

120 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Doswell Limited Partnership

Docket No. ER05-1119-003

OPINION NO. 496

OPINION AND ORDER ON INITIAL DECISION

(Issued July 5, 2007)

1. This case is before the Commission on exceptions to an *Initial Decision* issued by the Presiding Administrative Law Judge (Presiding Judge) on October 24, 2006.¹ The *Initial Decision* addresses a contractual dispute between Doswell Limited Partnership (Doswell) and Virginia Electric and Power Company, d/b/a Dominion Virginia Power (Dominion). The dispute concerns Doswell's proposed rate schedule, as submitted in this proceeding, for the supply of Reactive Power to PJM Interconnection, L.L.C. (PJM).² Dominion protested Doswell's filing, asserting that the compensation Doswell seeks from PJM is rightfully due to Dominion, not Doswell, pursuant to the parties' agreements, as identified below.

¹ *Doswell Limited Partnership*, 117 FERC ¶ 63,017 (2006) (*Initial Decision*).

² Reactive Power is the electricity required to maintain adequate voltages so that Real Power, *i.e.*, the active force that causes electrical equipment to perform, can be transmitted. *See Southern Company Services, Inc.*, 80 FERC ¶ 61,318 at 62,080 (1997). Under PJM's open access transmission tariff (OATT), at schedule 2, PJM is required to pay the entity that owns this Reactive Power an amount equal to this entity's Commission-accepted monthly revenue requirement for Reactive Power service, *i.e.*, for PJM's use of Reactive Power.

2. The Commission set for hearing the rights and obligations of the parties relating to one of the two sets of agreements at issue.³ In addressing these issues, the *Initial Decision* ruled in favor of Dominion. For the reasons discussed below, we affirm the *Initial Decision*.

I. Background

3. On June 15, 2005, Doswell submitted for approval, pursuant to section 205 of the Federal Power Act,⁴ a proposed rate schedule, consisting of its asserted revenue requirement for providing Reactive Power service from its facilities located in Doswell, Virginia (Doswell Facility).⁵ In its protest, Dominion argued that Dominion, not Doswell, is entitled to the compensation at issue based on a set of agreements addressing the parties' respective interests in Doswell's combined cycle units and a separate set of agreements addressing the parties' respective interests in Doswell's combustion turbine generator.

4. The first of these two sets of agreements was entered into in 1987. At that time, Doswell's predecessor-in-interest and Dominion executed two power purchase and operating agreements for the sale of energy and capacity from the Doswell Facility's combined cycle units (1987 Agreements). The 1987 Agreements were amended and restated in 1990 to include a fixed-fuel transportation charge and a holding charge (1990 Agreements). The 1990 Agreements were amended, restated, and consolidated in 1998 (1998 Agreement). In turn, the 1998 Agreement was amended and restated in 2001 to take into account new fuel supply arrangements (2001 Agreement).⁶

³ See *Doswell Limited Partnership*, 112 FERC ¶ 61,182 (2005) (*Doswell Order*), *order on reh'g*, 113 FERC ¶ 61,003 (2005) (*Doswell Rehearing Order*).

⁴ 16 U.S.C. § 824d (2000).

⁵ The Doswell Facility consists of two 300 MW gas-fired, combined cycle units and a 170 MW gas-fired, combustion turbine generator. The Doswell Facility interconnects with PJM's system along a transmission line owned by Dominion. Doswell's generation facilities became integrated into the PJM system on May 1, 2005.

⁶ The 2001 Agreement and its predecessor agreements are referred to, below, individually or, when appropriate, collectively as the Combined Cycle Agreement.

5. Section 2.1 of the Combined Cycle Agreement provides that “[s]ubject to the terms and conditions hereof, [Doswell] agrees to sell, and [Dominion] agrees to purchase, the Net Electrical Output [of the combined cycle units].”⁷ Section 2.2 provides that “[e]xcept as otherwise provided herein, and subject to other terms hereof, [Doswell] agrees to sell, and [Dominion] agrees to purchase, Dependable Capacity from the [combined cycle units].”

6. Doswell and Dominion also entered into agreements, in 2000 and 2001, concerning the Doswell Facility’s combustion turbine generator (collectively, the Combustion Turbine Agreement). However, the Combustion Turbine Agreement is not directly at issue here, given Doswell’s admission that, under the express terms of the agreement, Doswell has agreed to sell all ancillary services, including Reactive Power service, to Dominion.⁸ Doswell concedes that, as such, Dominion is entitled to the Reactive Power revenue associated with Doswell’s combustion turbine generator.⁹

7. As noted above, Dominion, in its protest, asserted that it is entitled to purchase *all* of the electrical output of Doswell’s combined cycle facilities, including Reactive Power. Dominion argued that it acquired these rights for the purpose of operating the Doswell Facility as if it were owned by Dominion, *i.e.*, for the purpose of serving its customers on a bundled basis, as permitted by the Commission prior to the issuance of the Commission’s open access mandate in Order No. 888.¹⁰

⁷ Section 1.76 of the 2001 Agreement (and section 1.69 of the 1998 Agreement) define the term “Net Electrical Output,” in relevant part, as “[t]he Complex’s electrical energy measured by the [Dominion]-owned metering. . . .”

