for an 18 percent interest rate, applied to Norwood's late payments. 476 F.3d at 27-28. However, the Court went on to hold that the Commission had failed to distinguish adequately the instant situation from the policy concerning interest set forth in *Connecticut Light & Power*. *Id.* at 28-29.

In the Court's view, because "the state court judgment no longer poses a res judicata objection" to the level of interest payments, and "the Commission itself . . . ha[s] chosen to decide the issue," the agency was required to "face it squarely and adequately resolve it." 476 F.3d at 29. The Court made clear, however, that

“[o]n remand, the Commission is not limited to a single choice.” *Id.*

Thus, the Court indicated that the Commission “[c]onceivably . . . could sustain the 18 percent figure” by either modifying the *Connecticut Light & Power* policy or adequately distinguishing it. 476 F.3d at 29. Alternatively, the Court explained, the agency “might find the 18 percent figure unreasonable and find the prime rate or some other rate above the prime rate to be appropriate.” *Id.* In this context, the Court emphasized that Norwood “is attacking a longstanding tariff provision and bears the ultimate burden of proof” on this issue under section 206 of the FPA. *Id.*

The Court then addressed what it described as “one other loose end as to interest.” 476 F.3d at 29. Norwood had argued that “even if the 18 percent rate is applicable to [Contract Termination Charge] late payments, the rate should not be applied to payments due prior to FERC’s order of February 22, 2006,” *i.e.*, the February 2006 Rehearing Order, as the precise Contract Termination Charge amount had not been determined by the Commission until that time. *Id.*

While agreeing that the Commission had not set the amount, the Court rejected Norwood’s argument as to the timing of interest payments. 476 F.3d at 29. Rather, the Court interpreted Section J of the New England Power’s Contract Termination Charge tariff to require interest to be paid “from the time the bill was

rendered,” not, as Norwood argued on appeal, at some later date. *Id.*

The Court went on to state that it affirmed the Commission “insofar as it requires interest based on at least the prime rate – the figure Norwood itself seeks – and remand[ed] *only* as to whether more is properly due.” 476 F.3d at 29 (emphasis added).

C. The Commission’s Orders On Remand

On May 17, 2007, the Commission issued the Remand Order. On the issue remanded, *i.e.*, the interest rate to be employed for refunds, the Commission held that “consistent with *Connecticut Light & Power . . .*, an 18 percent interest rate for late payments is unjust and unreasonable.” Remand Order at P 7. “In the absence of a persuasive showing in this proceeding justifying a different interest rate,” the Commission concluded, “it is appropriate to apply the [lower] prime rate-based interest rate set forth in section 35.19a of our regulations.” *Id.* (footnote omitted) (citing 18 C.F.R. § 35.19a).

Therefore, the Commission directed New England Power to remove the 18 percent interest rate found in Section J of its Contract Termination Charge tariff, and to replace it with the Revised Interest Rate, namely, the lower prime rate-based interest rate specified by the agency’s regulations. Remand Order at P 7. The Commission went on to explain:

As for calculating the amount due here, consistent with [*Norwood IV*], Norwood owes New England Power the [Contract Termination Charges] plus interest calculated from the time the bill was first rendered. Accordingly, we direct New England Power to calculate the late [Contract Termination Charge] payments and interest as described herein and submit a report to the Commission within 30 days of the date of this order.

Id. (footnote omitted) (citing *Norwood IV*, 476 F.3d at 29).

New England Power filed a Motion for Clarification and Request for Rehearing of the Commission’s Remand Order. Rehearing Request, JA 72. In so doing, New England Power “decided not to challenge the substance” of the Commission’s ruling that the higher 18 percent interest rate was unjust and unreasonable and must be replaced by the Revised Interest Rate. *Id.* at 9, JA 80.

