113 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Jersey Central Power & Light Company Docket No. EL05-50-001

v.

Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Company and Public Service Electric and Gas Company

ORDER GRANTING AND DENYING REHEARING AND GRANTING CLARIFICATION AND ESTABLISHING SETTLEMENT JUDGE AND HEARING PROCEDURES

(Issued December 2, 2005)

1. In this order, the Commission grants, in part, and denies, in part, requests for rehearing and clarification of its order on a complaint[1] filed by Jersey Central Power & Light Company (JCP&L) contending that it should no longer have to make payments under contracts pertaining to cost sharing of transmission facilities among JCP&L and the following transmission owners: Atlantic City Electric Company (Atlantic City), Delmarva Power & Light Company (Delmarva), PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSEG) (jointly, Respondents). The Commission affirms its conclusion that JCP&L's contractual obligations were not terminated by the PJM Restructuring Order.[2] The Commission, however, is establishing settlement judge and hearing procedures to examine whether JCP&L is entitled to pricing adjustments under its contracts due to impossibility of performance and whether JCP&L has built reasonable alternatives under the terms of the contracts.

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[1] Jersey Central Power & Light Co. v. Atlantic City Electric Co., 111 FERC ¶ 61,179 (2005) (May 6 Order).

[2] Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 (1997) (PJM Restructuring Order).

Background

A. The Parties' Agreements

2. JCP&L and Respondents are transmission owners within PJM Interconnection, LLC (PJM). In 1977, JCP&L and Respondents entered into an agreement (the LDV Agreement) under which the parties agreed to contribute existing transmission facilities to and construct new facilities for the Lower Delaware Valley (the LDV System). The purpose of the facilities covered by the LDV Agreement was to integrate certain new and existing nuclear generating plants owned by the five parties to the LDV Agreement, including the proposed Forked River nuclear plant to be constructed by JCP&L, into the existing regional transmission system. Under the LDV Agreement, each party agreed to provide certain portions of the LDV System and make those portions available to the other parties to the LDV Agreement. JCP&L's obligation under the LDV Agreements included constructing the "Seashore Loop" (the New Freedom-Forked River Line, the Forked River-Smithburg Line, and the Forked River Switching Station), or constructing "such alternative facilities as are mutually agreeable among the signatories."[3]

3. At the same time that the parties entered into the LDV Agreement, they entered into the Smithburg Substation Supply Agreement (Smithburg Agreement), which provided that, pending completion of the facilities JCP&L was required to provide under the LDV Agreement, JCP&L would make fixed monthly payments in order to use LDV facilities constructed by others to supply capacity and energy to its Smithburg substation. The monthly payments were a fixed priced determined as percentage of the cost of these facilities to the other parties, not as a usage or variable charge based on JCP&L's usage of the transmission systems of the other transmission owners. The Smithburg Agreement further provided that when JCP&L placed in service certain portions of the Seashore Loop, the Smithburg Agreement would terminate and payments under it would cease.[4]

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[3] LDV Agreement, Exhibit 1 to Complaint, Schedule 4, at 1-2.

[4] Smithburg Agreement, Exhibit 2 to Complaint.

4. The LDV Agreement was intended to last until 2017. In 1990, the parties entered into the LDV Supplemental Agreement, extending the term of the LDV Agreement until 2027.[5] They acknowledged at that time that JCP&L had cancelled its plan to construct the Forked River nuclear plant, and that the federal government and the state of New Jersey had promulgated new environmental regulations that would affect JCP&L's ability to construct the Seashore Loop. The Supplemental Agreement states that "it is desired to amend the Agreement to provide for . . . the cancellation of the Forked River Generating Station and alternative routing for the 500-kV Seashore Loop."[6]

5. At approximately the same time that they executed the LDV Supplemental Agreement, the parties also entered into the East Windsor Substation Supply Agreement (East Windsor Agreement). This Agreement, like the Smithburg Agreement, provided that, pending completion of the facilities it was to provide under the LDV Agreement, JCP&L would make fixed monthly payments to make use of the LDV facilities provided by others to supply energy and capacity to its substation at East Windsor. Like the Smithburg Agreement, these payments were not based on transmission usage, but were a fixed annual payment of $3,200,000, payable in equal monthly installments.[7] The East Windsor Agreement also provided that payments thereunder would terminate upon the completion by JCP&L of all the facilities it was to provide under Schedule 4 of the LDV Agreement, or the termination of the LDV Agreement.[8]

B. <u>JCP&L's Complaint and the Commission's May 6 Order</u>

6. JCP&L filed a complaint with the Commission, stating that although it has not constructed the Seashore Loop, over the past 23 years it has made approximately $67.6 million in payments to the other LDV parties under the Smithburg and East Windsor Agreements. JCP&L stated that these payments were "transmission use" payments (i.e., payments for the use of the transmission system). It asserted that after the restructuring of PJM into an Independent System Operator (ISO), the Commission ordered, and an addendum to the LDV Agreement provided, that transmission usage payments should be made solely under the PJM Open Access Transmission Tariff (OATT). JCP&L asserted, therefore, that it should no longer be obligated to either make payments under the Smithburg and East Windsor Agreements, or construct the Seashore Loop pursuant to its

[5] LDV Supplemental Agreement, Exhibit 1 to Complaint, section I. L, at 6.

[6] *Id.* at 3.

[7] East Windsor Agreement, Exhibit 3 to Complaint, Article II, at 3.

[8] East Windsor Agreement, Exhibit 3 to Complaint, Article III, at 4-5.

obligation under the LDV Agreement. It therefore asked the Commission to terminate the Smithburg and East Windsor Agreements, and to eliminate JCP&L's obligation to construct the Seashore Loop under the LDV Agreement.

7. The Commission in its May 6 Order denied JCP&L's complaint. The Commission first found that, contrary to JCP&L's assertions, the payments JCP&L was making to the other LDV System owners under the Smithburg and East Windsor Agreements were not transmission use payments that should be governed by the PJM OATT. Rather, the Commission found, those payments were part of an overall cost sharing agreement among all five LDV system owners, and were intended to compensate the other owners for the fact that JCP&L had failed to fulfill its obligations to provide the Seashore Loop for the other four parties' use.[9] The Commission further found that JCP&L had not proved that it would have been impossible for JCP&L to fulfill its contract obligations with regard to the Seashore Loop, because the LDV Agreement provided that JCP&L could either construct the Seashore Loop or "such alternative facilities as are mutually agreeable among the signatories,"[10] and JCP&L did not demonstrate the impossibility of constructing mutually agreeable alternative facilities.[11]

8. JCP&L filed a request for rehearing or, in the alternative, motion for clarification of the May 6 Order. Respondents filed a motion for leave to file an answer and answer.