⁸ See *Doswell Order*, 112 FERC ¶ 61,182 at P 11.

⁹ On August 31, 2005, Doswell made a compliance filing consisting of a revised Reactive Power revenue requirement attributable to its remaining claims, herein, regarding Doswell’s combined cycle units.

¹⁰ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *Order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 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 part and rev'd in 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*, 535 U.S. 1 (2002).

8. Doswell, in its answer, argued that the contractual right of a purchaser to acquire the capacity of a generating unit does not implicitly include the right to acquire the units' Reactive Power. Doswell also argued that these rights were not acquired by Dominion under the parties' agreements.

9. In the *Doswell Order*, the Commission found that the parties' dispute raised unresolved issues of material fact. The Commission noted that while Dominion had asserted its right to purchase all of the electrical output attributable to Doswell's combined cycle units, including Reactive Power, the Combined Cycle Agreement included no such express entitlement.¹¹ The Commission also found that while Doswell, for its part, had asserted that the Combined Cycle Agreement was not intended to include Reactive Power, Doswell had failed to adequately address the intent of the parties regarding this issue.¹² The Commission concluded that, under these circumstances, hearing and settlement judge procedures would be appropriate.¹³

10. Pursuant to the Commission's directive, the parties engaged in settlement negotiations. However, settlement efforts were not successful and the Chief Judge, on December 8, 2005, issued an order terminating the settlement judge procedures. On July 18, 2006, a hearing was held. On August 22, 2006, initial briefs were filed by Doswell, Dominion, and Commission Trial Staff (Staff). On September 14, 2006, reply briefs were filed by these same parties. As noted above, the Presiding Judge issued his *Initial Decision* on October 24, 2006, ruling in favor of Dominion. Doswell filed a brief on exceptions. Dominion and Staff filed briefs opposing exceptions.

II. Discussion

11. For the reasons discussed below, we affirm the *Initial Decision's* findings that Dominion is entitled to the Reactive Power revenues attributable to Doswell's combined cycle units.

A. **Whether the *Initial Decision* Erred in Rejecting Doswell's Argument that the Plain Language of the Combined Cycle Agreement Supports Doswell's Claimed Entitlement to Reactive Power Revenues**

¹¹ *Doswell Order*, 112 FERC ¶ 61,182 at P 19.

¹² *Id.*

¹³ The Commission subsequently reaffirmed this finding in the *Doswell Rehearing Order*. See *Doswell Rehearing Order*, 113 FERC ¶ 61,003 at P 13.

1. Initial Decision

12. The *Initial Decision* rejects Doswell's argument that the Combined Cycle Agreement unambiguously supports Doswell's claimed entitlement to Reactive Power revenues. First, the *Initial Decision* rejects Doswell's argument as a collateral attack on the *Doswell Order*, in which the Commission set the issue of the parties' contractual intent for hearing.¹⁴ The *Initial Decision* also finds that Doswell's plain language argument was not raised by Doswell in its initial filing, or in its answer responding to Dominion's protest, and that Doswell failed to request rehearing on this issue.¹⁵

13. The *Initial Decision* also holds, however, that even assuming that Doswell was permitted to make a plain language argument at hearing, such an argument fails on the merits. In particular, the *Initial Decision* rejects Doswell's reliance on *Mirant Chalk Point LLC*¹⁶ and *American Ref-Fuel Co.*¹⁷ The *Initial Decision* notes that in both cases, contracts entitling the purchaser to energy and capacity were found not to convey other rights that were not specifically included in the parties' agreements. The *Initial Decision* dismisses the applicability of these precedents, noting that both cases involved transactions occurring after the Commission's issuance of Order No. 888. The *Initial Decision* finds that, as such, both cases involved contracts that would have been required to specify the parties' entitlements to any unbundled services intended to be sold or purchased, without the expectation that the sale or purchase of energy and capacity alone would accomplish this purpose.¹⁸

¹⁴ *Initial Decision*, 117 FERC ¶ 63,017 at P 34.

¹⁵ *Id.* at note 21, citing *California Independent System Operator Corp.*, 104 FERC ¶ 61,128 at P 13 (2003) (rejecting arguments that could have been made on rehearing, but were not, as an impermissible collateral attack on the Commission's prior order on rehearing); *Utilicorp United Inc.*, 93 FERC ¶ 61,303, 62,046 (2000) (holding that the failure of a party to seek rehearing of a determination made by the Commission in a prior order bars that party from challenging the Commission's determination at a later phase in the proceeding).

¹⁶ 96 FERC ¶ 61,310 (2001) (*Mirant*).

¹⁷ 105 FERC ¶ 61,004 (2003) (*ARFC*).