Instead, New England Power raised the question of the effective date of the lower interest rate determined by the Remand Order. Rehearing Request at 10, JA 81. In New England Power’s view, the Commission had presumably intended that “the revised interest rate in. . . Section J[] is effective as of June 30, 2006,” the date of the Commission’s June 2006 Rehearing Order, “and applies only to late payment charges due on or after that date.” *Id.* (footnote omitted),

In the alternative, New England Power requested rehearing on the effective date of the Revised Interest Rate. Rehearing Request at 19, JA 90. In this regard, New England Power argued that if the Commission authorized the payment of

interest at the new lower rate any earlier than June 30, 2006, it would violate the refund restrictions of section 206 of the FPA, the filed rate doctrine and the rule against retroactive ratemaking. *Id.* at 19-23, JA 90-95. New England Power also argued that the Commission had neither authority nor reason to give Norwood equitable relief with respect to interest. *Id.* at 24-25, JA 95-96.

On August 30, 2007, the Commission issued the Rehearing Order, rejecting New England Power's position, and explaining that it had "expressly intended the Revised Interest Rate to be effective from the time the bills were first rendered." Rehearing Order at P 14. This was because, the Commission stated, "the Court of Appeals has already decided the issue of the Revised Interest Rate's effective date." *Id.* at P 15.

SUMMARY OF ARGUMENT

After ten years of litigation, and five trips to this Court, this case is almost over. In *Norwood IV*, this Court affirmed the Commission in most respects concerning Norwood’s tariff obligation to pay a Contract Termination Charge, but remanded to the agency for it to consider one “loose end” (476 F.3d at 29) – the *level* of Norwood’s interest payments. On remand, the Commission selected a lower interest rate, a decision New England Power does not now contest. All New England Power does contest is another supposed “loose end” on the remanded “loose end” – the *timing* of the revised level of interest payments.

Rejecting Norwood’s argument that interest accrued only to late payments due after the Commission’s February 2006 Rehearing Order, *Norwood IV* held that whatever level of interest “FERC finds justified,” Section J of the Contract Termination Tariff “provides that Norwood owes that amount from the time the bill was rendered.” 476 F.3d at 29. No party sought further review of this aspect of the Court’s decision.

Because *Norwood IV* considered and decided the timing of interest payments, its decision on this issue became the law of the case. The Commission was, therefore, obliged to apply the interest payment timing mandated by the Court. At the very least, it was certainly reasonable for the Commission to take the

Court's instructions into account, without questioning the Court's judgment.

No exceptional circumstances are present that should lead the Court to ignore the law of the case here. Because the Court's decision results in Norwood's customers paying a just and reasonable interest rate, rather than one the Commission has conclusively rejected as unreasonable under the FPA, the decision cannot be said to work a manifest injustice. Nor was it within the Commission's authority to find that the Court's decision was clearly erroneous and should not be applied as written.

ARGUMENT

I. STANDARD OF REVIEW

FERC orders are generally reviewed by the courts under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Under this standard, the Court has explained, “[o]n review, we give great deference to the Commission’s decision.” *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 943 (1st Cir. 1993) (citation omitted); *see also, e.g., Knott v. FERC*, 386 F.3d 368, 371 (1st Cir. 2004) (FERC entitled to deference so long as it examines “relevant data” and offers a “reasonable explanation”).

The determinative issue in this case is whether the Commission accurately applied the Court’s mandate in *Norwood IV*. Obedience to a mandate, this Court has explained, “is simply a specific application of the law of the case doctrine” generally requiring “conformity with the commands of a superior court” by a lower tribunal. *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993).

This Court in *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995), an appeal of a FERC order in response to prior remand by the Court, analyzed the convergence of these two standards of review, concluding that “[u]nder the circumstances, we will review the actions of FERC under the usual deferential standard, but always keeping in mind the restraints imposed on FERC

by the terms of our mandate and the ‘law of the case’ doctrine.” Id. at 689.

II. THE COMMISSION APPROPRIATELY INTERPRETED THE NORWOOD IV MANDATE AS HOLDING THAT THE PROPER INTEREST RATE SHOULD BE PAID DURING THE DURATION OF THE CONTRACT.

The Court’s decision that Norwood owed interest “from the time the bill was rendered” (476 F.3d at 29) is the law of the case, and was thus properly applied by the Commission on remand.