Discussion

9. The Commission grants rehearing in part and denies rehearing in part, and grants clarification, for the reasons set forth below.

A. Procedural issues

10. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2004), prohibits an answer to a petition for rehearing unless otherwise ordered by the decisional authority. We will accept Respondents’ answer to JCP&L's petition for rehearing because it has provided information that has assisted us in our decision-making process.

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[9] May 6 Order at P 19-20.

[10] LDV Agreement, Exhibit 1 to the Complaint, Schedule 4, at 1-2.

[11] May 6 Order at P 27.

B. Analysis

11. JCP&L seeks rehearing on three separate bases: that the PJM Restructuring Order, and Addendum Agreement, terminated JCP&L's obligations under the Agreements; that impossibility of performance terminates its obligations; and that its construction of alternative facilities terminates its obligations.

1. The PJM Restructuring Order And Addendum Agreement Did Not Terminate JCP&L's Obligations

a. JCP&L's Arguments on Rehearing

12. In its petition for rehearing, JCP&L asserts that the Commission erred in finding that JCP&L's payments under the Smithburg and East Windsor Agreements were not terminated by the Commission's PJM Restructuring Order. It asserts that the LDV Agreement provides for two separate kinds of payments: cost sharing payments, governed by Article V and Schedule 11, and transmission use payments, governed by Article VIII and Schedule 13. JCP&L then asserts that the language of the Smithburg and East Windsor Agreements establishes that Jersey Central's payments are transmission use payments pursuant to Article VIII and Schedule 13, rather than cost sharing payments under Article V. JCP&L points to the "whereas clause" of the Smithsburg Agreement that refers to the allocation of payments provided for under Article 8.3 of the LDV Agreement, and to a similar "whereas" clause in the East Windsor Agreement that provides for an allocation of payments provided for under Article VIII of the LDV Agreement.[12] In addition, JCP&L further claims that the methodology for calculating cost sharing charges and credits under the LDV Agreement, set forth in Schedule 11 of the LDV Agreement, applies only to "Station Owners," which term is defined under the LDV Agreement as including only Atlantic City, Delmarva, PECO and PSEG; thus, according to JCP&L, because it is not included within the definition "Station Owner," the cost sharing mechanism of the LDV Agreement does not apply to it.

13. JCP&L then contends that pursuant to the December 31, 1997 Addendum to the LDV Agreement executed after the restructuring of PJM as an ISO, all transmission payments under Article VIII are converted into payments under the PJM OATT. It

[12] "Whereas, in the LDV Agreement an appropriate allocation of payments is provided for under Article 8.3 for uses compatible with the intended function of LDV," Smithburg Agreement at 1; "[w]hereas, in the LDV Agreement an appropriate allocation of payments is provided for under Article VIII for use compatible with the intended function of LDV," East Windsor Agreement, Exhibit 3 to the Complaint, at 2.

therefore contends that its obligation to pay the additional amounts in the Smithburg and East Windsor Agreements terminated upon the formation of PJM.

14. JCP&L finally asserts that it is not covered by the "cost sharing" provisions of the LDV Agreement, because it constructed some of the facilities that the LDV Agreement required it to construct,[13] at a cost to JCP&L of $44 million, but that those costs have never been shared by the other LDV owners. JCP&L argues that this demonstrates that the "general cost-sharing obligation imposed on all the parties by the LDV Agreement"[14] referenced by the May 6 order does not include JCP&L.

b. <u>Commission Ruling</u>

15. JCP&L filed this complaint under section 206 of the Federal Power Act, seeking to obtain a Commission determination that it can be relieved of its obligations to make monetary payments to the other LDV system owners in lieu of building its share of the LDV system. The essence of JCP&L's argument is that the Commission's PJM Restructuring Order[15] terminated JCP&L's payment obligations because the Commission found that all payments for transmission service should be made pursuant to the PJM OATT. It maintains that its payments under the Smithburg and East Windsor Agreements are transmission use payments and that its obligation to make these payments was extinguished by the PJM Restructuring Order.

16. The Commission finds that JCP&L has not satisfied its burden to show that the PJM Restructuring Order terminated JCP&L's obligations under these contracts. The Commission made clear in the PJM Restructuring Order that payments made by parties in lieu of building their share of joint facilities would not be affected by the restructuring of PJM into an independent system operator (ISO).[16] Moreover, the Smithburg and East Windsor agreements are ambiguous with respect to the characterization of these payments. An examination of the entirety of the agreements supports the finding that the

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[13] JCP&L asserts that while it did not build the three facilities that comprised the planned Seashore Loop (the New Freedom-Forked River Line, the Forked River Switching Station, and the Forked River-Smithburg Line), it did build the other facilities covered by the LDV Agreement, the Smithburg Substation and the Smithburg-Deans Line. Request for Rehearing at 6.

[14] May 6 Order at P 20.

[15] PJM Restructuring Order 81 FERC at 62,279.

[16] *Id*.

payments made by JCP&L were payments made pursuant to the underlying LDV Agreement to share the costs of the LDV facilities that JCP&L incurred as a result of its failure to build its share of the facilities under the LDV Agreement.

i. The PJM Restructuring Order Did Not Terminate JCP&L's Obligations Under The Agreements

17. JCP&L maintains that the PJM Restructuring Order required the termination of all charges in the Agreements regarding usage and that usage charges would be placed under the PJM OATT. However, the PJM Restructuring Order specifically addressed the LDV Agreement and found that payments made in lieu of constructing facilities, like JCP&L's payments here, would not be terminated by the formation of PJM.

18. In the PJM Restructuring Order, some of the Supporting Companies, which included JCP&L, were parties to various cost-sharing agreements, including the LDV Agreement, (jointly referred to as "EHV" agreements). The Supporting Companies proposed to amend these agreements to eliminate provisions that restrict the use of the transmission facilities under the PJM Transmission Tariff, so the facilities would be available to all transmission customers on a not unduly discriminatory basis. However, the parties stated that most of the remaining provisions of these agreements concern the parties' cost-sharing arrangements, and that each of the PJM Companies installed facilities pursuant to the EHV Agreements subject to the express understanding that the other companies would contribute to, and would be fully compensated for, the costs of those facilities.

