

112 FERC ¶ 61,099  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Town of Norwood, Massachusetts

Docket No. EL03-37-001

v.

National Grid USA,  
New England Electric System,  
Massachusetts Electric Company,  
and Narragansett Electric Light Company

ORDER ON INITIAL DECISION

(Issued July 22, 2005)

**I. Introduction**

1. This complaint involves the calculation of compensation due New England Power Company (New England Power)<sup>1</sup> from the Town of Norwood, Massachusetts (Norwood) following Norwood's termination of a full requirements electric service contract before the end of the contract term so that it could purchase power from another supplier.

2. The Commission previously had accepted New England Power's Contract Termination Charge (CTC) to apply to customers who choose to terminate early.<sup>2</sup> Subsequently, Norwood filed this complaint, contending that the CTC is unjust, unreasonable, unduly discriminatory, and preferential under the Federal Power Act

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

<sup>2</sup> *New England Power Co.*, 83 FERC ¶ 61,174, *reh'g denied*, 84 FERC ¶ 61,175 (1998). In its transmittal letter, New England Power stated that the proposed amendment would allow only one customer, Norwood, to terminate the contract early. New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Transmittal Letter at 3 (March 18, 1998).

(FPA).<sup>3</sup> The Commission set only five of Norwood's challenges for hearing, noting that it already had accepted the CTC formula, but had not accepted the individual components in New England Power's calculation.<sup>4</sup>

3. This proceeding is now before the Commission on exceptions to an Initial Decision (ID) issued by the Presiding Administrative Law Judge (Judge).<sup>5</sup> Norwood, Respondents,<sup>6</sup> and the Commission's Trial Staff (Staff) filed briefs on and opposing exceptions to the ID. As discussed below, the Commission affirms the ID in part and modifies it in part.

## **II. Background**

4. The lengthy background of this proceeding is thoroughly recounted in the ID<sup>7</sup> and will be related only briefly here.

5. Historically, New England Power provided wholesale electric requirements service under its Tariff No. 1 to its retail distribution affiliates, Mass Electric and Narragansett. In 1983, it began full requirements service to Norwood. Norwood purchased transmission services separately from Boston Edison Company (Boston Edison).

6. In 1989, New England Power and Norwood amended their contract to permit Norwood to elect to extend the earliest date for notice of termination. Norwood exercised the election and extended the date for notice of termination, which extended the term of the contract for 10 years, through October 2008.

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<sup>3</sup> 16 U.S.C. 791a *et seq.* (2000).

<sup>4</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18 (2003) (Hearing Order).

<sup>5</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 (2004).

<sup>6</sup> Respondents include National Grid, New England Electric System, New England Power, Massachusetts Electric Company (Mass Electric), and Narragansett Electric Light Company (Narragansett).

<sup>7</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 1-14 (2004).

7. However, on March 4, 1998, Norwood notified New England Power that it would terminate its service as of April 1, 1998, and would begin taking service from Northeast Utilities Service Company (Northeast Utilities). As stated above, the Commission subsequently accepted an amendment to New England Power's tariff that would permit customers to terminate their contracts on 30 days' notice, but would require such customers to pay a CTC; New England Power acknowledged that the CTC applied only to Norwood.<sup>8</sup> In its CTC filing, New England Power also stated that the CTC formula applies the lost revenues approach used in Order No. 888 for the calculation of stranded costs,<sup>9</sup> although New England Power emphasized that it did not seek to charge for stranded costs attributable to any period beyond the earliest date upon which either New England Power or the customer could terminate the contract. Instead, explained New England Power, the CTC generally would compensate it for the revenues it would have collected under the contract if the customer had not terminated early.<sup>10</sup>

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<sup>8</sup> In its order accepting the CTC, the Commission observed that New England Power proposed to allow a customer to terminate service early, subject to the payment of a CTC, which was based on the revenues lost approach approved by the Commission in Order No. 888 for calculating stranded costs. However, the Commission pointed out that the CTC was not designed to recover extra-contractual costs and, therefore, was not a mechanism for recovering stranded costs, as defined in Order No. 888. The Commission further stated that New England Power's proposed CTC was designed to compensate New England Power for the revenues it otherwise would be entitled to collect in the absence of the customer's early termination of its service agreement. *New England Power Co.*, 83 FERC ¶ 61,174, at 61,721-22 (1998).

<sup>9</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S.Ct. 1012 (2002).

<sup>10</sup> New England Power Company FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000, Transmittal Letter at 2 (March 18, 1998).

8. Norwood did not pay the CTC and started a series of challenges, which are described in the ID. In setting the instant complaint for settlement judge and hearing procedures,<sup>11</sup> the Commission dismissed a number of the issues raised by the complaint and set for hearing only five of Norwood's claims, stating that it had not previously approved the individual components used in New England Power's calculation of the CTC. Additionally, the Commission affirmed its previous findings that (a) when a customer prematurely terminates a contract, imposition of a CTC is reasonable, (b) rules relating to stranded cost recovery are not applicable to a charge for premature termination of a contract, and (c) rules allowing customers to market released capacity do not apply when the customer prematurely terminates the contract.<sup>12</sup> Norwood, as the complainant in this proceeding, bore the burden of proof with respect to the issues set for hearing. Except as discussed below, Norwood failed to carry the burden of proving that the adjustments to the CTC formula that it advocated are consistent with the tariff.

### **III. Discussion**

9. In this order, the Commission addresses whether the Judge's calculation of the CTC is in accord with the previously-accepted CTC formula applicable to Norwood. Except as discussed below, the Commission affirms the Judge's determinations.<sup>13</sup> The Commission does not address again in this order the merits of the accepted CTC formula, which sets a specific tariff-based price for early termination of the service agreement. The CTC formula is structured to permit New England Power to recover the revenues it

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<sup>11</sup> Settlement judge proceedings proved fruitless, so the Judge conducted the hearing.

<sup>12</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18, 21 (2003).

<sup>13</sup> Norwood states that it will accept the Judge's determinations, and further, that in an effort to conclude the litigation, it sent a check to New England Power on July 22, 2004, in the amount of \$20,356,994.35. Norwood contends that this is the principal amount of \$11,366,175.00, as calculated under the ID for the period from April 1, 1998, through June 30, 2004, plus \$2,349,623.35 in interest (at the rate prescribed in New England Power's CTC filing) from April 1, 1998, through June 30, 2004, plus \$6,641,146.00 which is the present value of future charges from July 1, 2004, through October 31, 2008. Although it states that New England Power accepted the check, Norwood emphasizes that New England Power has not agreed to settle this proceeding. Reply Brief of Complainant Town of Norwood, Massachusetts to Respondent's Brief on Exceptions at 3 n.2 (July 29, 2004).

would have collected had the customer continued to pay the fixed tariff rate through the contract term.

### **A. Summary of the CTC<sup>14</sup>**

10. Norwood's CTC is determined by applying the following formula:  $CTC = (R - M) \times L$ , where "R" is New England Power's annual revenues from Norwood, "M" is the estimated market value of Norwood's released capacity, and "L" is the remaining length of the contract obligation, in this case, from April 1, 1998, through October 2008 in accordance with Norwood's decision to terminate its service from New England Power.

11. As discussed in greater detail below, the "R" factor reflects the revenues that New England Power was receiving from Norwood at the time of the termination under Commission-approved rates. Such revenues reflect a credit for the transmission services that Norwood purchased from Boston Edison. New England Power determined the revenues based on the revenue it received from Norwood during the 12 months immediately prior to the early termination date.

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

### **B. Revenue Factor**

#### **1. The ID<sup>15</sup>**

13. The revenue factor represents the revenues New England Power was receiving from Norwood under Commission-approved rates at the time Norwood terminated the contract, less a credit for transmission payments to Norwood's transmission provider,

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<sup>14</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 15-23 (2004). See also *New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000* (March 18, 1998).

<sup>15</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 55-71 (2004).

Boston Edison. At the hearing, New England Power claimed that its total revenue calculation was consistent with its tariff and Order No. 888.<sup>16</sup>

14. In contrast, Norwood argued that the total revenue component was too high because it failed to reflect a 28 percent reduction in revenues attributable to the divestiture of New England Power's non-nuclear assets; in other words, it would permit New England Power to recover costs attributable to facilities it no longer owned.<sup>17</sup> Staff agreed that the total revenue component should be adjusted to reflect asset divestitures that were known and measurable at the time the CTC was filed, but Staff also argued that the reduction in revenues should reflect the divestiture of nuclear as well as non-nuclear facilities.<sup>18</sup>

15. Citing Commission and judicial precedent, the Judge concluded that Order No. 888 and its progeny are not controlling precedent in this case;<sup>19</sup> rather, she found that the task here is to determine the just and reasonable compensation for New England Power for the consequences of Norwood's early termination of the contract. While the Judge emphasized that Order No. 888 rules related to stranded cost recovery do not apply to a

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<sup>16</sup> New England Power relied on *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,841 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,427 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S.Ct. 1012 (2002).