¹⁸ *Initial Decision*, 117 FERC ¶ 63,017 at P 36.

2. Doswell's Exceptions

14. On exceptions, Doswell renews its claim that the *Doswell Order* does not preclude consideration of its plain language argument. Doswell asserts that in setting this case for hearing, the Commission did not prejudge this issue. Doswell also relies on the Commission's clarification, in the *Doswell Rehearing Order*, that the "parties are free to explore [at hearing] all aspects of [Doswell's proposed] rate schedule."¹⁹

15. Doswell also renews its argument that Doswell, as the owner of the Doswell Facility, is entitled to Reactive Power revenues, absent a finding that Doswell has sold these revenues. Doswell asserts that because the plain language of the Combined Cycle Agreement fails to establish Dominion's claim to these revenues, these rights are, by default, retained by Doswell. Doswell also renews its reliance on *Mirant* and *ARFC*. Specifically, Doswell asserts, as erroneous, the distinction relied upon by the *Initial Decision* in refusing to apply these precedents (*i.e.*, the *Initial Decision*'s conclusion that the instant case involves a pre-Order No. 888 contract). Doswell argues that the operative agreements here, *i.e.*, the 1998 Agreement and 2001 Agreement, were executed post-Order No. 888. Doswell concludes that, as such, the Commission is required to apply both *Mirant* and *ARFC* and, in doing so, is required to find that because neither the 1998 Agreement nor the 2001 Agreement expressly convey Reactive Power revenue rights to Dominion, this entitlement was retained by Doswell.

3. Briefs Opposing Doswell's Exceptions

16. Dominion and Staff oppose Doswell's exceptions. First, Dominion and Staff assert that Doswell's plain language argument is a collateral attack on the *Doswell Order* for all the reasons cited by the *Initial Decision*. Staff adds that, regardless, under Virginia law (the law applicable to the Combined Cycle Agreement), the use of extrinsic evidence addressing course of performance, course of dealing, or usage of trade may be relied upon, even where the contract at issue is unambiguous.²⁰

17. Dominion and Staff also challenge Doswell's reliance on *Mirant* and *ARFC*. Staff asserts that where, as here, the operative rights and obligations date back to a contract executed in 1987, *Mirant* and *ARFC*, which address an exclusively post-Order No. 888

¹⁹ *Doswell Rehearing Order*, 113 FERC ¶ 61,003 at P 19.

²⁰ Staff brief opposing exceptions at 10-11 and 21, *citing* Va Code Ann. § 8.2-2-2 (2006) and McCormick, Charles T., *Handbook of the Law of Evidence*, § 217 at 442-43 (1954).

unbundled environment, do not apply. Dominion also challenges Doswell's assertion that the 1998 Agreement and/or 2001 Agreement constitute new agreements that trigger the applicability of *Mirant* and *ARFC*. Dominion argues that, in fact, the 1998 Agreement and 2001 Agreement simply amend and restate the parties' prior agreements.

4. Commission Finding

18. We affirm the collateral estoppel finding made by the *Initial Decision* regarding Doswell's plain language argument. It is beyond dispute that the plain language of the Combined Cycle Agreement was before the Commission when it issued the *Doswell Order*. Had the Commission, at that time, been persuaded that this plain language supported, or even addressed, Doswell's entitlement to Reactive Power compensation, it would not have been necessary to set this case for hearing. Specifically, there would have been no need for any further evidentiary findings regarding the parties' intent and the underlying meaning of the parties' agreement.

19. Instead, the Commission found that the Combined Cycle Agreement does not "expressly address Reactive Power, nor do the pleadings submitted by the parties adequately address the parties' intent as it relates to this issue."²¹ Doswell failed to seek rehearing of this determination and yet seeks now to re-litigate this issue on exceptions. However, it may not do so under our long-established precedents, as aptly cited by the *Initial Decision*.²²

20. We also reject Doswell's argument that the *Doswell Rehearing Order* reopened this issue by clarifying, at Dominion's request, that "parties are free to explore [at hearing] all aspects of [Doswell's proposed] rate schedule."²³ In fact, the Commission also reiterated, in this same discussion, the finding made in the *Doswell Order*: that "[n]either [section 2.1 or 2.2 of the Combined Cycle Agreement] expressly addresses Reactive Power."²⁴

21. We also agree with the *Initial Decision* that even assuming that Doswell's plain language argument must be considered here this argument fails on the merits. Because

²¹ *Doswell Order*, 112 FERC ¶ 61,182 at P 20.

²² *See supra* note 15.

²³ *Doswell Rehearing Order*, 113 FERC ¶ 61, 003 at P 19.