19. JCP&L was one of those supporting the proposal. PECO was the only party to the LDV Agreement that suggested that the EHV agreements be terminated and all service provided under the PJM OATT. JCP&L did not join PECO, nor did it suggest that its payments pursuant to the LDV Agreement, and the related Smithburg and East Windsor Agreement, should be treated differently from the cost sharing provisions.

20. The Commission accepted the Supporting Companies' proposal, and continued the cost-sharing arrangements under the EHV Agreements rather than terminating the agreements. The Commission found that the EHV Agreements were intended to effectuate a form of joint ownership. The Commission specifically found that elimination of the obligation to make support payments would unfairly permit those who chose to make support payments rather than construct facilities to reduce their obligation:

> The EHV Agreements are intended to effect a form of joint ownership. Rather than owning all of the transmission facilities jointly, the parties agreed to own a portion of the facilities and to support the cost of facilities owned by others in a percentage equal

> to their use. Elimination of the support charges would relieve those that chose support payments of any further cost responsibility, while at the same time increasing the cost responsibility of those that chose construction. We believe this would be unreasonable.[17]

21. Both the Smithburg and East Windsor Agreements provide that JCP&L makes payments that cover some portion of the costs of the facilities built by the other signatories and provides that all payments by JCP&L will terminate upon JCP&L's construction of its required facilities.[18] Since these Agreements were to remain in effect until JCP&L built its facilities, they provide for payments in lieu of constructing facilities. They, therefore, fall within the Commission's determination in the PJM Restructuring Order that parties, under facility cost sharing agreements, that are required to make payments in lieu of constructing facilities would not have those payments terminated. Indeed, terminating JCP&L's obligations under the Smithburg and East Windsor Agreements would have exactly the effect the Commission sought to avoid in the PJM Restructuring Order by "reliev[ing] those that chose support payments of any further cost responsibility" under the original LDV Agreement.[19]

22. JCP&L relies on the December 31, 1997 Addendum to the LDV Agreement executed by the parties to the LDV Agreement, including JCP&L, to implement the Commission's Order as indicating that the payments under the Smithburg and East Windsor Agreements would be terminated. The December 31, 1997 Addendum states:

> any use of LDV System facilities, including those described in Section 8.3 of the LDV Agreement, shall take place pursuant to the rates, terms, and conditions of the Tariff. The signatories hereby grant prior approval under Section 8.3 of the LDV Agreement for any transmission service, which is provided in accordance with the tariff.

The revision does not specifically waive the existing payments made by JCP&L that resulted from its failure to build its share of the required facilities. When viewed in connection with the Commission's order giving rise to the provision, the

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[17] *Id*.

[18] Smithburg Agreement, Exhibit 2 to the Complaint, section 3.2; East Windsor Agreement, Exhibit 3 to the Complaint, section 3.2.

[19] PJM Restructuring Order 81 FERC at 62,279.

Addendum is better interpreted as applying to new uses of the LDV system, rather than terminating pre-existing agreements based on a parties' failure to build required facilities under the LDV Agreement. The Addendum, for instance, refers to the signatories providing "prior approval" for transmission service. The use of such a phrase indicates that the parties were referring to future transmission uses, rather than past agreements among the principals to the cost sharing agreements. Indeed, since the Smithburg and East Windsor Agreements were outstanding at the time the Addendum was filed, if JCP&L, as a signatory, had wanted to ensure its payments were terminated, it should have included in the Addendum a specific reference to its pre-existing agreements.

23. Not only did JCP&L fail to include such a reference in the Addendum, it did not challenge the PJM Restructuring Order on rehearing or seek clarification as to how the Commission's ruling would apply to its Smithburg and East Windsor Agreements. Even if the Agreements as amended are considered ambiguous, in interpreting ambiguous agreements, the continued periodic payment by one party is strong evidence that the obligation to pay still continues in force and effect.[20] For the past seven years, JCP&L has been making the payments under the contracts. JCP&L's entire course of conduct, therefore, is consistent with an understanding that the PJM Restructuring Order, and the Addendum, was not intended to terminate JCP&L's obligations under these agreements.[21] And, JCP&L has not adduced any evidence to show that, in 1997, the parties to the LDV Agreement intended that the PJM Restructuring Order, and the Addendum to the LDV Agreement, would operate to terminate JCP&L's payment obligations.

[20] "The continued periodic payments and the affirmance of the obligation by plaintiff's predecessor long after the event upon which plaintiff relies occurred, is strong evidence that the obligation to pay still continues in force and effect, if any such evidence were needed." *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 668 (D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960). *See* Restatement (Second) of Contracts § 202 (1981) (where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement).

[21] The parties' course of conduct can help determine the meaning of an unclear contract provision. *See Red Sage Ltd. P'ship v. Despa Deutsche Sparkassen Immobilien-Anlage-Gasellschaft MBH*, 254 F.3d 1120 (D.C. Cir. 2001); *Foretich v. ABC*, 198 F.3d 270 (D.C. Cir. 1999); *Nofziger Communications v. Birks*, 989 F.2d 1227 (D.C. Cir. 1993); *American Red Cross v. Travelers Indem. Co.*, 816 F. Supp. 755, 760 (D.D.C. 1993).

ii. The Smithburg and East Windsor Agreements Do Not Demonstrate that JCP&L's Obligation Should Be Terminated

24. JCP&L contends that the Agreements were for additional transmission service and that, therefore, the Smithburg and East Windsor Agreements were terminated by the PJM Restructuring Order, and the Addendum. In our view, however, even if the Agreements are characterized as payments for transmission service, these are the type of payments, facility cost support payments made in lieu of constructing facilities, the PJM Restructuring Order did not terminate, as discussed above.

25. Moreover, when the Smithburg and East Windsor Agreements are read in context with the LDV Agreement, the Commission finds that these payments are better characterized as support or facility cost sharing payments made by JCP&L in place of constructing the facilities required by the LDV Agreement. At the time these Agreements were signed, a characterization of these payments (as transmission versus support or cost sharing) would have been unnecessary, since the same payment would be made regardless of characterization.[22] Thus, trying to classify these payments as either transmission payments or cost sharing based on contract language is not particularly productive.