<sup>17</sup> Norwood cited Ex. NOR-11 at 2-3; *New England Power Co.*, 82 FERC ¶ 61,179 (1998).

<sup>18</sup> Staff cited Ex. S-7 at 2-3 (1997 Annual Report of New England Electric System (NEES) filed in March 1998 with the Securities and Exchange Commission, in which NEES stated: "We are delighted to report that the purchase price will effectively recover our investments not only in our fossil and hydro plants, but in nuclear plants as well.").

<sup>19</sup> The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2004); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (1<sup>st</sup> Cir. 2000).

charge for the premature termination of a contract,<sup>20</sup> she found that the use of “present revenues” here is supported by the same goals that the Commission cited in Order No. 888.<sup>21</sup> In light of Norwood’s failure to file an FPA section 206 complaint to decrease its rates prior to termination, the Judge found that it was reasonable to use the last 12 months of New England Power’s Commission-approved rates to calculate the actual revenues that New England Power received from Norwood.

16. The Judge also adopted the 28 percent adjustment to reflect the divestiture of non-nuclear assets that was known and measurable at the time New England Power filed the Norwood CTC. The Judge pointed out that Respondents filed an application with the Commission on October 1, 1997, seeking approval for the divestiture of their generating business,<sup>22</sup> and New England Power indicated that the proceeds of the divestiture would be credited to New England Power’s wholesale customers to reduce stranded costs.<sup>23</sup> The Judge also found that New England Power’s corporate parent cited the divestiture in its 1997 Annual Report to the Securities and Exchange Commission<sup>24</sup> and that New England Power already was making plans for the divestiture, including signing the contract for the sale of the assets. In addition, the Judge cited the 28 percent reduction

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<sup>20</sup> The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003), citing *New England Power Co.*, 83 FERC ¶ 61,174 at 61,273, *reh’g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (D.C. Cir. 2000).

<sup>21</sup> The Judge stated that the Commission announced in Order No. 888 the need to provide certainty to customers contemplating a change in suppliers and to avoid disputes over whether the rates were excessive or inadequate. The Judge cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,841 (1996), *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,427 (1997).

<sup>22</sup> Docket Nos. EC98-1-000 and ER98-6-000.

<sup>23</sup> The Judge stated that Norwood relied on Ex. NOR-12 at 2. The Commission approved the divestiture and the CTCs for the affiliates. *New England Power Co.*, 82 FERC ¶ 61,179 (1998).

<sup>24</sup> The Judge cited Ex. S-7 at 2-3.

given to New England Power's affiliated customers.<sup>25</sup> For all of these reasons, the Judge concluded that divestiture of these non-nuclear assets was known and measurable at the time New England Power filed the Norwood CTC amendment.<sup>26</sup> With respect to the divestiture of the nuclear assets, the Judge noted that the 1997 annual report of New England Power's corporate parent showed that New England Power was planning to divest those assets as well, but the Judge did not include the sales in the calculation of "R" because she found that the transactions occurred piecemeal between 2000 and 2002.<sup>27</sup>

17. The Judge recognized that Norwood and New England Power's settling affiliates are not similarly situated, but despite that, she determined that similar treatment with respect to the effect of the divestiture proceeds is necessary. While she acknowledged that this adjustment would not result in completely equal treatment for Norwood and the settling customers, the Judge found that such differences are not unduly discriminatory under the facts of this case. The Judge concluded that, without interest, the "R" factor is \$141,314,711.

## **2. Positions of the Parties on Exceptions**

18. Respondents challenge the Judge's conclusion that divestiture of the non-nuclear facilities was known and measurable at the time New England Power filed the Norwood CTC. Additionally, Respondents contend that adjusting the CTC to assure parity with settling customers is contrary to the Commission's policy of encouraging settlements.<sup>28</sup> Respondents distinguish the settling customers' CTCs in part because those customers must pay a share of New England Power's power supply-related costs indefinitely, while Norwood's CTC obligation is limited based on the remainder of the contract term.<sup>29</sup>

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<sup>25</sup> The Judge cited Ex. NOR-11 at 2-3.

<sup>26</sup> The Judge cited Ex. S-7 at 2-3.

<sup>27</sup> The Judge cited Ex. S-7 at 2-3; Tr. 477-83.

<sup>28</sup> Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1<sup>st</sup> Cir. 2000); *New England Power Co.*, 83 FERC ¶ 61,174 at 61,722 (1998); *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 n.1 (2003); Ex. NEP-2 at 3; Ex. NEP-9; Ex. NEP-45; Ex. NOR-11 at 4; Ex. NOR-12 at 9-10; Tr. 467-70. See also *Edwards Mfg. Co., Inc.*, 83 FERC ¶ 61,269 at 62,123 (1998); *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 at 61,162 (1979).

<sup>29</sup> Respondents cite Ex. NEP-27 at 58-59.

Respondents further assert that the Judge's adjustment is contrary to the CTC formula, Order No. 888, and the Judge's own determination that the CTC is properly calculated on the basis of New England Power's actual revenues from Norwood at the time of the termination.<sup>30</sup> Respondents argue that the Norwood CTC does not permit this adjustment to the revenues.<sup>31</sup>

19. Respondents further contend that the Judge ignored testimony that the 28 percent reduction in the settlement CTCs was the result of reflecting a reduction in the charge for the wholesale Standard Offer service that was provided to the settling customers but not to Norwood, in addition to reflecting the non-nuclear asset sale proceeds in the settlement CTCs.<sup>32</sup> Respondents reason that the savings attributable to the Standard Offer service should not reduce Norwood's CTC because the Commission and the courts have found that Norwood was not entitled to Standard Offer service.<sup>33</sup>

20. Respondents next assert that the Judge's adjustment is contrary to the CTC formula, Order Nos. 888 and 888-A, and the Judge's own determination that the CTC is properly calculated on the basis of New England Power's actual revenues from Norwood at the time of the termination.<sup>34</sup> Respondents assert that there is no provision for adjustment to those revenues,<sup>35</sup> consistent with the Stranded Cost Obligation formula

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<sup>30</sup> Respondents cite Ex. NEP-2, Schedule II-C at 2.

<sup>31</sup> Respondents cite *New England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998); Ex. NEP-1 at 8.

<sup>32</sup> The rates that Norwood paid under the tariff prior to its contract termination were the same as the rates paid by New England Power's affiliates before the Boston Edison Transmission credit. The rate was 6.52 cents per kWh for the 12 months ending March 31, 1998. Thus, the 28 percent discount (1.82 cents per kWh) was determined by reducing the 6.52 cents by the 3.2 cents per kWh for the Standard Offer service and 1.5 cents per kWh for the affiliates' CTC ( $6.52 - 3.2 - 1.5 = 1.82$ ).

<sup>33</sup> Respondents cite *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 (2003); *New England Power Co.*, 82 FERC ¶ 61,179 at 61,664 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392, 403 (1<sup>st</sup> Cir. 2000).

<sup>34</sup> Respondents cite Ex. NEP-2, Schedule II-C at 2.

<sup>35</sup> Respondents cite Ex. NEP-1 at 8.

adopted in Order No. 888.<sup>36</sup> Respondents further argue that Order Nos. 888 and 888-A do not provide for adjustments to a supplier's present revenues to reflect the impact of future events, whether or not known and measurable.

21. Respondents claim that the Commission recognized that the Norwood CTC formula was based on the lost revenues approach adopted in Order No. 888 and accepted it without objection to the formula's reliance on the present revenues from a terminating customer or on the absence of adjustments to account for the planned sale of the non-nuclear assets.<sup>37</sup> However, maintain Respondents, while the Judge determined that the same considerations that caused the Commission to rely on present revenues in the Order No. 888 Stranded Cost Obligation formula applied to the Norwood CTC, she disregarded her own ruling that it was reasonable to use New England Power's Commission-approved rates in making the calculation when she recommended that the actual revenues should be reduced in proportion to the reductions applicable to the settling affiliated customers.

22. Additionally, Respondents assert that the Commission's regulations provide that adjustments to an historic Period I test year are limited to "changes that affect revenues and costs prior to the proposed effective date of the rate schedule change and that are known and measurable with reasonable accuracy at the time the rate schedule change is filed."<sup>38</sup> While the proposed effective date of the CTC amendment was March 31, 1998, Respondents emphasize that the divestiture transaction occurred several months later.

23. Respondents also cite Order No. 888-A, stating that the revenues lost approach used in the Norwood CTC already includes an offset for the value of generating assets that can fetch a market price higher than the book value of the assets;<sup>39</sup> therefore, there is

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<sup>36</sup> Respondents cite Order No. 888 at 31,841.

<sup>37</sup> Respondents cite May 15, 1998 Order at 61,723.