²⁴ *Id.* at P 15.

the provisions on which Doswell relies make no express reference to Reactive Power, Doswell's plain language argument is not, in fact, a plain language argument at all. Rather, Doswell's claim is that the *absence* of contract language supports its inference that Reactive Power was not intended to be sold under the parties' agreement. However, this inference is itself an interpretation of the parties' agreement that goes to the issue of the parties' intent and the underlying, implied (non-express) meaning of sections 2.1 and 2.2. This is the issue the Commission set for hearing and is the issue we consider below in conjunction with the additional evidence and arguments presented here on exceptions. It necessarily follows that Doswell's asserted inference cannot be supported by the agreement's plain language.²⁵

22. Finally, we are not required to apply *Mirant* or *ARFC* to the facts presented here. While the Combined Cycle Agreement has been amended and restated by the parties, it was initially executed in 1987, prior to the advent of the Commission's Order No. 888 unbundling mandate. For the reasons discussed below, this circumstance is not without significance regarding the intent of the parties, as of 1987, and there is no credible evidence presented here, in connection with either the 1998 Agreement or 2001 Agreement that would alter the continuing applicability of this finding to the parties' subsequent amended and restated agreements.

B. Whether the *Initial Decision* Erred in its Finding that the 1987 Agreements Implicitly Provided for the Sale of Reactive Power Rights to Dominion and then Remained in Effect, as to these Rights, in the Parties' Amended and Restated Agreements

1. *Initial Decision*

23. The *Initial Decision* finds that in a bid solicitation dated September 23, 1986, Dominion sought a substitute for constructing its own generating facility, based on the cost-of-service attributable to its Chesterfield 7 unit. The *Initial Decision* finds that the 1987 Agreements effectuated this intent by providing to Dominion the energy and net electrical output capability of the Doswell Facility's combined cycle units and all of their associated attributes, including Reactive Power.²⁶ The *Initial Decision* notes that the parties' intent, on this issue, was supported by Dominion's witness, Mr. Edwards, the

²⁵ Doswell also makes what could be construed as a plain language argument with respect to article XIX of the 1998 Agreement in a section of its brief that follows its plain language argument. We address this issue below.

²⁶ *Initial Decision*, 117 FERC ¶ 63,017 at P 49 and P 50.

only witness for either party who was actually involved in the negotiations leading up to the 1987 Agreements.²⁷

24. The *Initial Decision* also relies on the extrinsic evidence of trade custom and usage to interpret the intent of the parties. Specifically, the *Initial Decision* finds that Dominion was required, at all times, to operate its transmission system in a reliable manner and thus control and maintain the amount of Reactive Power its system required.²⁸ The *Initial Decision* also reviewed the state of the industry as it existed at the time of the 1987 Agreement, noting that functional unbundling of electrical service did not exist at this time. The *Initial Decision* concludes that, in 1987, a utility's cost of service included the cost of all ancillary services related to the sale of power and/or capacity, including the cost of providing Reactive Power.

25. The *Initial Decision* also makes reference to the following passage from Order No. 888, as it relates to the need for Reactive Power service both before and after Order No. 888:

[Reactive Power service] is necessary to the provision of basic transmission service within every control area. Because Reactive Power cannot be transmitted for significant distances, the local transmission provider has to supply Reactive Power from generation sources. It is often uniquely situated to supply Reactive Power. The transmission provider or the operator of the control area in which the provider is located cannot avoid supplying it to the transmission customer, and the transmission customer cannot avoid taking at least some of this service from the transmission provider. Although a customer is required to take this ancillary service from the transmission provider or control area operator, it may reduce the charge for this service to the extent it can.²⁹

The *Initial Decision* concludes that in 1987, Doswell's predecessor-in-interest, as a prudent owner of a utility generator, would have included the costs of providing Reactive

²⁷ *Id.* at P 50, *citing* Exh. No. DVP-13 at 6-7. The *Initial Decision* notes that this testimony was given significant weight.

²⁸ The *Initial Decision* notes that this need and expectation, on Dominion's part, was also reflected in sections 6.4 and 6.5 of the 1987 Agreements, wherein Doswell warrants that its combined cycle units will be operated in a manner that will assist Dominion in maintaining proper voltages on Dominion's system.

²⁹ Order No. 888 at 31,716.

Power in its bundled rate calculations because Reactive Power is a necessity when one provides electric power to a transmission system.³⁰

26. The *Initial Decision* also finds that Dominion's entitlement to Reactive Power was not defeated by operation of the 1998 Agreement or 2001 Agreement. First, the *Initial Decision* finds that these agreements, through their recitals, are simply restatements of sections 2.1 and 2.2, as set forth in the prior agreements. The *Initial Decision* also finds that neither party to the 1998 negotiations raised the issue of Reactive Power.³¹ In addition, the *Initial Decision* notes that if the 1998 Agreement had been an entirely new agreement that had abrogated the prior agreements, the parties would have been required to file these agreements as proposed tariffs providing for unbundled rates and services.

27. In interpreting the parties' intent, the *Initial Decision* also notes that, for almost ten years, Dominion has been authorized to recover the Reactive Power revenues at issue here pursuant to filings to which Doswell has raised no objections.³² The *Initial Decision* finds that while these authorizations are not relevant *per se* to establish whether Dominion is entitled to the Reactive Power revenue at issue here, these filings are nonetheless relevant to the cumulative parol evidence record establishing the parties' course of performance under the Combined Cycle Agreement.