In *Norwood IV*, this Court finally resolved all but one issue that was raised in the course of this extensive litigation concerning Norwood’s termination of its contract with New England Power, namely the appropriate rate of interest on Norwood’s late payments to New England Power. 476 F.3d at 29. On remand, the Commission held that “the use of the prime rate, as calculated” pursuant to the agency’s regulations “is appropriate in these circumstances.” Remand Order at P 1. As New England Power acknowledges, it “chose not to challenge FERC’s ruling on the reasonableness of the Section J interest rate.” Br. 13.

Under these circumstances, it would be reasonable for one to assume that this long controversy was over. However, New England Power is now before the Court questioning *when* the interest rate should go into effect. The problem with New England Power’s challenge, as the Commission concluded, is that in *Norwood IV* this Court “has already decided the issue of the Revised Interest

Rate's effective date." Rehearing Order at P 15. Thus, the Commission observed, the Court "held that whatever interest rate the Commission specified on remand must apply from the time the bill was first rendered." *Id.*

The Commission's interpretation of the Court's resolution of the issue is based on the unmistakable language of *Norwood IV*. This Court rejected Norwood's argument that the interest rate under Section J of the tariff (which Norwood was then assuming would be 18 percent) should apply only to payments made after the Commission's February 2006 Rehearing Order because, Norwood alleged, the Commission had not previously determined the amount owed. To the contrary, the Court concluded:

[S]ection J makes it quite clear that, when a customer disputes an amount billed by a carrier, the carrier [*i.e.* New England Power] is entitled to prescribed interest that accrues "from . . . the rendering of said bill" on "the amount determined to be due and payable." Norwood has challenged the amount of interest prescribed; *but whatever the figure FERC finds justified, the tariff provides that Norwood owes that amount from the time the bill was rendered.*

476 F.3d at 29 (emphasis added) (quoting Section J of the tariff).

Based on this language, the Commission concluded that it did not have the discretion to further address New England Power's arguments that the timing of the interest payments should be different from that ordered by the Court:

The Court of Appeals rejected the argument that Norwood should have to pay that interest rate only on late [Contract Termination Charge]

payments due after the Commission’s [February 2006 Rehearing Order]. The court held that whatever interest rate the Commission specified on remand must apply from the time the bill was first rendered.

Rehearing Order at P 15 (footnote omitted) (citing *Norwood IV*, 476 F.3d at 29).

The Commission’s reliance in this regard on the Court’s ruling was reasonable and should be sustained. This Court has recently explained the effect of the law of the case doctrine in the context of a remand to a federal agency: “When an appellate opinion clearly addresses a disputed issue, it ‘instructs an inferior [tribunal] to comply with [this decision] on remand.’” *NLRB v. Goodless Brothers Electric Co.*, 285 F.3d 102, 107 (1st Cir. 2002) (quoting *Field v. Mans*, 157 F.3d 35, 40 (1st Cir. 1998)). Thus, “[a]n appellate court’s mandate controls all issues that ‘were actually considered and decided by the appellate court, or as were necessarily inferred from the disposition on appeal.’” *Id.* (quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 168 (1st Cir. 1996), and *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 770 (1st Cir. 1994)).

Because *Norwood IV* “actually considered and decided” the time from which interest was due and owing, the Commission reasonably determined that it had no choice but to “comply with [this decision] on remand.” Thus, the Commission concluded that “[c]onsistent with the Court of Appeals’ decision, the Revised Interest Rate is effective from the time the bill was first rendered.” Rehearing

Order at P 16.

If New England Power disagreed with the Court's determination on this issue, it should have sought further clarification or further review as appropriate. Instead, New England Power asked the Commission on remand to ignore the Court's directive. However, the Commission played its appropriate role, applying the law of the case as set down by the Court. *See Atlantic City Electric Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003) (absent further appellate review, "FERC is bound by [the court's] decision").

New England Power's arguments that the Court should overturn the Commission's decision on remand essentially ignore the law of the case doctrine. Rather, New England Power contends that the Commission had no authority under FPA section 206 to authorize refunds of interest (at least prior to the agency's June 2006 Rehearing Order), Br. 19-21, 26-32, and that the contested orders violate both the filed rate doctrine and the rule against retroactive ratemaking. *Id.* 22-26.