<sup>38</sup> Respondents cite 18 C.F.R. §§ 35.13(d)(1)(ii), 35.13 (a)(2)(D) (2004). Section 35.13(a)(2)(A) defines the test period as "the most recent calendar year for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing...."

<sup>39</sup> Respondents cite *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,438-39 (1997).

no need for a divestiture credit. In this regard, Respondents assert that the Judge erred in finding that the Order No. 888-A stranded cost obligation provision does not apply to the Norwood CTC.

24. Norwood maintains that the affiliates were allowed to terminate their contracts and receive more favorable rates than the rate offered Norwood. Further, asserts Norwood, Respondents incorrectly relied on *Delmarva Power & Light Co. (Delmarva)*<sup>40</sup> in support of their assertion that the Judge's decision on this issue would subvert the public interest in promoting settlements.

25. Additionally, Norwood challenges Respondents' claim that the revenue adjustment does not comply with the "known and measurable" standard established in 18 C.F.R. § 35.13 (d)(1)(ii). Norwood submits that this regulation applies only if the utility is not required to file Period II data and only if the company adjusts all Period I data to reflect such changes.

26. Norwood also maintains that the Judge did not give it an undue preference.<sup>41</sup> For example, states Norwood, the Judge did not require an adjustment for the sale of the nuclear facilities, although such an adjustment is included in the settling customers' CTCs. Norwood argues that New England Power made the commitment to divest the nuclear facilities well before it filed the Norwood CTC;<sup>42</sup> therefore, the revenue factor in its CTC should be adjusted to reflect the divestiture of those facilities as well as the non-nuclear facilities.

27. Norwood also argues that adjusting revenues to account for divestiture of assets is consistent with Order No. 888.<sup>43</sup> Norwood contends that Order No. 888 implemented a

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<sup>40</sup> 6 FERC ¶ 61,084 (1979). In that case, the Commission stated that differences in rates between settling and non-settling customers may be justified if there are factual differences that justify the disparity. *Id.* at 61,161-62.

<sup>41</sup> Norwood cites Ex. NOR-30 at 3-7; Ex. NOR-35.

<sup>42</sup> Norwood cites Ex. NOR-10 at 13-17.

<sup>43</sup> Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,788-89 (1996).

separate approach applicable to a situation involving divestiture of generating assets. Norwood also claims that the Commission denied stranded cost recovery where the departing customer does not use the former supplier's transmission system to reach a new supplier, as is true in this case.<sup>44</sup>

28. Norwood contends that the following evidence supports the 28 percent reduction in revenues:

1. Respondents agreed well before New England Power filed the Norwood CTC to divest all of their generation business (Ex. NOR-10 at 13-17);
2. Respondents sold all of their non-nuclear generation business pursuant to a contract dated August 5, 1997, for \$500 million over book value (Ex. NOR-12);
3. Respondents agreed to structure CTC charges for their affiliates, filed with the Commission on October 1, 1997, to reduce the affiliates' CTC charges to 1.5 cents per kWh based on the sale agreement and to provide for annual updates to reduce fixed costs based on the sale of nuclear units;
4. Respondents obtained approval from the Commission on February 25, 1998, for the divestiture and for the reduced CTCs for their affiliates, including annual updates to reduce fixed costs (*New England Power Co.*, 82 FERC ¶ 61,179 (1998));
5. Respondents filed annual reports for 1997 with the Commission and the Securities and Exchange Commission advising of the proceeds from the divestiture for all of their generation business, including their nuclear units (ID at P 67);
6. Respondents closed the divestiture transaction in September 1998 (Ex. NEP-27 at 55, 58);
7. Respondents closed the sale of the nuclear units in 2000-2002 (ID at P 67); and
8. As of November 11, 2003, Respondents adjusted the CTCs for their affiliates downward in annual increments based on remaining fixed power

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<sup>44</sup> *Id.* at 30,362. Respondents also cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 399 (1<sup>st</sup> Cir. 2000).

supply costs, to range from 1.407 cents per kWh in 1998 to 0.14 cents per kWh in 2008 (Ex. NOR-41, Schedule 1, page 1 of 16, column 12).

29. Staff supports the Judge's adjustment to the "R" component, claiming that it prevents New England Power from double-recovering its fixed costs.<sup>45</sup> Staff points out that the Commission previously decided that the stranded cost obligation provisions of Order No. 888 do not control in this case. Staff maintains that this case is merely to calculate the proper compensation due New England Power as a consequence of Norwood's termination of the contract. Staff also states that the Judge correctly determined that the proper reading of the "R" component description in the Norwood CTC requires use of the last 12 months of revenue data as a starting point from which adjustments, such as that for the divestiture, could be made.<sup>46</sup>

30. Staff asserts that the CTC formula contemplates further adjustments when the last 12 months of revenues are used in the calculation of "R". Staff agrees that the evidence cited by Norwood supports the Judge's determination that divestiture of the non-nuclear assets was known and measurable. Staff also emphasizes that the 28 percent figure is supported by the evidence and is not an attempt to ensure parity with the settling customers.

31. Staff further challenges Respondents' argument that the "R" factor already accounts for the divestiture proceeds under the Order No. 888 stranded cost formula. Staff emphasizes that the Order No. 888-A provision assumes that the assets continue to be owned by the utility claiming stranded costs. Further, maintains Staff, Order No. 888 specifically states that, when stranded assets are sold above their book value, the proceeds must be taken into account.<sup>47</sup> Staff reasons that, if this were done automatically, the Commission in Order No. 888 would not have singled out divestiture sales as exceptional circumstances for determining stranded costs, rather than determining such costs through a formula.

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<sup>45</sup> Staff states that even New England Power's witness agreed that this would be inappropriate. Staff cites *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 65, 68, 70 (2004); Tr. 543; Ex. S-3 at 17.

<sup>46</sup> Staff states that this is true even though Norwood could have filed a complaint that might have resulted in a calculation of revenues even lower than that the results from adjusting the last 12 months of data to reflect the divestiture.

<sup>47</sup> Staff cites Ex. S-1 at 19.

### 3. Commission Analysis

32. The Commission modifies the ID with respect to calculation of the “R” factor. Although the Judge correctly adopted use of the actual revenues paid by Norwood during the 12 months prior to the contract termination as the starting point in determining the total revenue component in this case, the Commission finds that the 28 percent adjustment adopted by the Judge does not comply with the CTC formula previously accepted by the Commission. The tariff specifically provides for certain types of adjustments, including the credit for transmission services provided by third parties,<sup>48</sup> which is discussed elsewhere in this order, but does not provide for an adjustment such as the Judge proposed, which reflects the divestiture of certain facilities and a factor related to the rates for Standard Offer service, which Norwood has not received. Absent specific language providing for such an adjustment, the Commission will not include it in the calculation of Norwood’s CTC. The tariff language is unambiguous.

33. Moreover, as the Commission has stated, Norwood is not similarly situated vis-à-vis the settling customers, so this difference between its CTC and those of the settling customers is not undue discrimination. The Commission emphasizes again that the purpose of this CTC is to compensate New England Power for the loss of revenues attributable to Norwood’s early termination of the contract. There is no requirement that Norwood receive the benefits received by the customers that negotiated their departures from New England Power’s system, an opportunity that Norwood declined.<sup>49</sup> The

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<sup>48</sup> FERC Electric Tariff No 1, Schedule II-C, Original Page No. 2, section 1.a. attached to New England Power’s Amendment to Tariff (March 18, 1998) provides as follows:

The calculation of Total Revenue shall include credits pursuant to Schedule III-D of this tariff as well as all credits and surcharges applicable to the Customer under the Customer’s Service Agreement with the Company under this tariff, with the exception of credits associated with Integrated Facilities arrangements under Schedule III-B of this tariff and any credits associated with the Company’s reimbursement of the Customer’s payments to third parties for transmission service.

<sup>49</sup> Respondents’ reliance on *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 (1979), is misplaced. That order does not say that affording a non-settling customer the same adjustment provided to the settling customers would discourage settlements. Rather, the Commission ruled in that case that differences in rates between settling and non-settling customers may be justified if there are factual differences to justify the disparity. As the Commission has stated in this proceeding as well as in others,

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Commission will not address again the arguments that Norwood's CTC is governed by the stranded cost obligation provisions of Order No. 888. That issue has been resolved much earlier, as previously discussed in this order. Accordingly, the correct "R" factor is \$196,270,432.