28. Finally, the *Initial Decision* addresses the difference between the Combined Cycle Agreement, as it relates to Reactive Power, and the Combustion Turbine Agreement. The *Initial Decision* finds that the Combined Cycle Agreement, as a series of restatements and amendments to the 1987 Agreements, continued to provide Reactive Power service as part of a bundled service, while the Combustion Turbine Agreement, which originated in 2000, was required by Order No. 888 to provide Reactive Power as an unbundled ancillary service.³³

³⁰ *Initial Decision*, 117 FERC ¶ 63,017 at P 59.

³¹ See Tr. 79: 15-23 and 87: 13-88:8.

³² See *Virginia Electric and Power Company*, Docket No. OA96-52-000, Letter Order (June 11, 1997); *Virginia Electric and Power Company*, 111 FERC ¶ 61,340 (2005); and *PJM Interconnection, L.L.C. and Virginia Electric and Power Company*, 109 FERC ¶ 61,302 (2004).

³³ *Initial Decision*, 117 FERC ¶ 63,017 at P 100-04.

2. Doswell's Exceptions

29. Doswell asserts as error the *Initial Decision's* reliance on Dominion's proxy generation unit as evidence that all attributes relating to the combined cycle unit's energy and capacity were intended to be conveyed to Dominion in the 1987 Agreements. First, Doswell asserts that the cost-of-service for the proxy generation to which the 1986 bid solicitation refers, cannot be regarded as including Reactive Power, consistent with Dominion's filing in a recent proceeding to recover *incremental* Reactive Power revenue for this same unit over-and-above the unit's 1987 cost-of-service.³⁴ Doswell also argues that because, following the execution of the 1987 Agreements, the parties agreed, in their successor agreements, to the purchase and sale of separate and discrete services (including peak firing capability and reserve standby service), the 1987 Agreements could not have conveyed all attributes relating to the combined cycle units.

30. Doswell also argues that the *Initial Decision* erroneously relies on Order No. 888 for the proposition that Reactive Power *must* be included in the purchase and sale of electrical energy and dependable capacity. Doswell asserts that, as a merchant generator, it is not a transmission provider, or a control area operator (the entities to whom Order No. 888 was directed) and was therefore not required to provide Reactive Power service to Dominion.³⁵

31. Doswell also challenges the *Initial Decision's* finding that the 1998 Agreement and 2001 Agreement did not supersede the parties' prior agreements. Doswell asserts that these latter agreements did, in fact, abrogate and replace the prior agreements, based on language set forth at article XIX of the 1998 Agreement.³⁶ Doswell argues that while

³⁴ Dominion's filing was conditionally accepted by the Commission on April 3, 2007. See *Virginia Electric and Power Company*, 119 FERC ¶ 61,004 (2007) (*Dominion Reactive Power Order*).

³⁵ Doswell also asserts that the requirements of Order No. 888 would not have provided an incentive to leave the prior agreements in place because Order No. 888 only obligated transmission providers, not merchant generators, to file unbundled rates.

³⁶ Article XIX provides as follows:

This agreement, including the Operating Procedures, is intended by the Parties as the final expression of their agreement and is intended also as a complete and exclusive statement of the terms of their agreement with respect to the Net Electrical Output and Dependable Capacity sold and purchased hereunder. Except to the extent that this Agreement expressly

(continued)

the second sentence of article XIX keeps in place any express reference incorporated into the agreement from the prior agreements, this allowance cannot be relied upon to incorporate an implied understanding.

32. With respect to the intent of the parties to the 1998 Agreement, Doswell argues that its witness, Mr. Sanchez, who was a member of its negotiating team, testified, at hearing, that Doswell did not intend to sell any services or products associated with its combined cycle units that were not expressly sold.³⁷ Doswell therefore asserts as error the *Initial Decision*'s failure to regard this testimony with sufficient weight.

33. Doswell also takes issue with the *Initial Decision*'s finding that the parties' intent can be gleaned from Doswell's apparent acquiescence in Dominion's prior Reactive Power filings. Doswell asserts that, in fact, it had no knowledge of these filings.³⁸ Finally, Doswell asserts that the *Initial Decision* failed to take account of the stark difference between the Combined Cycle Agreement (which makes no reference to Reactive Power) and the Combustion Turbine Agreement (which does). Doswell asserts that the *Initial Decision*, while analyzing these differences, incorrectly attributes the difference between these two agreements to Order No. 888 and its requirement applicable to unbundled transmission provider services.

3. Briefs Opposing Doswell's Exceptions

34. Dominion and Staff oppose Doswell's exceptions. Dominion asserts that Doswell has offered no credible evidence on the intent of the parties to the 1987 Agreements or

references the terms and conditions of the Original Agreements or the First Amendments, all prior written or oral understandings, offers or other communications of every kind pertaining to the sale of energy and Dependable Capacity hereunder to [Dominion] by [Doswell] or to [Dominion] by Intercontinental Energy Corporation or [Diamond Energy, Inc.] are hereby abrogated and withdrawn.

