

UNITED STATES OF AMERICA 117 FERC ¶63,017  
FEDERAL ENERGY REGULATORY COMMISSION

Doswell Limited Partnership

Docket No. ER05-1119-003

**INITIAL DECISION**

(Issued October 24, 2006)

**APPEARANCES**

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**ROBERT K. ROGERS, JR., Presiding Administrative Law Judge**

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## PROCEDURAL HISTORY AND BACKGROUND

1. On June 15, 2005, in Docket No. ER05-1119-000, Doswell Limited Partnership (Doswell) filed a proposed rate schedule pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> specifying its revenue requirement for providing cost-based Reactive Support and Voltage Control from Generation Sources Service (Reactive Power Service) to PJM Interconnection, L.L.C. (PJM) from generating facilities located in Doswell, Virginia, (the “Doswell Facility”) including two 300 MW gas-fired, combined cycle units (the “CC units”) and a 170 MW gas-fired, combustion turbine generator (the “CT unit”). The Commission issued a Notice of Filing on June 20, 2005.
2. In the June 15, 2005 filing Doswell states that it is an indirect subsidiary of FPL Energy, LLC, formed for the purpose of owning and operating certain generating facilities located in Doswell, Virginia, (Doswell Facility) including two 300 MW gas-fired, combined cycle units and a 170 MW gas-fired, combustion turbine generator. Doswell states that the Doswell Facility is connected to transmission facilities owned by the Virginia Electric and Power Company (Dominion) and that, as of May 1, 2005, these transmission facilities became integrated with the transmission grid operated by PJM. Doswell also states in its filing that it has not previously filed the Reactive Power revenue requirements for the Doswell Facility with the Commission and that the Doswell Facility has never been included in any utility’s rates.
3. In the June 15, 2005 filing Doswell states that in an order issued by the Commission in Docket No. ER00-3327-000, the Commission approved a revised methodology proposed by PJM in connection with PJM’s use of Reactive Power Service. Doswell states that this revised methodology also established procedures for compensating non-transmission owner generators, such as Doswell, for the Reactive Power Service it provides to PJM. Specifically, Doswell states that under Schedule 2 of the PJM open access transmission tariff (OATT), as approved by the Commission in Docket No. ER00-3327-000, PJM is required to pay each generation owner an amount equal to the generation owner’s Commission-accepted monthly revenue requirement for Reactive Power Service.
4. In the June 15, 2005 filing Doswell states that its proposed monthly revenue requirement was developed using three cost components: (i) a fixed capability component, representing that portion of the plant fixed costs attributed to its proposed Reactive Power Service; (ii) a heating loss component, allowing for recovery of the increased generator heating losses resulting from producing Reactive Power; and (iii) a lost opportunity cost component, allowing for recovery of lost opportunity costs, as authorized under the PJM Operating Agreement. In support of its filing, Doswell states it

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<sup>1</sup> 16 U.S.C. § 824d (2000).

has performed its cost calculations in accordance with *American Electric Power Service Corp.*, 80 FERC ¶ 63,006 at 65,071 (1997) (*AEP*). Doswell claims that utilizing this methodology, its total annual Reactive Power Service costs are \$1,636,944. However, as discussed in paragraph 24, *infra*, the participants have stipulated that, should Doswell prevail at the hearing, the revenue requirement for the Combined Cycle Agreements will be \$1,098,000.

5. Notice of Doswell's filing was published in the *Federal Register*<sup>2</sup> with interventions and protests due on or before July 6, 2005.

6. PJM Interconnection, L.L.C. (PJM) filed an intervention and comments on July 6, 2005. Virginia Electric and Power Company (Dominion) also filed an intervention and protest on July 6, 2005.

7. In its protest, Dominion asserted that Doswell's filing should be rejected in its entirety because the compensation Doswell seeks from PJM for Reactive Power Service is rightfully due to Dominion, not Doswell, and is already payable to Dominion pursuant to prior Commission orders.<sup>3</sup> Dominion argued that prior to its recent integration into PJM, Dominion was authorized to recover from its transmission customers a Commission-approved Schedule 2 charge for Reactive Power under Dominion's OATT covering, in part, the Doswell Facility. Dominion asserted that since its integration into PJM, it has also received payments from PJM for the services it provides to PJM from the Doswell Facility as a transmission provider, while paying PJM for the portion of that service that it uses as a transmission customer. Dominion argued that Doswell's filing represents a collateral attack on these Commission-approved authorizations.

8. In its protest, Dominion asserts that its rights giving rise to these rate arrangements are set forth in two sets of agreements entered into between Dominion and Doswell addressing, respectively, Doswell's combined cycle units (collectively, the "Combined Cycle Agreements") and Doswell's 170 MW combustion turbine generator (Combustion Turbine Agreements). Dominion explains that the Combined Cycle Agreements were executed with Doswell's predecessor-in-interest in 1987, pursuant to which Dominion agreed to purchase all of the electrical output and dependable capacity of these facilities and obtained the right to fully dispatch these units. Dominion states that the Combined

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<sup>2</sup> 70 Fed. Reg. 36,931 (2005).