### **C. Rate of Return**

#### **1. The ID**<sup>50</sup>

34. This issue deals with the rate of return that can be used in determining the "R" component of the CTC. At the hearing, New England Power argued that the CTC does not specify a rate of return and, further, that the issue already has been litigated. In contrast, Norwood claimed that the CTC's rate of return is excessive<sup>51</sup> and that a rollback of the demand charge by \$1.94/kWh is required. Norwood contended that this would reduce the level of gross revenue by \$1,138,931, based on the 12-month period ended March 31, 1998.<sup>52</sup>

35. Norwood also disputed New England Power's contention that the issue is outside the scope of this case, emphasizing that the Commission made that determination when it set this issue for hearing<sup>53</sup> and that New England Power did not seek rehearing of the Hearing Order. Staff agreed that the Norwood CTC would yield an excessive rate of return for New England Power. However, Staff maintained that Norwood's rate of return calculations were too high as well. Staff claimed that Norwood's proposed rate of return did not reflect New England Power's ownership of generating assets, which were still at a nominal risk of non-recovery for a period of time after March 1998.<sup>54</sup>

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differences between Norwood's CTC and the CTCs of the settling customers are warranted because Norwood and the settling customers are not similarly situated.

<sup>50</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 72-79 (2004).

<sup>51</sup> Norwood cited Ex. NOR-18; Ex. NOR-17 at 10-11; Ex. NOR-25 at Workpaper No. 7.

<sup>52</sup> Norwood cited Ex. NOR-30 at 6-7; Ex. NOR-31 at 3.

<sup>53</sup> Norwood cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 13, 18 (2003).

<sup>54</sup> Staff cited Tr. 254– 255.

36. The Judge ruled that this issue is within the scope of this case.<sup>55</sup> However, the she found that neither Norwood nor Staff justified the reductions they recommended.<sup>56</sup> Accordingly, the Judge stated that, because the actual revenues included in the calculation by New England Power were just, reasonable, and not unduly discriminatory once adjusted downward to account for the divestiture, the overall rate of return that New England Power would earn from the CTC need not be adjusted.

## **2. Commission Analysis**

37. On exceptions, the parties raise no new arguments not addressed by the Judge. The Commission affirms the ID with respect to the reasonableness of the rate of return used in the determination of the “R” component of the CTC. The record supports the Judge’s ruling that Norwood and Staff failed to meet the FPA section 206 burden of proof to support their challenges to the rate of return. The rate of return applicable to the CTC formula is the same as the rate of return applicable to the rates charged Norwood during the 12 months preceding the contract termination. Neither Norwood nor Staff has shown that such rate of return was unjust or unreasonable or that its use in the CTC formula was improper. Therefore, regardless of whether the actual revenues are adjusted to reflect the divestiture, the Commission finds that the rate of return used by New England Power in its CTC calculations is just and reasonable.

### **D. Deduction for Transmission Revenues**

#### **1. The ID<sup>57</sup>**

38. According to the tariff, the “R” component must be reduced by transmission revenues. At the hearing, New England Power claimed that Norwood improperly sought a transmission credit based on New England Power’s transmission costs rather than the transmission credit in Norwood’s service agreement.<sup>58</sup> However, the Judge found that because Norwood paid Boston Edison for transmission and received a credit from New England Power for that purchase, the amount Norwood paid Boston Edison for

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<sup>55</sup> The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P18 – 21 (2003).

<sup>56</sup> The Judge cited Ex. NOR-17 at 14-15.

<sup>57</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 80-89 (2004).

<sup>58</sup> New England Power cited Tr. 278; Ex. NEP-51 at 6.

transmission services should be used as the transmission credit in determining the “R” factor.

## **2. Commission Analysis**

39. The Commission summarily affirms the Judge’s determination with respect to this issue. New England Power applied the proper factor in calculating the credit for transmission revenues in Norwood’s CTC, and the parties have raised no new arguments on exceptions.

### **E. The Market Price Estimate of the “M” Factor**

#### **1. The ID**<sup>59</sup>

40. The Judge acknowledged that New England Power properly determined Norwood’s released load<sup>60</sup> for the remaining term of Norwood’s contractual obligation to New England Power.<sup>61</sup> While the Judge pointed out that Norwood did not challenge at the hearing the reasonableness of the prices that were forecast,<sup>62</sup> she explained that Norwood and Staff argued that New England Power improperly relied on a market price forecast by an independent third party (the POLARIS forecast) instead of actual market values determined in the Northeast Power Pool (NEPOOL) market. Additionally, Norwood claimed at the hearing that New England Power failed to provide for updates to the estimates, as it had done in CTCs negotiated with other Tariff No. 1 customers, including affiliates of New England Power.<sup>63</sup> Norwood further asserted at the hearing

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<sup>59</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 37-54 (2004).

<sup>60</sup> The Judge explained that New England Power corrected an initial error in calculating Norwood’s Released Load. The Judge cited Ex. NEP-1 at 31; Ex. NEP-6.

<sup>61</sup> The Judge cited *Town of Norwood, Massachusetts*, 87 FERC ¶ 61,341 (1999), *reh’g denied*, 88 FERC ¶ 61,187 (1999), *aff’d*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001).

<sup>62</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 38 (2004).

<sup>63</sup> New England Power negotiated CTCs with other departing Tariff No. 1 customers, including its affiliates. Those CTCs contain certain provisions that are not part of the Norwood CTC, and many of Norwood’s objections to its CTC center on these differences. However, as noted throughout this order, the Commission and the court have

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that it should be allowed to broker the electricity it is not purchasing as a means of minimizing its CTC obligation. At the hearing, New England Power countered that Norwood's challenges were beyond the scope of this proceeding and further, that Norwood's position was contrary to Order No. 888. New England Power maintained that Norwood had not demonstrated that the alternative forecasts it proposed rendered use of the POLARIS forecast unreasonable.

41. The Judge ruled that Norwood and Staff had not demonstrated that use of the POLARIS forecast in the CTC calculation rendered it unjust and unreasonable. The Judge found in part that the market prices in New England Power's forecast were very close to, but slightly higher than certain other prices that could also be deemed relevant to the projections, including: (1) the prices in Norwood's replacement contract with Northeast Utilities, (2) the prices in another contemporaneous power supply offer that Norwood received, and (3) the prices that Norwood offered New England Power for continued purchase of power. The Judge recommended that, if the Commission rejects use of the POLARIS forecast, Norwood's replacement contract with Northeast Utilities would provide the best alternative basis for the market price estimate, although she cautioned that use of the prices in the replacement contract would result in a higher CTC for Norwood.

## **2. Positions of the Parties on Exceptions**

42. Norwood contends that the Judge erred by rejecting its arguments that the estimated market value (1) was far below actual market prices determined by the NEPOOL ISO from the inception of the NEPOOL Energy Exchange in May 1999 through February 2004, the period corresponding to the updates required by the CTCs applicable to New England Power's affiliates;<sup>64</sup> (2) conflicted with the stranded cost provisions of Order Nos. 888 and 888-A requiring an independent market analysis with supporting workpapers and prohibiting the use of a customer's contract rate without the customer's consent; and (3) conflicted with other market projections available prior to the

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ruled that these differences are not undue discrimination because, given Norwood's unilateral termination of its contract, it is not similarly situated with the customers that negotiated the terms of release from their contracts with New England Power. *See, e.g., Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392-402-03 (1st Cir. 2000); *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 P. 19 (2003); *New England Power Co.*, 84 FERC ¶ 61,175 at 61,920 (1998); *New England Power Co.*, 83 FERC ¶ 61,265 at 62,106-07 (1998).

<sup>64</sup> Norwood cites Ex. NOR-15 at 2-7; Ex. NOR-16; Ex. NOR-28; Ex. NOR-29.

date of the CTC filing. Moreover, argues Norwood, the Judge's ruling would allow Respondents to collect the value of the power twice -- once from Norwood and again by selling the power in the NEPOOL market at actual market prices. Additionally, Norwood and Staff contend that New England Power improperly obtained the market value estimates (the POLARIS forecast) from the testimony of an employee of another company in a proceeding before the New Hampshire Public Service Commission rather than from a qualified witness in this case. Norwood also challenges the relevance of market value estimate numbers based on the Norwood/Northeast Utilities contract, claiming that this is contrary to Order No. 888's requirements.

43. Norwood points out that Respondents' generation divestiture agreements with its affiliates<sup>65</sup> required Respondents to mitigate their stranded cost charges and to credit shares of the net proceeds against the CTC obligations of Mass Electric and Narragansett.<sup>66</sup> However, continues Norwood, while respondents have made annual true-ups to the affiliates' CTCs, Respondents did not provide for comparable true-ups in the Norwood CTC.

44. Norwood next asserts that allowing a customer to broker the power it is no longer purchasing is the only way to protect against New England Power lowballing the market value estimate.<sup>67</sup> However, Norwood states that it does not have the option to broker that power because the Commission has ruled in this proceeding that "the rules relating to stranded cost recovery [under Order No. 888] do not apply to a charge for premature termination of a contract."<sup>68</sup> Despite that, Norwood argues that Order 888 requires different rules when, as here, a divestiture was authorized.

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<sup>65</sup> Norwood cites Ex. NOR-10, Article 6.0 at 13-18; Ex. NOR-12 at 1. In 1996 and 1997, New England Power made several filings to, *inter alia*, restructure its operations and sell its non-nuclear generating facilities. *See Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 4 (2004).