26. It is true that, as JCP&L argues, it obtained transmission service on the facilities of the other participants by entering into the Smithburg and East Windsor Agreements, But the fact that JCP&L obtained transmission service is not dispositive, since JCP&L also would have obtained transmission service on other utilities' facilities pursuant to the underlying LDV Agreement.

27. The Smithburg and East Windsor Agreements are properly viewed as part of the overall cost sharing arrangement which the LDV Agreement established. The Smithburg and East Windsor Agreements were not executed as separate contracts for transmission service, but were part and parcel of the overall LDV Agreement providing for sharing among the signatories of the costs of constructing facilities for the use and benefit of all parties. Both the Smithburg and East Windsor reference the LDV Agreement, and the Smithburg and East Windsor Agreement specifically include provisions, as discussed below, indicating that these agreements were part of the underlying LDV cost sharing Agreement.

[22] The characterization of payments as transmission, rather than cost sharing, only became relevant in 1997 when the Commission issued the PJM Restructuring Order.

28. Both Agreements require JCP&L to provide cost support to the other generators based on a percentage of the cost of the facilities built by the other signatories. These payments were not payments for transmission use, but were payments based on a percentage of the construction cost of the facilities. Such payments are consistent with the obligation of the signatory parties to the LDV Agreement to share facilities they were constructing. The payments made by JCP&L are treated as cost sharing payments, since both Agreements allocate JCP&L's payments to the other signatories of the LDV Agreement based on their construction costs for the LDV System. The Smithburg Agreement, in fact, allocates JCP&L's payments according to the same percentages used in the LDV Agreement.[23] The East Windsor Agreement similarly provides that JCP&L's payments will be made to PSEG, as the billing agent under the LDV Agreement, and that the payments will be "allocated among the other signatories hereto in proportion to their investment in the Salem-Deans line."[24] JCP&L's payments therefore are part and parcel of the cost sharing of the LDV facilities established in the LDV Agreement.

29. Moreover, the relation between the Smithburg and East Windsor Agreements and the LDV Agreement is evident from the fact that both the Smithburg and East Windsor Agreements clearly recognize that these payments were made necessary only because JCP&L failed to construct its required facilities under the LDV Agreement. The terms of both the Smithburg and East Windsor Agreements reference JCP&L's obligation to build the facilities under the LDV Agreement, specifically providing that payments under the Agreements will cease upon the completion of those facilities. The fact that such payments would terminate upon JCP&L's completion of its facilities shows that these payments were a part of the overall cost sharing arrangement, not an independent transmission agreement.

30. As discussed earlier, JCP&L's conduct in continuing to pay under the Smithburg and East Windsor Agreements over the last seven years provides strong support for finding that the signatory parties, including JCP&L, recognized that these Agreements were not transmission agreements, but were a part of the overall package of cost sharing arrangements among the signatories. JCP&L offers no extrinsic evidence to show that

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[23] Section 2.3 of the Smithburg Agreement allocates the payments 42.55% to PSEG, 42.55% to PECO, 7.45% to Atlantic City, and 7.45% to Delmarva. These are exactly the same percentages used in the LDV Agreement as the percent of LDV Investment Responsibility for these companies. *Compare* Smithburg Agreement, Exhibit 1 to the Complaint, section 2.3 *with* LDV Agreement, Exhibit 1 to the Complaint, Schedule 11 Exhibit A.

[24] East Windsor Agreement, Exhibit 2 to the Complaint, section 2.2.

the parties to the Agreements contemplated that they were transmission agreements terminated by the Commission's PJM Restructuring Order and the Addendum.[25]

31. JCP&L makes several arguments based on "whereas" clauses in the Smithburg and East Windsor Agreements, the definition of Station Owners in the LDV Agreement, and its payment of construction costs for other facilities to support its argument that its payments should be characterized as transmission payments, not cost sharing. But as discussed below the Commission finds that reliance on the "whereas" clauses and the definition of Station Owners cannot overshadow the entirety of this integrated set of contracts, which demonstrate that these agreements were part of the overall cost sharing arrangement of the parties to the LDV Agreement. With respect to JCP&L's contentions about constructing LDV facilities, the Commission is setting for hearing the question of whether JCP&L's construction of other facilities would, pursuant to the terms of the Agreements, terminate or reduce JCP&L's payment obligations.

(a) Smithburg Agreement "Whereas" Clause

32. JCP&L's relies on a reference in a single "whereas" clause of the Smithburg Agreement in arguing that its payments should be considered transmission payments under Article VIII of the LDV Agreement, rather than cost sharing payments pursuant to Article V of the LDV Agreement. JCP&L cites the reference to section 8.3 of the LDV Agreement in a "whereas" clause of the Smithburg Agreement. Section 8.3 provides for uses of the LDV System that are in addition to those uses set forth by the rest of the LDV Agreement. It states that "with the prior approval of the signatories, the LDV may be used for purposes compatible with *but other than* the delivery of energy and capacity from Peach Bottom, Salem and Forked River for the respective owners thereof to their underlying transmission systems" and further provides that "[a]n appropriate allocation of payments shall be made for such *additional use*."[26]

[25] JCP&L states only that "although arguably Jersey Central was entitled to begin taking service under the PJM OATT, it is not seeking refunds of the amounts it has previously paid under the LDV, Smithburg and East Windsor Agreements." JCP&L Complaint, at 13. JCP&L offers no explanation of why it paid for seven years if the parties truly agreed that its payment obligations were terminated by the PJM Restructuring Order.

[26] LDV Agreement, Exhibit 1 to the Complaint, Article VIII, section 8.3, emphasis added.

33. In the first place, a "whereas" clause should not be determinative of the parties rights and obligations under an Agreement when the underlying terms of the Agreement lead to a different conclusion.[27] Although the "whereas" clause in the Smithburg Agreement may have referenced section 8.3 of the LDV Agreement, the Smithburg Agreement did not represent an additional use of the LDV Agreement. Rather, the Smithburg Agreement provided for a substituted use of different LDV facilities while JCP&L completed its share of the joint facilities. Instead of using the LDV facilities for the initial intended use of delivering energy and capacity from the Peach Bottom, Salem, and Forked River plants, the Smithburg Agreement permitted JCP&L to substitute deliveries along the Deans-Branchburg line while JCP&L completed its facilities. The fact that the other transmission owners accommodated JCP&L's construction difficulties does not mean that the payments being made under this Agreement were not part of the overall cost sharing agreement among the parties. As discussed above, the Smithburg Agreement, when considered in its entirety, provides for JCP&L to share the costs of transmission facilities built by the other signatories until such time as JCP&L contributes its facilities to the project.