<sup>3</sup> Dominion Protest at 10-11 (citing *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).

Cycle Agreements were subsequently assigned to Doswell in 1989 and were filed with the Commission as Doswell's initial rate schedules in Docket No. ER90-80-000.<sup>4</sup>

9. In its protest, Dominion states that the Combustion Turbine Agreement was entered into by the parties in April 2000, pursuant to which Dominion agreed to purchase all of the electrical output of Doswell's 170 MW combustion turbine unit. Dominion states that this agreement was accepted by the Commission in Docket No. ER01-1182-000 and has an expiration date of December 31, 2005.<sup>5</sup>

10. In its protest, Dominion argued that under both the Combined Cycle Agreements and the Combustion Turbine Agreement, Dominion, not Doswell, is the exclusive owner of the ancillary service products that Doswell purports to provide in its filing and that Dominion, not Doswell, is exclusively entitled to compensation for these services under Schedule 2 of the PJM OATT. Dominion argued that given Doswell's contractual obligations to Dominion, Doswell's filing and the assumptions on which it relies would also violate the requirements of the PJM Operating Agreement, which obligate market participants to represent that their participation in PJM's markets will not conflict with any contract to which the participant is a party.

11. PJM, in its comments, requested that the Commission address the contract dispute issue raised by Dominion in its protest. Specifically, PJM seeks clarification regarding the entity to which it owes Reactive Power compensation.

12. On July 18, 2005, Doswell filed an answer to Dominion's protest asserting, *inter alia*, that the issues in dispute in this case concern only the Combined Cycle Agreements.

13. Doswell concedes that under the Combustion Turbine Agreement, Doswell sold all ancillary services, including Reactive Power Service, to Dominion and that, as such, Dominion is entitled to the Reactive Power revenue associated with this agreement for the term of the contract, *i.e.*, through December 31, 2005.<sup>6</sup> By contrast, Doswell argues that the Combined Cycle Agreements address only a sale of energy and capacity rights, and Dominion has no rights to Reactive Power.

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<sup>4</sup> Dominion notes that these agreements were subsequently consolidated into a single agreement in 1998, in Docket No. ER98-3606-000, and then further modified in 2001 in Docket No. ER01-3060-000. Dominion notes that the term of the Combined Cycle Agreements is scheduled to terminate on May 5, 2017.

<sup>5</sup> Dominion states that revisions to the Combustion Turbine Agreement were approved by the Commission in Docket Nos. ER01-1182-000 and ER01-3059-000. In its answer, Doswell concedes this point. *See* paragraph 13, *infra*.

<sup>6</sup> Accordingly, Doswell offers to reimburse Dominion for the revenues attributable to the Combustion Turbine Agreement.

14. Dominion states that the Combined Cycle Agreements are different from the Combustion Turbine Agreement, because the initial Combined Cycle Agreements were entered into prior to the Commission's recognition of an unbundled Reactive Power Service in Order No. 888.<sup>7</sup>

15. Doswell argues that the timing of the initial agreements, and any predecessors to the current agreement that occurred prior to the issuance of Order No. 888, is not probative. Doswell further argues in its answer that the sale of energy and capacity rights, as set forth in the Combined Cycle Agreements, is not the equivalent to the sale of Reactive Power.<sup>8</sup> Doswell argues that if the parties had intended for the Combined Cycle Agreements to include Reactive Power revenue rights, they could have so provided in the Second Amendment to the Combined Cycle Agreement, which was entered into following the issuance of Order No. 888.

16. Doswell's answer also challenges Dominion's claim that prior Commission orders approving Dominion's Schedule 2 rates, including Dominion's Order No. 888 compliance filing in 1996 and its PJM integration filing, preclude Doswell from receiving Reactive Power revenue pursuant to its filing in this proceeding. Doswell asserts that, in fact, Dominion's costs attributable to non-utility generation in Docket No. OA96-52-000 were based on imputed data and were accepted by the Commission in the context of a non-precedential settlement agreement.

17. On August 12, 2005, the Commission issued an Order Accepting In Part, And Rejecting, In Part, Proposed Rate Schedule, Subject to Suspension, And Establishing Hearing And Settlement Judge Procedures.<sup>9</sup> In the August 12 Order, the Commission accepted, in part, and rejected in part, Doswell's proposed revenue requirement for Reactive Power, suspended it for a nominal period, subject to refund and conditions, and set it for hearing and settlement judge proceedings. The Commission rejected Doswell's proposal to include in its Reactive Power revenue requirement costs attributable to its Combustion Turbine generator, and conditioned its acceptance of the Doswell filing on

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<sup>7</sup> 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) (Order No. 888).