<sup>66</sup> Norwood cites Ex. NOR-12 at 8.

<sup>67</sup> Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996).

<sup>68</sup> Norwood cites *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003).

45. Norwood argues that, if the lost revenue approach is to be used, then Respondents should follow Order No. 888 and should treat Norwood as they do their affiliates and other municipal customers. Norwood maintains that by the time New England Power filed the Norwood CTC, it was no longer entering into any long-term bilateral contracts because of the impending sale of its generation units;<sup>69</sup> therefore, reasons Norwood, New England Power should be required to provide true-ups for the CTC at issue here.<sup>70</sup>

46. In contrast, Respondents assert that the Judge correctly found that Norwood and Staff had not met their burden of proof in challenging the market value estimate because a forecast underlying a wholesale charge is valid if it was reasonable when made, not with the benefit of hindsight.<sup>71</sup> Respondents also emphasize that the Norwood CTC formula provides for the calculation to be based on the market price estimate in effect on the early termination date.<sup>72</sup> In this case, explain Respondents, this was established in the CTC formula as a series of projected annual prices.<sup>73</sup> Thus, continue Respondents, the rate on file relied on a fixed forecast of market prices, not on a series of true-ups based on post-termination market prices. Respondents contend that Norwood's CTC formula uses Order No. 888's formula for calculating a departing customer's stranded cost obligation under the lost revenues approach, which provides for a credit based on an up-front estimate of the market value of a departing customer's released load, without true-up

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<sup>69</sup> Norwood cites Tr. 402-03.

<sup>70</sup> Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996) (emphasis in original). In its brief on exceptions, Norwood points out that the CTCs applicable to New England Power's affiliates contained "true-up" provisions, which require an annual reconciliation of those CTCs to be consistent with the actual costs of New England Power's remaining facilities. Brief on Exceptions of Complainant Town of Norwood, Massachusetts at 31-32 (July 9, 2004).

<sup>71</sup> Respondents cite *Northern Natural Gas Co.*, 27 FERC ¶ 61,031 at 61,057 (1984); *Jersey Central Power and Light Co.*, 60 FERC ¶ 63,012 at 65,140 (1992), *aff'd*, 77 FERC ¶ 61,001 (1996); *Indiana & Michigan Electric Co.*, 4 FERC ¶ 63,039 (1978), *aff'd in part and modified in part*, 10 FERC ¶ 61,238 (1980).

<sup>72</sup> Respondents cite Ex. NEP-2 at Orig. Page 3.

<sup>73</sup> *Id.* at Orig. Page 4.

adjustments. Respondents emphasize that New England Power specifically stated when it filed the Norwood CTC that any updates would not affect the CTC.<sup>74</sup>

47. Respondents further emphasize that Norwood rejected a number of opportunities to pay settlement CTCs (calculated under the same formula used to calculate the CTCs of those customers who settled the terms of their departures).<sup>75</sup> Respondents point out that the Commission and the courts have ruled that differences between the CTCs payable by Norwood and those payable by other customers are not undue discrimination.<sup>76</sup>

48. Respondents next contend that Norwood improperly relies on the Order No. 888 principle that a utility may use replacement contract prices as market price estimates only if the customer agrees. They argue that New England Power did not base the market price estimate in Norwood's CTCs on the prices in Norwood's replacement contract with Northeast Utilities; in fact, they claim that New England Power did not know the replacement contract prices when it filed the CTC formula. Respondents support the Judge's reliance on evidence of a contemporaneous price in a binding, long-term contract, pointing out that the Commission stated in Order No. 888 that the price a customer pays its alternative supplier is an accurate measure of the market value of the power not taken from the former supplier.<sup>77</sup>

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<sup>74</sup> Respondents cite Ex. NEP-2, Transmittal Letter at 2 n.1. Respondents state that New England Power has found it did not need to update the CTC formula's market price estimate because none of its other wholesale requirements customers has indicated any intention to terminate service prematurely. Ex. NEP-1 at 12.

<sup>75</sup> Respondents cite *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 n.21 (2003); Ex. NEP-1 at 44; Ex. NOR-11 at 4; Ex. NEP-2 at 3; Ex. NEP-9.

<sup>76</sup> Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1<sup>st</sup> Cir. 2000); *New England Power Co.*, 84 FERC ¶ 61,174 at 61,920 (1998), *citing Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir), *cert. denied*, 469 U.S. 917 (1984); *Pacific Gas and Electric Co.*, 51 FERC ¶ 61,371 at 62,264, *order denying reh'g*, 52 FERC ¶ 61,318 (1990). *See also New England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998); *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 (2003).

<sup>77</sup> Respondents cite *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10,

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49. Respondents also challenge Norwood's argument that New England Power failed to comply with Order No. 888 when it did not submit an independent market analysis with supporting workpapers. They emphasize that the Commission explicitly rejected this argument when it held that the requirements for stranded cost recovery under Order No. 888 do not apply to CTCs because the CTC "would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations."<sup>78</sup>

50. Staff opposes Norwood's exception in part, pointing to the Judge's statement that "the fact that the price forecast [New England Power] used in 1998 did not perfectly predict subsequent energy prices does not satisfy Norwood's burden to prove that the Market Price Estimate in the CTC Formula is unjust and unreasonable."<sup>79</sup> In addition, even if actual prices were relevant, Staff argues that Norwood did not present the complete actual prices from April 1, 1998 forward, and indeed could not have, as there was no organized energy market in the region at the time.

### **3. Commission Analysis**

51. The Commission affirms the ID with respect to this issue. The record supports the Judge's determination of the "M" factor in the Norwood CTC formula, which is explicitly defined in the tariff and has not been shown to be unjust or unreasonable. Additionally, the Commission and the courts previously have ruled on certain issues raised by Norwood.

52. Norwood's arguments fail for a number of reasons. First, because Norwood unilaterally terminated its contract and was not a party to the settlement with New

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1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996). Respondents point out that the Commission ruled in the Hearing Order that Norwood was not entitled to the "market or broker" option and explicitly excluded that issue from this proceeding. *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003). Moreover, argue Respondents, the relevance of the prices in Norwood's replacement contract to the reasonableness of the similar market price estimate is obvious and has nothing to do with whether or not Norwood was offered the right to market or broker power from New England Power.

<sup>78</sup> Respondents cite *New England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998). See also *New England Power Co.*, 84 FERC ¶ 61,174 at 61,920 (1998).

<sup>79</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 41 (2004).

England Power's other wholesale customers, it is not situated similarly to New England Power's settling customers.<sup>80</sup> The Commission affirmed this in the Hearing Order.<sup>81</sup> Because the Norwood CTC is not required to contain the same provisions as the CTCs for the settling customers, it is not unduly discriminatory for New England Power to refuse to afford Norwood periodic true-ups<sup>82</sup> or otherwise include in Norwood's CTC the features included in the settling customers' CTCs. Norwood is not entitled to have it both ways, *i.e.*, it cannot seek a better outcome through litigation in lieu of settlement, and then, in this proceeding, achieve the benefits of a settlement to which it was not a party.

53. In the Hearing Order, the Commission rejected several other arguments that Norwood raises again on exceptions to the ID. The Commission stated as follows:

Both the Commission and the court of appeals have found that: (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable; (b) the rules related to stranded cost recovery do not apply to a charge for premature termination of a contract; and (c) the rules allowing customers to market or broker released capacity do not apply to premature contract termination.<sup>83</sup>

Thus, Norwood's arguments to the contrary are rejected.

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<sup>80</sup> The Court of Appeals pointed out that New England Power offered to negotiate a similar termination agreement with Norwood, but its efforts were rebuffed. *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1<sup>st</sup> Cir. 2000).

<sup>81</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 19 (2004) (footnotes omitted).

<sup>82</sup> Norwood acknowledges that New England Power's CTC filing provided that updated estimates would not affect the CTC charges payable by a customer that terminated prior to the filing of the CTC formula. Although Norwood argues for a different interpretation of that sentence, the Commission finds that the provision is clear and may not be interpreted as urged by Norwood.

<sup>83</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003) (footnotes omitted).

54. The Commission also affirms the Judge's interpretation of language in the CTC filing accepted by the Commission stating that updated estimates will not affect CTC charges payable by a customer that terminates the contract early.<sup>84</sup>

55. Norwood challenges the use of the POLARIS forecast in determining the "M" factor. However, the Commission finds that the Judge's acceptance of that forecast was reasonable. The Judge determined that Norwood and Staff had not demonstrated that use of the POLARIS forecast rendered the CTC's market price estimate unjust and unreasonable. In fact, the Judge pointed to relevant contemporaneous prices that would have resulted in an even higher CTC for Norwood. Specifically, the Judge observed that the market prices in New England Power's POLARIS-based forecast were only slightly higher than the prices (1) in Norwood's replacement contract with Northeast Utilities, (2) in another power supply offer received by Norwood, and (3) that Norwood offered New England Power for continued purchase of power.