34. Indeed, the Smithburg Agreement states, in its first "whereas" clause, that all the signatories are providing facilities to the LDV system,[28] and in the second "whereas" clause, that "[w]hereas, *pending completion of the facilities it is to provide under the LDV Agreement*, [JCP&L] wishes to make use of LDV facilities provided by others" to provide energy and capacity from one part of its LDV facilities to another.[29] Thus, even if "whereas" clauses are used as interpretive aids, the "whereas" clauses in the Smithburg Agreement show that the payments were part of the cost sharing arrangement

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[27] *See Grynberg v. FERC*, 71 F.3d 413, 416 (D.C. Cir. 1995) ("whereas" clause, while sometimes useful as an aid to interpretation, cannot create any right beyond those arising from the operative terms of the document).

[28] Smithburg Agreement, Exhibit 2 to the Complaint, at 1.

[29] *Id.*, emphasis added. The five facilities JCP&L committed in the LDV Agreement to contribute to the LDV system were the three facilities that comprised the Seashore Loop (the New Freedom-Forked River Line, the Forked River Switching Station, and the Forked River-Smithburg Line), and two other facilities, the Smithburg substation and the Smithburg-Deans Line. JCP&L did construct the Smithburg substation and the Smithburg-Deans line. *See* Complaint at 5. In the Smithburg Agreement, the parties then stated, "whereas, pending completion of the facilities it is to provide under the LDV Agreement, [JCP&L] wishes to make use of LDV facilities provided by others in order to supply capacity and energy from Deans Substation to [JCP&L's] 500 kV substation at Smithburg," Smithburg Agreement at 1.

contemplated in the LDV Agreement, and were required because JCP&L had failed to contribute its required facilities.

35. Further, the payment JCP&L was required to make under the Smithburg Agreement was based on a percentage of the fixed costs of the facilities used,[30] rather than the volumetric basis provided for additional use of transmission facilities under Schedules 13 and 14 of the LDV Agreement.[31] The Agreement provides that payment shall be made monthly at the rate of 1.25% of 25% of the original cost of the Deans-Branchburg line.[32] The use of a percentage of cost basis to determine JCP&L's payment is evidence that these payments were not volumetric or usage charges, but were payments made by JCP&L to share the costs of the facilities constructed by others. Section 2.3 of the Smithburg Agreement allocated JCP&L's payments to the other signatories based on their cost contribution to the project, further indicating that these are cost sharing payments, not transmission usage payments. The Smithburg Agreement, therefore, was part of the original facility sharing arrangement precipitated by JCP&L's failure, at the time, to contribute its required facilities. The Smithburg Agreement recognized that until JCP&L fulfilled its commitments under the LDV Agreement, it was required to make additional payments to the other four signatories, since otherwise JCP&L would be receiving a benefit by having access to the other parties' facilities, but the other parties would not receive the benefit of having access to JCP&L's Seashore Loop.

36. Moreover, section 8.4 of the LDV Agreement deals with the situation when a party fails to build required facilities, as occurred here. It states that if a party fails to install required facilities, a reallocation of payments will be made under Article V, which JCP&L concedes applies to cost sharing among the participants:

> Should the installation or completion of any facilities described in the attached schedules be cancelled or delayed by a signatory for any cause and the cancellation or delay of such facilities materially

[30] Smithburg Agreement, Exhibit 2 to the Complaint, Article II.

[31] LDV Agreement, Exhibit 1 to the Complaint, Schedule 13, Article IV; Schedule 14, Article II.

[32] Smithburg Agreement, Exhibit 2 to the Complaint, section 2.1.

> affects the proportional use of the LDV facilities as planned on a continuing basis, *a reallocation shall be made of the payments provided for in Article V.*[33]

The LDV Agreement did not include JCP&L within the true-up mechanism of Article V. Thus, the Smithburg Agreement itself was the contractual vehicle by which JCP&L was to share in the cost of the joint facilities and, in return, receive access to those facilities. Since the payments under the Smithburg Agreement were necessary because JCP&L failed to build its facilities, section 8.4 of the LDV Agreement recognizes that payments made as a result of a failure to build required facilities are part of the cost sharing arrangement as established in the LDV Agreement.

37. Finally, the fact that the Smithburg Agreement references section 8.3 of the LDV Agreement rather than Article 5 does not mean, as JCP&L contends, that the Smithburg Agreement should not be characterized as part of the overall LVD cost sharing agreement. Article V established a true-up mechanism to account for differences in the contributions and use of the facilities between the signatory parties. But, as JCP&L itself recognizes, the Article V true-up mechanism did not apply to its required construction commitments to the project.[34] Section 8.2 of the LDV Agreement, for example, provides that "there shall be no reallocation of the payments [under Article V] when [JCP&L] places into service the LDV facilities it is to provide." Since under the LDV Agreement, no true-up was needed under Article V with respect to JCP&L's contribution of its facilities, inclusion in the Article V true-up mechanism is not determinative of whether payments should be treated as part of the cost sharing arrangement between the LDV parties.

38. In conclusion, the single reference to section 8.3 in the "whereas" clause, cited by JCP&L, is not sufficient to establish that these payments were not part of the facility cost sharing agreement between the parties. When the Smithburg Agreement is examined as a whole and in connection with the overall LDV Agreement, the Smithburg Agreement is consistent with the finding that JCP&L was making these payments to share in the cost of the joint facilities as a result of its failure to contribute its required facilities.

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[33] LDV Agreement, Exhibit 1 to the Complaint, Article VIII, section 8.4, emphasis added.

[34] As discussed later, JCP&L points out that it was not included in the definition of Station Owners and was not included in the true-up mechanisms in Schedule 11.

(b) East Windsor Agreement "Whereas" Clause

39. JCP&L also cites to the "whereas" clause of the East Windsor Agreement which states that "[w]hereas, in the LDV Agreement an appropriate allocation of payments is provided for under Article VIII for uses compatible with the intended function of the LDV."[35] But for the same reasons as discussed with respect to the Smithburg Agreement, the East Windsor Agreement provides for cost sharing payments by JCP&L for substituted access to the LDV facilities, since such payments would terminate when JCP&L built its required facilities.