These arguments are, however, irrelevant at this point in the case. The Commission reasonably relied on *Norwood IV* as having already decided that the interest payments would begin, in accordance with the tariff language, in 1998 (when the Contract Termination Charge tariff first went into effect, and bills based on that effective tariff were first rendered). Thus, on remand, the Commission

acknowledged New England Power's arguments (Rehearing Order PP 8-10), but did not find it necessary to address them. *See MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (federal agency is "not obliged to respond to every comment" it receives, but "only those that can be thought to challenge a fundamental premise" underlying the agency proceeding). Once again, if New England Power disagreed with the Court's decision in this respect, even if it appeared to be the likely beneficiary of that decision, its appropriate remedy was to have sought further review of the Court's decision.

When New England Power eventually does address the Court's decision on this interest timing issue, it first argues that the relevant language in *Norwood IV* "did not *require* FERC to apply any adjustment to the tariff's interest rate retroactively, to *all* bills containing a late payment charge." Br. 35 (emphasis in original). This reading, however, flies in the face of the Court's specific holding that, contrary to Norwood's argument at the time, whatever the interest rate "FERC finds justified, the tariff provides that Norwood owes that amount from the time the bill was rendered." 476 F.3d at 29.

The law of the case doctrine cannot be evaded so easily. While the "doctrine is neither an absolute bar to reconsideration nor a limitation on a federal court's power," this "does not mean that the doctrine can – or should be – lightly shrugged

aside.” *United States v. Rivera-Martinez*, 931 F.2d 148, 150-151 (1st Cir. 1991) (citations omitted). “To the contrary,” the Court in *Rivera-Martinez* went on to explain,

the doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decisionmaking process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy. The law of the case should be treated respectfully, and, in the absence of exceptional circumstances, applied according to its tenor.

Id. at 151. Exceptional circumstances negating the doctrine are “narrowly cabined,” and, in a case of this nature, limited to a decision that is “clearly erroneous and would work a manifest injustice.” *Id.* (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)).

New England Power argues extensively that the Court could not possibly have meant to decide that the revised interest rate would be applicable from the time of the first bill, because neither the Court nor the Commission has the authority to make such a retroactive adjustment in interest. Br. 40-42. But New England Power cannot demonstrate that the Court’s decision on this point was clearly erroneous and would work a manifest injustice, so as to avoid the application of the law of the case to the timing of the interest rate.

First, the Court’s decision can hardly be said to work a manifest injustice. On the contrary, if New England Power were to prevail here, it would collect a

high 18 percent interest rate from Norwood's customers over a substantial period that the Commission has already found to be unjust and reasonable, *see* Remand Order at P 7, a finding that has not been contested by New England Power.

Second, to the extent that New England Power is arguing that the Court's ruling on the issue is clearly erroneous, its contention is not well taken. It is certainly not the Commission's role to second-guess explicit language in a court's decision and mandate, much less to arrogate to itself the ability to determine that a judicial decision is clearly erroneous. *See Donohoe v. Consolidated Operating & Production*, 30 F.3d 907, 910-911 (7th Cir. 1994) (lower tribunal has no choice but to carry out the mandate of an appeals court).

In any event, whatever the limitations on the Commission's refund authority, both the Court and the Commission (and New England Power, *see* Br. 27) were certainly aware that when agency orders are subject to judicial review, it may "at times result[] in the return of benefits received under the upset administrative order." *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965)(citation omitted). Thus, once the Court interpreted Section J of the Contract Termination Tariff, now incorporating the Revised Interest Rate, as applying to all payments due and owing, it was not for the Commission to question the Court's inherent authority to correct this wrong.

In sum, New England Power cannot demonstrate either element of the exceptional circumstances test under which the Court could or should disturb its prior decision with respect to the timing of interest

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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February 8, 2008

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 4,742 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d)(1), I hereby certify that I have, this 8th day of February, 2008, served the foregoing by causing copies of it to be mailed to the counsel listed below.

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