56. Finally, there is no merit to Norwood's allegation that New England Power could in effect collect twice on the power supply relinquished by Norwood. No double collection is possible because the CTC formula subtracts the value of the power supply relinquished by Norwood from the revenues otherwise collectable under the contract. The value of the power relinquished by Norwood is reflected as "M" in the CTC formula. Therefore, all that is collected from Norwood is the difference between what New England Power would have collected from Norwood, absent the contract termination, and what it would recover if it sold the relinquished power to another customer.

## **F. CTC Cap**

### **1. The ID**

57. The CTC cap is the maximum contract termination charge that Norwood can be obligated to pay.<sup>85</sup> New England Power again argued that its proposed CTC cap is

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<sup>84</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 42 (2004).

<sup>85</sup> The CTC cap was established by New England Power's March 18, 1998 tariff amendment filing. It provides as follows:

In no event shall the difference between R and M ... exceed the Customer's annual contribution to the Company's fixed power supply costs under this tariff. The Customer's annual contribution to the Company's fixed power supply costs shall equal its Total Revenue minus Transmission Revenue minus the Company's

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consistent with the stranded cost obligation provisions of Order No. 888-A,<sup>86</sup> which, according to New England Power, provides that the revenue stream estimate automatically includes an offset for the market value of any generating assets reflected in the utility's rates that are worth more than their book value.<sup>87</sup> New England Power also claimed that the Commission has approved use of the cost of fuel as a proxy for the variable power supply costs.<sup>88</sup> In addition, New England Power challenged the assertion that the CTC cap must be adjusted to afford Norwood treatment comparable to that of other customers.

58. In contrast, Norwood argued that New England Power's proposed cap overstated the fixed power supply costs. Norwood proposed alternate versions of a CTC cap, one of which subtracted the fixed cost of the divested plant assets from the applicable tariff rate.<sup>89</sup> Under this version, Norwood's maximum contribution to New England Power's

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Average Fuel Costs. Average Fuel Costs shall equal the annual average of revenues the Company recovered for its Cost of Fuel, as defined in ... this tariff multiplied by the Customer's monthly kilowatt-hour purchases during the period over which Total Revenue as determined in Section 1 above.

<sup>86</sup> New England Power cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,425, 30,438 (1997).

<sup>87</sup> *Id.* at 30,438-39; Ex. NEP-52 at 7 – 8 (“If present rates include some assets that have a market value that exceeds net book value . . . the formula automatically captures the described offset because the revenue stream is based on the lower book value of the utility's assets rather than their higher market value.”).

<sup>88</sup> New England Power cited *New England Power Co.*, 83 FERC ¶ 61,174 at 61,723 (1998). New England Power explains that in Order No. 888-A, the Commission recognized that the variable component of a wholesale power sale is “mostly fuel cost.” New England Power cited *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] ¶ 31,048 at 30,433 (1997).

<sup>89</sup> Norwood cited Ex. NOR-32 at 3.

remaining fixed costs would be a total of \$18.3 million over the CTC payment period. The second version used the fixed costs that New England Power used to develop the CTCs paid by its affiliates,<sup>90</sup> resulting in a CTC cap of \$7,459,963 for Norwood.

59. According to Staff, if the Order No. 888 stranded cost provisions are applicable here, then in the unique scenario in which a utility claims stranded assets and then divests those assets, the Commission will account for the divestiture in determining the appropriate recovery.<sup>91</sup> Staff also contended that New England Power overstated the CTC cap by including some variable costs as fixed costs, contrary to Order No. 888, which establishes a maximum stranded cost obligation as revenues minus “variable costs.” Staff maintained that inclusion of only some variable costs in fixed costs allows for the subtraction from revenue of only a subset of variable costs, which then leads to a higher CTC cap. Staff proposed a revised CTC cap, which would include fixed power supply costs and allocate to Norwood its share of those costs for the balance of the contract term.<sup>92</sup>

60. The Judge explained that the CTC is capped as follows:

[T]he difference between “R” and “M” cannot exceed the departing customer’s annual contribution to NEP’s fixed power supply costs under the Tariff, at the time of termination. That annual contribution is in turn defined in the Tariff as the difference between the departing customer’s Total Revenue minus Transmission Revenue -- which defines the R factor applicable to the customer -- reduced by NEP’s Average Fuel Costs with respect to the customer. NEP’s Average Fuel Costs are the annual average of revenues NEP receives for its cost of fuel multiplied by the customer’s monthly kilowatt-hour purchases during the period over which Total Revenue is determined. . . . [T]his determination is made on a one-time “snapshot” basis, at the time of termination.<sup>93</sup>

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<sup>90</sup> Norwood cited Ex. NOR-35; Ex. NOR-30 at 17–20; Ex. NEP-35.

<sup>91</sup> Staff cited Ex. S-1 at 19–30.

<sup>92</sup> Staff cited Ex. S-1 at 20–21.

<sup>93</sup> The Judge cited Ex. NEP-1 at 13– 14.

61. The Judge ruled that the issue of whether the CTC cap is just, reasonable, and not unduly discriminatory is properly within the scope of this case because the Commission set it for hearing.<sup>94</sup>

62. With regard to the parties' dispute over whether the CTC formula cap accounts for the sale of New England Power's assets in excess of their book value, the Judge agreed with Staff that the Order No. 888-A provision assumes the continuing availability of the fixed assets to supply electric service to a customer for which revenue is to be paid. That is not the case here.<sup>95</sup> The Judge also agreed with Staff that the cited provision does not pertain to establishing a stranded cost obligation "cap" when the utility has divested itself of fixed assets by selling them on the market. Further, the Judge stated that the provision does not concern the need to avoid double recovery of fixed assets that would occur once through the sale above book value, and then again through collecting revenues from Norwood as though the fixed assets were still on the books. Thus, concluded the Judge, stranded cost obligation principles are not controlling in determining the justness and reasonableness of the Norwood CTC or the CTC cap formula.<sup>96</sup>

63. Because the Judge found that the CTC cap improperly included fixed non-nuclear assets that had been divested and also improperly included certain variable costs as fixed costs, the Judge rejected New England Power's proposed CTC cap. The Judge also rejected Norwood's proposals.<sup>97</sup> Instead, the Judge adopted the CTC cap recommended

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<sup>94</sup> The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18 (2003).

<sup>95</sup> The Judge cited Ex. NEP-52 at 30,439 ("The revenue stream is based on present rates, which are based on the net book value of all of the underlying assets used to provide the service.")(emphasis added).

<sup>96</sup> The Judge cited *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 21 (2003), citing *New England Power Co.*, 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 398-99 (1<sup>st</sup> Cir. 2000).

<sup>97</sup> Norwood cited Ex. NOR-35; Ex. NOR-30 at 17-20.

by Staff, which as revised, is \$25,403,742.<sup>98</sup> Accordingly, the Judge concluded that, as modified by the ID, the CTC of \$16,925,796, is well below the \$25,403,742 cap.

## **2. Positions of the Parties on Exceptions**

64. Norwood maintains that this case involves the divestiture of assets, as contemplated by Order No. 888, and thus, the amount of stranded costs associated with those assets is the book value less the sale price.<sup>99</sup> Norwood also contends that its CTC cap calculation eliminates bonuses improperly conferred by Respondents on their affiliates and reflects divestiture of the nuclear facilities, as did the settling parties' CTCs. Norwood calculates its share of the fixed costs to be \$7,459,963.<sup>100</sup> It further argues that the Judge erred in adopting Staff's revised CTC cap without correcting for acknowledged overstatements in the computation, which Norwood claims would reduce the cap to \$21,624,966.

65. Norwood asserts that the Judge correctly found that the proposed CTC cap treats certain variable costs as fixed costs. Because fuel costs normally are variable costs,

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<sup>98</sup> The Judge cited Ex. S-12. She acknowledged that New England Power has pointed out the inconsistencies in Staff's first calculation of the CTC cap. However, the Judge pointed out that New England Power has custody and control of the records necessary to clarify which costs fall into which category. Therefore, New England Power has the burden of producing evidence to clear up inconsistencies in Staff's initial calculations. According to the Judge, New England Power has had the opportunity during this case to clear up any inconsistencies that may have resulted from a hastily filed CTC and should therefore be held responsible for the consequences of the CTC cap provision. Further, stated the Judge, New England Power should not be allowed to dispute the credibility of the revised calculations, which are based upon new information it provided. The Judge emphasized that this holding does not disturb the Commission's directive that the party challenging the CTC holds the burden of proof; rather, it ensures that the CTC that New England Power charges Norwood is just, reasonable, and not unduly discriminatory.

<sup>99</sup> Norwood cites *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] ¶ 31,036 at 31,842 (1996).