40. Like the Smithburg Agreement, the other "whereas" clauses of the East Windsor Agreement recognize that this Agreement is part of the overall cost sharing Agreement under the LDV Agreement. The first "whereas" clause states "the signatories hereto are all signatories to an agreement dated September 30, 1977. as supplemented, known as the Lower Delaware Valley Transmission System Agreement (LDV Agreement) …"[36] The second "whereas" clause states: "pending completion of the facilities it is to provide under the LDV Agreement, JC wishes to make use of [LDV] facilities provided by the other signatories …"[37] These clauses again indicated that the East Windsor Agreement was a part of the overall LDV Agreement to share the costs of facilities, not an independent contract for transmission service.

41. The East Windsor Agreement provides that JCP&L will make a monthly payment of $3,200,000 to "be allocated among the other signatories hereto in proportion to their investment responsibilities in the Salem-Deans line."[38] The East Windsor Agreement was clearly executed with reference to the LDV Agreement and provided a means by which JCP&L could share the costs of the facilities built by the other participants under the LDV Agreement. Moreover, the East Windsor "whereas" clause refers to all of Article VIII of the LDV Agreement, not to section 8.3 or any particular clause in Article VIII. It, therefore, provides no support that the parties intended that these payments be characterized as transmission usage payments. For instance, Article VIII includes section 8.4, which, as discussed above, suggests that payments made as a result of a failure to build facilities are cost sharing payments.

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[35] East Windsor Agreement, Exhibit 3 to the Complaint, at 2.

[36] *Id.* at 1.

[37] *Id.*

[38] *Id.*, section 2.2.

(c) Definition of Station Owners

42. JCP&L contends that the exclusion of JCP&L from the definition of “Station Owners" in the "whereas" clauses of the LDV Agreement, as referenced in Schedule 11, indicates that JCP&L’s payments were payments for additional transmission use of the LDV. JCP&L was excluded from the definition of “Station Owners” at the time the LDV Agreement was executed, because it had not yet constructed its proposed Forked River generating station.[39] Moreover, as discussed above, even when JCP&L built its required facilities under the LDV Agreement, it would not have been included in the true-up mechanism established by Article V.

43. Inclusion in the definition of the term “Station Owners,” therefore, is not determinative of whether JCP&L’s Smithburg and East Windsor are part of the overall cost sharing arrangement among the parties. The LDV Agreement expressly contemplated that JCP&L was to construct certain facilities under Article II and schedule 4 of the LDV Agreement and that these facilities would be part of the LDV System under the LDV Agreement. Because JCP&L did not construct all of these facilities, the Smithburg and East Windsor Agreements established the required cost sharing responsibilities of JCP&L until it completed its portion of the required facilities. Indeed, as discussed above, even had JCP&L built its required facilities, section 8.2 of the LDV Agreement did not envision any change in the true-up payments under Article V and Schedule 11 for JCP&L's completed construction. Since the parties did not consider that JCP&L would be included in the Schedule 11 calculations, its exclusion from Schedule 11 says nothing about whether the Smithburg and East Windsor Agreements are part of the overall cost sharing agreement of the parties.

44. Thus, the exclusion of JCP&L from the definition of “Station Owners” does not demonstrate that the payments under the Smithburg and East Windsor Agreements were not part of the overall cost sharing arrangement in the LDV Agreement. These payments were payments to cover the costs of the other signatories until such time as JCP&L completed its required facilities, and as such were part of the integrated package of cost sharing agreements signed by the parties. Terminating such payments, would do exactly

[39] "Whereas, [Atlantic City, Delmarva, PECO and PSEG] (herein called Station Owners) . . . ," LDV Agreement, Exhibit 1 to the Complaint, at 1. Atlantic City, Delmarva, PECO and PSEG were owners of interests in already constructed nuclear facilities, Peach Bottom and Salem. The next whereas clause then references JCP&L as “constructing” the Forked River plant, *id.*

that which the Commission in the PJM Restructuring Order provided should not occur: it would terminate "support charges [which] would relieve those that chose support payments of any further cost responsibility."[40]

(d) Investment in Other Facilities

45. JCP&L finally contends that it has invested $44 million in LDV assets and has not received any credits for the facilities it has constructed and contributed to the LDV System.[41] It maintains that this is evidence that its payments under the Smithburg and East Windsor Agreements were for additional transmission uses of the facilities, not part of the cost sharing arrangements.

46. JCP&L's provision of facilities that it alleges fall within the LDV Agreement is not determinative as to whether the Smithburg and East Windsor Agreements were terminated pursuant to the PJM Restructuring Order. Rather, the issue raised by this construction is whether these facilities should, pursuant to the terms of the LDV Agreement, be considered alternative facilities that reduce or terminate JCP&L's payment obligations under the Smithburg and East Windsor Agreements. As discussed below, the Commission is granting rehearing, and establishing settlement judge and hearing procedures to determine whether such investments should reduce or eliminate JCP&L's payment obligations under the Smithburg and East Windsor Agreements.

2. Impossibility of Performance and Alternative Facilities

a. May 6 Order

47. JCP&L argued in its complaint that it should be excused from its obligation to make payments under the Smithburg and East Windsor Agreements, because it had become impossible for JCP&L to obtain the necessary approvals from the state of New Jersey and PJM (through PJM's Regional Transmission Expansion Plan (RTEP) process) to construct the Seashore Loop. In support of this argument, JCP&L cited to language contained in the LDV, Smithburg, and East Windsor Agreements, as follows:

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[40] PJM Restructuring Order, 81 FERC at 62,279.

[41] Petition for rehearing at 7. It is not clear whether the $44 million of investment in LDV assets to which JCP&L refers here is a subset of the $100 million in bulk transmission system enhancements in central New Jersey that JCP&L also alleges that it has invested, *see id.* at 10.

> If, and to the extent that, any transaction pursuant to this Agreement shall require the authorization of any governmental body, the rights and obligations of the signatories hereto shall be subject to obtaining such authorization.[42]

48. The Commission did not accept this argument. It relied on the fact that the Smithburg and East Windsor Agreements expressly provided for the possibility that JCP&L would not be able to construct the Seashore Loop, and therefore provided JCP&L with another option for compliance.[43] The Commission also found that under section 3.3 of the East Windsor Agreement, the parties are obligated to reconsider JCP&L's payment obligations in the event that it cannot build the required facilities.[44] The other transmission owners agreed to review this issue within six months, and the Commission found that this should be a first step and expected a good faith review by the Administrative Committee of these proposals.