³⁷ See Exh. No. DLP-3 at 4.

³⁸ Doswell notes, for example, that in the *Federal Register* notice issued on July 19, 1996, concerning the first of these filings, only a docket number and the name of the filing entity were provided – among 213 *other* filing entities. Doswell submits that this notice did not provide any indication that Dominion's filing asserted, by implication, a contractual right to the Reactive Power revenue at issue here.

1990 Agreements.³⁹ Dominion asserts that, by contrast, its witness, Mr. Edwards, provided first-hand evidence regarding the original intent of the parties. Dominion argues that the *Initial Decision* properly gave this evidence significant weight on the issue of intent. Dominion adds that for nearly a decade after Reactive Power service was unbundled and became available as a separate ancillary service, Doswell at no time prior to the instant filing requested that it be compensated for providing this service.

35. Dominion argues that in its 1986 bid solicitation, it sought to acquire, by long-term contract, the output of generating units that would provide Dominion with dependable capacity and energy as an avoided unit equivalent to construction and operation of its own facility. Dominion further asserts that its 1986 bid solicitation required the responding generator to provide all of the attributes supplied by Dominion's Chesterfield 7 facility, including Reactive Power and full dispatchability, all for a bundled price reflecting the costs to contract and operate the Chesterfield 7 facility. Dominion asserts that its rights to Reactive Power, under the 1987 Agreements, is further confirmed by provisions in the Combined Cycle Agreement and related operating procedures, including provisions requiring Doswell to adhere to the voltage schedules provided by Dominion.

36. Dominion also disputes the relevance of its Chesterfield 7 Reactive Power filing and the argument, made by Doswell, that Dominion, by collecting Reactive Power revenues for its Chesterfield 7 combined cycle facility, could not have included these costs in the contract price applicable to the Combined Cycle Agreement. Dominion argues that the party that owns generation and the related Reactive Power attributes is the party that is entitled to file for and receive compensation for such generation-related attributes.

37. Dominion and Staff also respond to Doswell's argument that because, following the execution of the 1987 Agreements, the parties agreed, in their successor agreements, to additional, incremental services, the 1987 Agreement could not have conveyed everything of value relating to the Doswell Facility. Dominion argues that the amendments at issue did not concern changes in the rights and obligations of the parties with respect to Reactive Power. Staff adds that the additional services at issue were specifically negotiated by the parties and involved the application of additional resources in equipment and/or personnel that were not contemplated by the parties in 1987.

³⁹ Dominion notes that Doswell offered only Mr. Sanchez on this issue, who had no role in responding to the 1986 solicitation or in negotiating either the 1987 Agreements or the 1990 Agreements.

38. Staff also argues that the relatively limited costs at issue in this case support the *Initial Decision*'s finding that the cost of Reactive Power was subsumed in the capacity and energy payments established in the 1987 Agreements. Staff notes that while the annual revenues for Reactive Power service from the Doswell Facility total approximately \$1 million, Doswell received, in 2005, almost \$141 million in energy payments and \$82 million in capacity payments.

39. Dominion and Staff also dispute Doswell's assertions regarding the *Initial Decision*'s interpretation of Order No. 888. Dominion argues that the *Initial Decision* did not find that Order No. 888 applied to merchant generators. Rather, the *Initial Decision* simply found that Reactive Power, before Order No. 888 and now, is necessary to the provision of basic transmission service and must be provided by the transmission provider. Staff also disputes the extent to which the *Initial Decision* relied on Order No. 888 to support its findings.⁴⁰ Staff also characterizes, as irrelevant, Dominion's argument that Order No. 888 does not apply to merchant generators such as Doswell. First, Staff notes that while Doswell refers to the Combined Cycle Agreement as a "merchant generation agreement," Dominion, the other party to the agreement, is a vertically-integrated utility subject to the unbundling requirements of Order No. 888. Staff asserts that regardless, the pre-Order No. 888 environment in which the 1987 Agreements were executed was marked by the expectation and reality that services and products in the wholesale electricity markets would be sold on a bundled basis.

40. Dominion and Staff also dispute Doswell's assertions regarding the differences between the Combined Cycle Agreement and the Combustion Turbine Agreement. Staff asserts that Doswell's professed contemporaneous awareness of the differences in these two agreements regarding Reactive Power is not relevant unless Doswell is suggesting that by remaining silent, it acquired a right to Reactive Power. Dominion asserts that, in fact, the only relevance to the distinction is that the Combustion Turbine Agreement was executed post-Order No. 888.