<sup>100</sup> Norwood cites Ex. NOR-35 at 1-3.

Norwood argues that New England Power bore the burden of proving that some of the variable costs are not included in the fixed costs. Norwood also argues that there are many other variable costs that are not fixed costs, so the Judge properly ruled that it would not be just and reasonable to include those in the fixed costs.

66. Respondents maintain that calculation of the CTC cap is flawed because the Judge uses the same total revenue factor that Respondents have challenged, as discussed above. Moreover, Respondents argue that the CTC cap reflects certain additional errors. First, they claim that the reduction in actual revenues used to calculate the cap is not necessary to protect Norwood from undue discrimination since Norwood declined to terminate service early under the methodology used in the settling customers' CTCs.

67. Second, argue Respondents, it is consistent with Order Nos. 888 and 888-A to calculate the CTC cap using New England Power's actual revenues from Norwood during the period before Norwood's termination of service. Respondents point out that the Judge found that the considerations on which Order No. 888 is based apply to the CTC formula, but they argue that she disregarded this by reducing Norwood's actual revenues in calculating the cap.

68. Next, Respondents challenge the Judge's determination that the effect of the sale of the non-nuclear generating assets was known and measurable at the time the CTC formula was filed. Respondents claim that the Judge failed to apply the Order No. 888-A principle that the revenues lost approach automatically captures an offset for the above-book market value assets. Respondents argue that, if the actual revenues paid by Norwood under rates applicable prior to termination are adjusted to take account of an asset sale or other events that took place months after termination, then the cap does not accurately measure the contribution Norwood was making to New England Power's fixed power supply costs before it terminated service.

69. Respondents further assert that the CTC cap adopted by the Judge is unsupported and gives Norwood the benefit of the settlement it repeatedly rejected. In fact, they continue, the ID prescribes a cap that assures Norwood of CTCs proportionately lower than the CTCs paid by any other customer because its recommended adjustment is based on a shorter payment schedule.<sup>101</sup> Respondents assert that the Commission has rejected a

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<sup>101</sup> Respondents cite Tr. 239, 628, 633-34.

claim that a settlement negotiated with some customers sets a ceiling on the rate to be charged to non-settling customers,<sup>102</sup> and the court has agreed.<sup>103</sup>

70. Next, Respondents argue that the record does not support the Judge's finding that the CTC formula cap treats certain variable costs as fixed costs. According to Respondents, the cap uses New England Power's cost of fuel as a proxy for its variable power supply costs.<sup>104</sup> However, Respondents state that Norwood and Staff failed to quantify any variable power supply costs that are not included in New England Power's cost of fuel, as defined in the tariff.<sup>105</sup> Respondents assert that New England Power is not required to prove that the cost of fuel, as defined in the tariff, was exactly equal to its variable power supply costs, so the Judge's speculation that some unidentified and unquantified variable costs might have been omitted cannot justify the replacement of the CTC formula's provision with an alternative cap calculation.

71. Moreover, state Respondents, unchallenged evidence in the record establishes that the CTC formula's deduction for New England Power's cost of fuel covers more than just variable fuel costs; if anything, it is a conservative proxy for New England Power's variable power supply costs, because it includes significant amounts of fixed costs. Respondents claim that the Judge ignored evidence that Norwood's CTC obligation is still well below the CTC formula's cap provision, even if the deduction for variable power supply costs were increased significantly to account for "certain [unidentified] variable costs" that the Judge believed may not be captured by New England Power's cost of fuel proxy.

72. Next, state Respondents, the Judge's recommendation that the CTC formula's cap be replaced because of her concern that certain variable costs may not be captured by the cost of fuel proxy inappropriately shifts the burden of proof to Respondents. Further, they claim that the ID does not identify any evidence that the alternative cap calculation it adopts is a just and reasonable measurement of the contribution that Norwood was

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<sup>102</sup> Respondents cite *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 at 61,162 (1979).

<sup>103</sup> Respondents cite *New England Power Co.*, 84 FERC ¶ 61,175 at 61,920 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1<sup>st</sup> Cir. 2000).

<sup>104</sup> Respondents cite Ex. NEP-2, Schedule II-C, § B(4); Ex. NEP-27 at 43; Tr. 512-15.

<sup>105</sup> Respondents cite Tr. 666.

making to New England Power's fixed power supply costs under those rates. In fact, assert Respondents, the alternative calculation adopted by the Judge does not remedy the defect she found in the cap calculated in accordance with the accepted CTC formula.

73. Staff maintains that the CTC cap is not intended to guarantee New England Power a continuation of payments it received when it was providing service to Norwood; rather, the cap is designed to ensure that Norwood pays no more than its share of New England Power's sunk costs. Staff also submits that New England Power poorly drafted the description of the Norwood CTC cap in its original filing so that it included some variable as well as fixed costs and that the language contemplates that some variable costs will be treated as fixed power supply costs and that the universe of variable costs is broader than simply fuel costs. Staff contends that the Judge correctly rejected New England Power's arguments concerning the composition of fixed costs in determining the maximum CTC for Norwood. Further, states Staff, because New England Power drafted the provision, it must bear the consequences of the ambiguity.

### **3. Commission Analysis**

74. The Judge correctly stated that the cap issue is within the scope of this case. Further, the Commission previously ruled that the Norwood CTC is not governed by Order No. 888 and that differences between the Norwood CTC and the settling customers' CTC does not make the Norwood CTC unduly discriminatory. The Commission will not address these issues further. The tariff clearly establishes the manner in which the cap is to be calculated. However, the Judge did not follow this formula in her determination of the cap applicable to the Norwood CTC, and the Commission will modify the ID in that regard. As discussed above, the CTC at issue here does not permit a credit relating to divested facilities; therefore, no such credit should be applied in determining the CTC cap.

75. As calculated by the Commission, the CTC cap is \$157,982,793, plus applicable interest, as discussed below. This determination of this sum is reflected in Exhibit NEP-6, which shows a Total Revenue of \$19,676,712, less the Transmission Revenue of \$1,131,474 and less the Fuel Adjustment Revenue (\$3,617,730), for a total annual contribution of \$14,927,508 per year to New England Power's fixed costs times 10 years and seven months. Because this amount exceeds the CTC amount of \$71,881,516 calculated above, the cap does not lower Norwood's CTC.

## **G. Other Issues**

### **1. Interest**

#### **a. The ID<sup>106</sup>**

76. New England Power asserted that Norwood should be required to pay interest in the amount of 18 percent per annum from the time of the original bill in 1998. Norwood disagreed, contending that the CTC filing required use of the prime rate.<sup>107</sup> Norwood also claimed that the 18 percent rate is taken from a tariff provision applicable to delinquent customer bills, which is not the case here, where Norwood contested the filing. However, the Judge stated that Norwood's position regarding interest has been rejected by the Massachusetts Appeals Court,<sup>108</sup> and the Commission did not set the interest issue for hearing. Accordingly, the Judge rejected Norwood's position and found that the issue of the appropriate interest rate was controlled by the outcome of the Massachusetts litigation.

#### **b. Positions of the Parties on Exceptions**

77. Norwood again challenges the 18 percent interest rate, claiming that the state court decision cited by the Judge relied on an erroneous statement that the Commission had accepted that rate. Norwood also asserts that state courts cannot set any part of a Commission-jurisdictional filed rate and that the interest rate is an integral part of the rate. Moreover, claims Norwood, adoption of a state court judgment from March 2001 is inconsistent with the snapshot approach the Judge used to determine other elements of the CTC, which focused on the date of termination of the service.

78. Norwood argues that the CTC provides that interest must be determined under 18 C.F.R. § 35.19a and allows a customer payment schedule options.<sup>109</sup> It also claims that the tariff requires that the CTC must be determined on a net present value basis, with the

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<sup>106</sup> *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 97, 109-110 (2004).

<sup>107</sup> Norwood cited 18 C.F.R. § 35.19a.

<sup>108</sup> The Judge cited *New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 (Mass. App. Ct. 2003), *further appellate review denied*, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 2004 U.S. LEXIS 3861 (2004).

<sup>109</sup> Norwood cites Ex. NOR-8 at 8.

difference between “R” and “M” discounted to the early termination date.<sup>110</sup> According to Norwood, New England Power itself previously calculated the monthly level charge payable over the 10-year, seven-month period, along with interest at the refund rate in effect under the Commission’s regulations at the time of the early termination date, which was eight percent.<sup>111</sup>

79. Respondents support the Judge’s determination that the applicable interest rate is outside the scope of this hearing. They contend that Norwood and Staff did not challenge this conclusion and that Staff offers no explanation for its change in position at the exceptions stage concerning whether the issue had been decided. Even assuming that the issues of the interest rate and whether it has already been decided are properly part of the hearing, Respondents contend that Norwood and Staff failed to prove that application of the Tariff No. 1 late payment interest rate was unjust or unreasonable.