49. In addition, JCP&L argued that it had constructed alternative facilities that should satisfy its obligations under the LDV Agreement. The Commission stated, in the May 6 Order, that it would not determine whether JCP&L's facilities should qualify as "alternative facilities" under the LDV Agreement because JCP&L had failed to go through the LDV Agreement procedures for determining whether there was mutual agreement among the other parties that these facilities were reasonable alternatives. The Commission further provided that "the parties should consider these issues as part of the review by the LDV Administrative Committee."[45]

b. <u>Rehearing Request</u>

50. As noted above, the LDV Agreement provides that JCP&L will construct either a particular group of LDV facilities, including the Seashore Loop, "or such alternative

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[42] Complaint at 14.

[43] May 6 Order at P 27.

[44] "In the event that [JCP&L] has not placed in service by December 31, 2000 the facilities it is to provide under Schedule 4 of the LDV Agreement, the annual payment in Section 2.1 and the allocation in Section 2.2 shall be subject to review and appropriate adjustment by the LDV Administrative Committee in accordance with Article VIII of the LDV Agreement," East Windsor Agreement, Exhibit 3 to the Complaint, at section 3.3.

[45] May 6 Order at P 30-32, emphasis added.

facilities as are mutually agreeable among the signatories" with respect to the three facilities that make up the Seashore Loop.[46]

51. On rehearing, JCP&L continues to argue with respect to impossibility that "[t]he provisions of the agreements which require that [JCP&L] make payments and build alternative facilities are predicated on the requirement that it construct the Seashore Loop . . . [and] excuse [JCP&L's] obligation to construct the Seashore Loop based on its inability to receive necessary authorizations. With that obligation removed, [JCP&L argues] it follows that [JCP&L] is no longer obligated to make payments or build alternative facilities."[47] JCP&L then argues that under the Commission's reading, it is required to make payments or construct alternative facilities under the Smithburg and East Windsor Agreements, even if construction of the Seashore Loop becomes impossible. According to JCP&L, this reading is impermissible, because "it renders the provisions which excuse performance meaningless. . . . [I]f [JCP&L] is excused from its obligation to construct the Seashore Loop, yet still required to make payments or construct alternative facilities then the provisions which excuse performance become meaningless."[48]

52. With respect to the alternative facilities, JCP&L continues to argue it already has constructed facilities that are acceptable alternatives to the Seashore Loop by investing in $100 million in bulk transmission enhancements in central New Jersey. It further asserts that "[t]here is no requirement under the LDV Agreement that [JCP&L] seek approval from the LDV Owners for alternative facilities *prior* to constructing those facilities."[49] JCP&L then asks the Commission to find that JCP&L has already constructed alternative facilities to the Seashore Loop, and that those facilities satisfy JCP&L's obligations under the LDV Agreement.

c. <u>Commission Ruling</u>

53. The Commission denies rehearing with respect to the question of whether JCP&L should be relieved of its payment obligations under the Smithburg Agreement due to impossibility of performance. The Commission is, however, granting rehearing and establishing settlement judge and hearing procedures with respect to: whether JCP&L's

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[46] LDV Agreement, Exhibit 1 to the Complaint, Schedule 4 at 1-2.

[47] Request for Rehearing at 9.

[48] *Id*.

[49] *Id*. at 10, emphasis in original.

payment obligations under the East Windsor Agreement should be reduced or terminated under section 3.3 of that Agreement as a result of its inability to build its facilities whether due to impossibility of performance or other reasons; and whether JCP&L's construction of facilities should be deemed alternative facilities under the LDV Agreement.

54. The Smithburg Agreement provides that JCP&L would share in the costs of construction of the LDV facilities from Deans to Branchburg until it completed its share of the LDV facilities. Unlike the East Windsor Agreement, the Smithburg Agreement contains no clause which would obviate JCP&L's payment obligations in the event that it is unable to build its share of the facilities. JCP&L cites to section 3.4 of the Smithburg Agreement which provides that: "If, and to the extent that, any transaction pursuant to this Agreement shall require the authorization of any governmental body, the rights and obligations of the signatories hereto shall be subject to obtaining such authorization and the signatories hereto agree to use their best efforts to obtain such authorization." This clause provides only for cooperation in obtaining governmental agreements; it does not provide that a party's obligations will be terminated if a governmental entity does not grant permission to construct facilities. JCP&L cites to no extrinsic evidence to show that the parties intended that section 3.4 of the Smithburg Agreement would operate to terminate JCP&L's payment obligations in the event it failed to receive governmental authorization for construction of its facilities. . Had JCP&L sought to protect itself against an inability to complete its required facilities, it could have included a clause to do so in the Smithburg Agreement, as it did in the East Windsor Agreement.

55. As the Commission determined in the May 6 Order, JCP&L's obligation to perform under the Smithburg Agreement did not become impossible by virtue of its inability to construct its share of the facilities. The Smithburg Agreement specifically provided for this alternative by requiring JCP&L to pay its share of the costs of the facilities constructed by the other LDV participants in lieu of building its own facilities. As the Commission stated, "the *quid pro quo* to each signatory [to the LDV Agreement], in return for the facilities and investment that it contributed to the LDV System, was the use of the transmission facilities and investment contributed by the other signatories."[50] The purpose of the Smithburg Agreement was to enable JCP&L to receive benefits under the LDV Agreement (*i.e.*, access to the other signatories' facilities) even though it had not yet performed its full *quid pro quo* under the LDV Agreement: until JCP&L completed the Seashore Loop, it could keep the other parties whole by making monetary payments to compensate them for its failure to provide its portion of the LDV facilities. The Commission therefore denies rehearing of JCP&L's impossibility argument with respect to the Smithburg Agreement.

[50] May 6 Order at P 19.

56. The Commission will, however, set for hearing the question of whether JCP&L's payment obligations under the East Windsor Agreement should be adjusted. Unlike the Smithburg Agreement, the East Windsor Agreement contains a clause requiring the parties to review and, if necessary, adjust JCP&L's payments if JCP&L does not place into service all of the facilities it is required to build by the LDV Agreement by December 31, 2000.[51] In the May 6 Order, the Commission noted that the LDV Committee had committed to conduct a review of that question within six months of the issuance of an order dismissing the complaint. However, the Commission has received no information that that review has been performed. Thus, the Commission is here establishing settlement judge and hearing procedures to examine whether JCP&L's assertion that it is unable to obtain approval from the state of New Jersey and PJM to construct the Seashore Loop should serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3.[52]

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[51] Section 3.3 of the East Windsor Agreement provides that:

> in the event that [JCP&L] has not placed in service by December 31, 2000 the facilities it is to provide under Schedule 4 of the LDV Agreement, the annual payment in Section 2.1 and the allocation in Section 2.2 shall be subject to review and appropriate adjustment by the LDV Administrative Committee in accordance with Article VIII of the LDV Agreement.