41. Dominion and Staff also challenge Doswell's article XIX argument. Dominion argues that the title and recitals of both the 1998 Agreement and 2001 Agreement clearly state that they are mere amendments and restatements of their immediate predecessors. Staff adds that, in these latter agreements, the parties did not renegotiate the entire

⁴⁰ Staff notes, for example, that the *Initial Decision*'s finding that the 1998 Agreement and 2001 Agreement are amendments and restatements of the 1987 Agreements and 1990 Agreements, rather than entirely new agreements, relies principally on the parties' intent regarding integration, as evidenced, in part, by the lack of change in the applicable contract terms and rates. Staff concludes that a reliance on Order No. 888 is not necessary to support the *Initial Decision*'s contract interpretation.

agreements but rather modified the predecessor agreement only as necessary to accomplish the specific purposes for which they were being amended.

42. Dominion also asserts that its prior filing, seeking compensation for Reactive Power attributable to the Doswell Facility, is indicative of the intent of the parties and the longstanding belief held by Dominion that it is exclusively entitled to these revenues. Staff concurs, noting that Dominion's past filings conclusively demonstrate Dominion's belief that it was entitled to Reactive Power revenues. Staff argues that, conversely, Doswell's failure to make such a filing, prior to the instant filing, similarly demonstrates a belief, on Doswell's part, that it was *not* entitled to these revenues.⁴¹ Dominion adds that, despite being on proper notice, Doswell never objected to Dominion's position on this issue, prior to the instant filing.

4. Commission Finding

43. Sections 2.1 and 2.2 of the 1987 Agreements expressly provide for the sale and purchase of the net electrical output and dependable capacity of the Doswell Facility's combined cycle units. We find that these provisions also implicitly provide for the purchase and sale of Reactive Power as an associated attribute of these products and services.

44. This finding is supported by Dominion's witness, Mr. Edwards, who participated in the negotiations leading up to the execution of the 1987 Agreements. Mr. Edwards testified that in December of 1986, Dominion issued to prospective developers of qualifying cogeneration and small power production facilities a solicitation for proposals to provide dependable capacity and energy to Dominion at the full avoided costs for construction and operation of Dominion's Chesterfield 7 gas-fired combined cycle generating unit.⁴² Mr. Edwards further testified that the 1986 solicitation was seeking to acquire by contract from non-utility generators all of the attributes that were supplied by

⁴¹ Staff asserts that Doswell, if it believed it had this right, could have filed to recover Reactive Power revenues in 2001, if not earlier. *See* Staff brief on exceptions at 27, *citing Michigan Electric Transmission Co.*, 96 FERC ¶ 61,214 at 61,906 (2001), *order on reh'g*, 97 FERC ¶ 61,187 at 61,852-53 (2001) ("To the extent that Michigan Electric is treating Reactive Power as an ancillary service provided by its affiliate and thus reimbursing its affiliate, it must compensate the Generators Generators may file rate schedules, as necessary, to be compensated for Reactive Power as an ancillary service").

⁴² Exh. No. DVP-13 at 3-4.

the Chesterfield 7 unit.⁴³ In addition, Mr. Edwards testified that the 1987 Agreements required the owner of the Doswell Facility to operate the facility's combined cycle units in a manner that would provide voltage control and Reactive Power.⁴⁴ This evidence fully supports Dominion's claim to Reactive Power under the parties' agreement.

45. We also agree that this finding is supported by the additional extrinsic evidence relied upon by the *Initial Decision*. Specifically, we agree that prior to the Commission's issuance of Order No. 888, the sale of energy and capacity, under the circumstances presented here, would have included all related ancillary services, including Reactive Power. We also agree that Dominion, as the operator of a transmission system, would have had the need and expectation that it was acquiring this right as a bundled entitlement attributable to its purchase of energy and dependable capacity.

46. In addition, we find that Doswell's predecessor-in-interest would have shared this understanding, given the fact that Reactive Power is necessary to the provision of basic transmission service within every control area and did not constitute, prior to Order No. 888, an independent revenue stream. We also agree that Doswell's predecessor-in-interest, as a prudent owner of a utility generator, would have included the costs of providing Reactive Power in its bundled rate calculations given its likely assumption that Reactive Power is a product that Dominion would have both needed and wanted. Finally, we agree with the *Initial Decision* that Dominion's prior filings to recover Reactive Power compensation (and Doswell's failure to challenge those filings) provides additional evidence regarding the intent and expectations of the parties.

47. Doswell disputes these findings. First, Doswell asserts that the *Initial Decision*, in analyzing the extrinsic evidence identified above, erroneously interprets Order No. 888 as providing, in effect, that because Reactive Power is a necessity when one provides electric power to a transmission system, it must be included in the purchase and sale of electrical energy and dependable capacity. Doswell asserts, to the contrary, that a merchant generator is not (and was not, in 1987) *required* to provide Reactive Power. Doswell concludes that because it was not required to provide Reactive Power to any entity, the 1987 Agreements must not have conveyed this right to Dominion.

48. However, we reject this unwarranted jump in logic. In fact, Doswell's argument cannot be reconciled with the record evidence presented here. First, Doswell's argument is inconsistent with Dominion's demonstrated, contemporaneous needs and expectations

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 7.