80. Staff asserts that the Judge erred in concluding that the interest rate on the unpaid CTC charges has been resolved elsewhere. According to the Staff, the Judge determined that the interest rate is not a component of the CTC formula and was not identified by the Commission as an issue for this hearing, yet she addressed the issue anyway. In reaching this decision, continues Staff, the Judge did not rely on the record, but instead relied on a decision of a state court. However, Staff acknowledges that the 18 percent interest rate to which Norwood objects is not authorized by the tariff amendment filed with the CTC. Staff asserts that, in determining the interest to be paid on the CTC, the Commission is not bound by the Massachusetts court’s decision, and the Commission should determine the interest rate applicable to the CTC, which has not been adjudicated. Staff points out that Term N from the CTC filing clearly addresses this issue, providing that the appropriate rate of interest is determined pursuant to Commission Rule 35.19a.<sup>112</sup>

### **c. Commission Analysis**

81. The Commission reverses the Judge's determination that 18 percent is the proper interest rate. The Commission did not set the issue of the applicable interest rate for hearing in this proceeding because the tariff clearly addresses that issue. The relevant provision of the CTC tariff amendment adopted by the Commission, Term N of New England Power’s Tariff No. 1 provides that

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<sup>110</sup> *Id.* at 10.

<sup>111</sup> Norwood cites Ex. NEP-1 at 36-37.

<sup>112</sup> Staff cites Ex. NEP-2, Attachment A, p. 1 of 6.f

The Contract Termination Charge shall be payable in equal monthly installments of principal and interest, the first payment to be made within 30 days after the date of termination of service (“Early Termination Date”), over the remaining term of the Customer’s notice period (or such shorter term, or in a single payment, as agreed by the Company and the Customer). The Customer’s payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to section 35.19a of the Commission’s regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

82. The last sentence of this provision clearly establishes the interest rate applicable to the Norwood CTC. Conversely, the tariff provision that establishes an 18 percent interest rate<sup>113</sup> is applicable to a customer’s failure to pay its bills for monthly service, which is not the situation here, where a customer is required to pay a contract termination charge when it terminates service from New England Power prior to the end of the contract term.

## **2. Refund Effective Date**

83. In the Hearing Order, the Commission established February 21, 2003, as the refund effective date, as required by FPA section 206(b). The ID does not address the refund effective date.

### **a. Positions of the Parties on Exceptions**

84. Norwood maintains that the Commission has the authority to correct bills for past CTC charges from the effective date of the rate, which was March 31, 1998. However, Norwood emphasizes that New England Power is not entitled to collect any CTC before the refund effective date.<sup>114</sup>

85. Respondents claim that the ID does not address the Commission’s establishment of February 21, 2003, as the refund effective date, although under FPA section 206, the Commission may only require CTC adjustments payable from and after the refund effective date. Because Norwood delayed almost five years before filing the complaint, Respondents argue that, even if the Commission determines that any reduction in the

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<sup>113</sup> Provision J, Billings and Payment, of Schedule I, Tariff No. 1.

<sup>114</sup> Norwood cites *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-79 (1981).

CTC is appropriate, it can only require such reductions payable after the refund effective date. If the Commission decides to require any adjustments to the CTCs charged to Norwood since April 1, 1998, Respondents claim the Commission must explain which monthly CTCs are affected by the ruling.

86. Staff points out that the Commission did not set for hearing the question of the effect of the refund effective date. Staff argues that at the time of the Norwood CTC filing, the total amount of the CTC was unknown, as were the monthly installments necessary to meet the obligation. Staff maintains that the refund effective date provision protects a customer who is in a continuing service relationship with a utility even though the customer must pay a disputed rate during the pendency of a proceeding to determine the justness and reasonableness of the rate. Staff states that, if Norwood pays in one payment the amount the Commission determines to be due New England Power, it will have met its obligation, and the refund effective date provision will not be violated.

#### **b. Commission Analysis**

87. The language in the Hearing Order concerning a refund date is mandated by the FPA. In this case, because no refunds are due, the refund effective date is not relevant. Norwood's CTC is determined on the basis of a snapshot in time, which is the date of the contract termination. Norwood must now pay in monthly installments or in a lump sum the balance of the CTC plus interest owed to New England Power as determined in this order.

### **3. Filed Rate and *Mobile-Sierra* Doctrines**

#### **a. Positions of the Parties on Exceptions**

88. New England Power argues that because the CTC is a formula rate, it could bill any components of the CTC rate that it desired and that no components need be approved. Further, argued New England Power, even if the Commission changes the components in a section 206 proceeding, they may only be changed after the refund effective date established by the Commission in the Hearing Order. Norwood rejects New England Power's claim that the CTC is a formula rate, instead contending that the CTC is a rate that establishes a fixed, one-time obligation.

89. Respondents acknowledge that, if the Commission determines that a utility has incorrectly computed a charge based on an approved formula rate, it may order refunds to correct that miscalculation; however, the Commission cannot change the formula itself

retroactively (that is, going back before the refund effective date).<sup>115</sup> Respondents state that the Judge did not determine that New England Power had improperly applied the CTC formula rate; rather, she found that two provisions of the CTC formula itself are not just and reasonable, so that Norwood's CTCs should be calculated in a manner that departs from the filed rate. This requires a change in the filed rate, the CTC formula itself.

90. Respondents maintain that the Commission's statement that it "accepted" but did not "approve" the CTC formula does not entitle Norwood to any greater relief. Respondents assert that two courts have ruled that the CTC formula is part of the tariff and is the filed rate. They argue that the Court of Appeals rejected Norwood's claim that the filed rate doctrine does not apply to the CTC formula, stating that it is the filing of the tariff, not the Commission's review or approval of it, which triggers the filed rate doctrine. Respondents further state that the court also observed that the Commission addressed Norwood's challenges to the CTC formula and found the CTC to be in principle a reasonable recovery of expected revenues less avoided costs.<sup>116</sup>

91. Norwood argues that the power contract between it and New England Power provided that any conflict between the contract provisions and the tariff provisions would be governed by the contract.<sup>117</sup> Norwood reasons that, because it never elected to make the CTC part of its contract with New England Power, the CTC is void under the *Mobile-Sierra* doctrine.<sup>118</sup> Norwood also contends that the Judge erred by granting a motion to strike testimony that showed that Norwood declined to accept the CTC because it was so much higher than the affiliates' CTCs.

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<sup>115</sup> Respondents cite *Alabama Electric Coop., Inc. v. Alabama Power Co.*, 5 FERC ¶ 61,274 at 61,599 (1978).

<sup>116</sup> Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 419 (1<sup>st</sup> Cir. 2000).

<sup>117</sup> Norwood cites Ex. NOR-4 at 12, 15; Ex. NOR-1 at 24.

<sup>118</sup> Norwood cites *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Power Co.*, 350 U.S. 348, 355 (1956).

92. Respondents submit that the court rejected the argument that the CTC violates the *Mobile-Sierra* doctrine.<sup>119</sup> Thus, they contend that the Judge properly struck the testimony concerning an argument that was already foreclosed.

### **b. Commission Analysis**

93. Norwood's claim that the Judge improperly struck certain testimony has no merit. Norwood's reasons for declining to accept settlement terms as did New England Power's other customers are not relevant here. When the Commission accepted the CTC, that tariff provision controlled the calculation of the Norwood CTC, regardless of the motivation behind any decisions prior to Norwood's termination of the power contract. Likewise, the Commission rejects the contention that the CTC is void under the *Mobile-Sierra* doctrine. Any such argument was properly raised at a much earlier point, and in fact, the Commission and the court long ago clearly rejected Norwood's *Mobile-Sierra* and filed rate doctrine claims.<sup>120</sup>

### **H. Conclusion**

94. Accordingly, the Commission finds that the total CTC owed by Norwood is \$71,881,517,<sup>121</sup> plus interest calculated in accordance with the Commission's regulations. Norwood has informed the Commission that it already has paid New England Power the amount of the CTC calculated by the Judge and that New England Power has cashed the check. Norwood must pay the difference between \$71,881,517 and the amount already paid to New England Power, with interest due on the \$71,881,517 calculated in accordance with the Commission's regulations.

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<sup>119</sup> Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 400 (1<sup>st</sup> Cir. 2000).

<sup>120</sup> *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 400-401 (1<sup>st</sup> Cir. 2000).

<sup>121</sup> See *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 70 (2004). This is the revenue that would have been attributable to Norwood less the market value of the electric power capacity determined as discussed elsewhere in this order.

The Commission orders:

(A) The ID is affirmed in part and modified in part, as discussed in the body of this order.

(B) Within 15 days of the date of issuance of this order, New England Power must file a report with the Commission reflecting the amount of the Norwood CTC computed in accordance with this order, plus interest calculated pursuant to section 35.19(a) of the Commission's regulations.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.