Article VIII of the LDV Agreement, in turn, provides at section 8.4 that:

> [s]hould the installation or completion of any facilities described in the attached schedules be cancelled or delayed by a signatory for any cause and the cancellation or delay of such facilities materially affects the proportional use of the LDV facilities as planned on a continuing basis, a reallocation shall be made of the payments provided for in Article V.

[52] *See Beech Aircraft Corp. v. Ross*, 155 F.2d 615, 617 (10th Cir. 1946) (if parties are unable to agree upon what is reasonable or just and equitable, the courts will imply that the parties intended for the court to determine a reasonable price as a consideration for the contract); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217 (1985) (good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party); *Beraha v. Baxter Health Care Corp*., 956 F.2d 1436, 1445 (7th Cir. 1992) (party given discretion under the contract must exercise that discretion in a manner consistent with the reasonable expectations of the parties).

57. The Commission is further setting for hearing, with regard to a determination of JCP&L's continuing payment obligations under both the Smithburg and East Windsor Agreements, the question of whether, as JCP&L states, it has already constructed facilities that are alternatives to the Seashore Loop. In the Commission's May 6 Order, we noted that the other parties of the LDV Administrative Committee were willing to consider adjustments to JCP&L's payment obligations under the East Windsor Agreement,[53] and directed the parties to include the question of whether JCP&L had constructed alternative facilities in that reconsideration process.[54] In their answer to JCP&L's rehearing request, however, the other parties make clear that "there will be no . . . agreement" by the other parties that other facilities constructed by JCP&L are, in fact, electrically equivalent alternatives to the Seashore Loop.[55] Moreover, as a result of PJM's restructuring into first an ISO and now a Regional Transmission Organization (RTO), there has been a change in the incentive for the other transmission owners to agree that any facilities are sufficient alternative facilities to those JCP&L was obligated to build under the LDV Agreement. At the time the LDV Agreement was signed, the Agreements' provision for construction of "mutually agreeable" alternative facilities provided protection to JCP&L, because the other transmission owners had an incentive to accept facilities as reasonable alternatives in order to obtain access to those facilities as shared facilities. The restructuring of PJM, however, has eliminated an incentive for the other parties to agree, since they can use any facilities by paying their zonal charges under the PJM OATT.

58. Given this change in circumstances, we find that a determination needs to be made by an impartial party as to whether facilities constructed or to be constructed by JCP&L

[53] May 6 Order at P 26 ("Respondents . . . commit that they will undertake this review and reallocation process within six months of a Commission order dismissing the complaint.").

[54] *Id.* at P 32.

[55] Joint Respondents Answer to Rehearing, at 10 (June 20, 2005) ("The fact is that there has been no agreement . . . among the LDV signatories that the facilities JCP&L references in its Complaint are in fact 'alternatives' to the Seashore Loop. Moreover, there will be no such agreement, since, as previously explained by Joint Respondents . . . JCP&L's alleged 'alternative' facilities were built to provide power to its customers only, are not electrically equivalent to the Seashore Loop, and therefore cannot properly be characterized as "alternative" facilities to the Seashore Loop").

qualify as reasonable alternatives under the LDV Agreement.[56] Because the claims of both sides raise disputed material issues of fact, we are establishing settlement judge and hearing procedures to resolve these issues. In considering whether facilities are reasonable alternatives, the hearing needs to consider the effect of PJM's RTEP process on determining whether facilities are necessary, and whether, in light of those determinations, other JCP&L facilities should be found to be reasonable alternatives.

3. <u>Other Issues</u>

a. <u>Retention of open docket</u>

59. JCP&L seeks rehearing, contending that the Commission erred in failing to keep this docket open pending the completion of the LDV Administrative Committee's review of JCP&L's payments. The Commission grants this request. Since the Commission has received no information that LDV Administrative Committee has reviewed the readjustment of JCP&L's obligations, and since the respondents stated in their response to JCP&L's rehearing petition that no possible agreement as to whether JCP&L has constructed alternative facilities could be forthcoming, we are establishing a hearing to examine these issues, and this docket will therefore remain open.

b. <u>Motion for clarification</u>

60. JCP&L asks the Commission to clarify the May 6 Order to make clear that JCP&L is entitled to receive credit for the LDV facilities that it has built and contributed to the LDV System. Since the Commission is establishing settlement judge and hearing procedures regarding these Agreements, the issue of whether JCP&L is entitled to credit for facilities it has constructed should be considered in the settlement and hearing procedures.

c. <u>Settlement Judge and Hearing Procedures</u>

61. As discussed above, we are instituting an investigation into the issues raised by these contracts under section 206 of the Federal Power Act (FPA) and establishing a refund effective date. Pursuant to section 206(b) of the FPA, the Commission must establish a refund effective date that is no earlier than the date of the filing of the complaint, and no later than five (5) months subsequent to the filing of the complaint.

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[56] A contract should be interpreted in light of the changed circumstances to accomplish what the parties intended. *See Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp*., 986 F.2d 1463, 1473 (5th Cir. 1993); *Richmond Power & Light v. FPC*, 481 F.2d 490, 499 (D.C. Cir. 1973). *See also* cases cited in note 523, *supra*.

The Commission will establish a refund effective date as of the date the complaint was filed.

62. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle the dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed under Rule 603 of the Commission's Rules of Practice and Procedure.[57] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[58] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

63. The Commission is also required by section 206 to indicate when it expects to issue a final order. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Although we do not have the benefit of the presiding judge's decision, based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately 4 months of the filing of briefs on exceptions and briefs on opposing exceptions.

The Commission orders:

(A) JCP&L's request for rehearing and in the alternative motion for clarification are granted in part, and denied in part as discussed in the body of this order.

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[57] 18 C.F.R. § 385.603 (2005).

[58] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at 202-502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the matters set forth above. However, the hearing shall be held in abeyance until six months after the date of this order, or until such later date as is necessary to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.