(its actual, uncontroverted intent) in entering into the 1987 Agreements and the reasonable inferences that can be drawn regarding the intent and understanding of Doswell's predecessor-in-interest. Doswell's asserted interpretation is also inconsistent with the trade custom and usage relied upon by the *Initial Decision* in interpreting the meaning and intent of the 1987 Agreement.

49. We also reject Doswell's argument challenging the *Initial Decision's* reliance on Dominion's 1986 bid solicitation and the fact that Dominion used a proxy generation unit to assess its needs and expectations in entering into the 1987 Agreements. Doswell argues that the cost-of-service for this proxy generation cannot be regarded as including Reactive Power because Dominion has made a filing to recover incremental Reactive Power revenue for this same unit over-and-above the unit's 1987 cost-of-service. However, the filing to which Doswell refers was made by Dominion in January, 2006 and resulted in a settlement.⁴⁵ The Commission's conditional approval of this settlement, however, does not constitute approval of, or precedent regarding, any principle or issue raised by that proceeding and may not be relied upon, here, regarding the parties' intent in entering into the 1987 Agreements.

50. We also reject Doswell's argument that the provisions included in the parties' post-1987 successor agreements, including provisions addressing an additional peak firing capability and reserve standby service, demonstrate that the 1987 Agreements were not intended to convey all attributes relating to the combined cycle units. As Staff notes in its brief opposing Doswell's exceptions, the additional services at issue were specifically negotiated by the parties and involved the application of additional resources in equipment and/or personnel that were not contemplated by the parties in 1987.⁴⁶ We conclude, then, that the 1987 Agreements entitle Dominion to Reactive Power as a bundled attribute of the energy and dependable capacity produced by the Doswell's Facility's combined cycle units.

51. We also find that no provision in the parties' amended and restated agreements alters this entitlement. Doswell argues to the contrary that article XIX of the 1998 Agreement renders this amended and restated agreement a complete and exclusive statement of the parties' rights and obligations, without reference to the implicit rights regarding Reactive Power found to exist, above, under the 1987 Agreements. We reject this argument. Article XIX is a standard integration clause, a general, boilerplate representation addressing the finality of the parties' agreement that does not directly

⁴⁵ See *Dominion Reactive Power Order*, 119 FERC ¶ 61,004 at P 5.

⁴⁶ Staff brief on exceptions at 19, *citing* Tr. at 99.

address the issue of Reactive Power.⁴⁷ Moreover, this integration clause must be reconciled, here, with the parties' recitals stating that both the 1998 Agreement and 2001 Agreement are intended to operate as amendments and restatements of the parties' *prior* agreements. In this sense, then, the "final expression" and "exclusive statement" of the parties' agreement, absent an express amendment or revision to the contrary, necessarily refers to the parties' prior agreements, whether express or implied.

52. In addition, the integration clause included by the parties in the 1998 Agreement includes words of limitation regarding its applicability. As shown in the italicized words that follow, article XIX states, in relevant part, that "[e]xcept to the extent that this Agreement expressly references the terms and conditions of the [prior agreements], all prior written or oral understandings, offers or other communications of every kind pertaining to the sale of energy and Dependable Capacity hereunder . . . are hereby abrogated and withdrawn." Sections 2.1 and 2.2 of the 1987 Agreements were expressly referenced in, *i.e.*, incorporated into, the 1998 Agreement and 2001 Agreement.⁴⁸ As such, the integration provisions of article XIX do not apply to these prior agreements.

53. We also reject Doswell's argument that when it negotiated the 1998 Agreement and 2001 Agreement, its intent was to retain its entitlement to the Doswell Facility's Reactive Power. First, the right that Doswell asserts it retained had, in fact, already been sold to Dominion by way of the 1987 Agreements. No provision included in the 1998 Agreement or 2001 Agreement abrogates this entitlement. Moreover, Doswell's professed intent is supported only by the testimony of its witness, Mr. Sanchez, who acknowledged, at hearing, that the issue of Reactive Power was never discussed by the parties' in their negotiations leading up to the 1998 Agreement.⁴⁹

54. Finally, we reject Doswell's argument regarding the express right to Reactive Power, as conveyed in the Combustion Turbine Agreement. Doswell asserts that this entitlement demonstrates that the corresponding silence of the 1998 Agreement and 2001 Agreement on this issue is proof that Doswell retained these rights with respect to its combined cycle units. As noted above, however, the Reactive Power rights at issue here

⁴⁷ See *supra* note 36.

⁴⁸ See *supra* P 5.

⁴⁹ See witness Sanchez testimony at Tr. 79: 15-23 and 87: 13-88:8 (conceding that in negotiating the 1998 Agreement, there was no discussion between the parties or even within the Doswell negotiating team on the subject of Reactive Power).

arose in the 1987 Agreements and were not altered or revised by the parties in their amended and restated agreements.

The Commission orders:

The *Initial Decision* is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.