<sup>8</sup> Doswell Answer at 5, (citing *Mirant Chalk Point, LLC*, 96 FERC ¶ 61,310 (2001) (*Mirant*)).

<sup>9</sup> *Doswell Limited Partnership*, 112 FERC ¶61,182 (2005) (August 12 Order).

the requirement that Doswell remove from its revenue requirement costs arising under the Combustion Turbine Agreement.

18. Regarding the Combined Cycle Agreements, however, the Commission stated that it was unable to determine the parties' meaning and intent regarding their respective entitlements to receive Reactive Power revenues, and set the issue for hearing. More specifically, paragraph 19 of the August 12 Order stated, "Dominion claims that under the Combined Cycle Agreement, it is entitled to purchase all of the electrical output attributable to Doswell's Combined Cycle units, including Reactive Power, yet Dominion is unable to cite to any language in the agreements expressly asserting this claimed entitlement." The order also states, "Doswell asserts that the Combined Cycle Agreements were not intended to include Reactive Power, yet Doswell fails to adequately address the intent of the parties at the time these agreements were executed, which occurred prior to the Commission's adoption of Order No. 888."

19. Paragraph 20 of the August 12 Order notes various provisions in the Combined Cycle Agreements defining terms related to Reactive Power, for example the definitions of electrical output, dependable capacity and net electrical output, and provisions which address the testing and capacity ratings. After review of those provisions, however, the Commission said none of them adequately address Reactive Power, nor do the pleadings submitted by the parties adequately address the parties' intent as it relates to this issue. The Commission set the matter for hearing to develop a fuller and more complete record, indicating that extrinsic evidence was necessary to determine the intent of the parties regarding Reactive Power revenue rights.

20. On August 18, 2005, the Chief Judge issued an order appointing Administrative Law Judge Brenner as Settlement Judge. The parties were unable to reach agreement, and on December 8, 2005, the Chief Judge issued an order terminating the settlement judge procedures and designating me as Presiding Judge in this matter.

21. On September 12, 2005, Dominion filed a Request for Rehearing and in the Alternative Motion for Clarification, and attached to it the Operating Procedures<sup>10</sup> that were included in the 2001 Combined Cycle Agreement; but were omitted from Doswell's initial filing.<sup>11</sup> Doswell later filed those same Operating Procedures as a continuation of Exhibit DLP-4 as directed by me.

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<sup>10</sup> Entitled "Virginia Power Doswell Limited Partnership Four Rivers-NUG Complex Operating Procedures, Prepared by: Doswell Limited Partnership February 1, 1999" and executed by representatives of Dominion and Doswell (Operating Procedures).

<sup>11</sup> Although Exhibit DLP-4, at paragraph 19.1, includes the Operating Procedures and Letter Agreements as part of the Combined Cycle Agreement, the Operating Procedures were not contained in Doswell's original filing as part of Exhibit DLP-4.

22. On October 3, 2005, the Commission issued an Order on Rehearing.<sup>12</sup> In the October 3 Order, the Commission reviewed Sections 1.25, 1.76, 2.1, 2.2, 6.2, 6.3, 6.4, 7.4, 7.5(b), 7.6, 7.9 and 7.10 and found that none of those sections expressly establish Dominion's entitlement to Reactive Power revenues. The Commission also found that sections 2.1 and 1.76 addressing "Net Electrical Output" and section 2.2 treating "Dependable Capacity" failed to expressly address Reactive Power. The Commission denied rehearing of its decision to send the Combined Cycle Agreement to hearing, stating, "...we cannot, on this record, summarily find that Dominion has [Reactive Power] rights under the Combined Cycle Agreements."

23. On April 4, 2006, FERC Trial Staff (Staff) filed a Joint Stipulation on Revenue Requirement, stipulating that Doswell, Dominion and Staff agreed that the revenue requirement at issue regarding the CC units shall be \$1,098,000, which will become relevant if Doswell prevails on the entitlement issue.

24. On July 11, 2006, the participants submitted to me, via email, the Joint Stipulation of Contested Issues (Joint Stipulation) herein, and on July 18, 2006, I convened a hearing on the issues set for hearing in this proceeding, which was concluded on the same day.

25. Initial briefs were filed by all parties on August 22, 2006, and reply briefs were filed on September 14, 2006.

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<sup>12</sup> *Doswell Limited Partnership*, 113 FERC ¶ 61,003(2005) (October 3 Order).

## ISSUES

26. The July 11, 2006, Joint Stipulation includes:<sup>13</sup>

**The entitlement issue.** Whether Doswell is entitled under the 2001 PPOA<sup>14</sup> and the 1998 PPOA<sup>15</sup> to receive from PJM revenues associated with Reactive Power Service from the combined cycle generating units (CC units) located at the Doswell Facility.

**Subissues:**<sup>16</sup>

(a) What was the meaning and intent of the parties at the time the 1987 and 1990 combined cycle PPOAs (CC PPOAs) were executed, which occurred prior to the Commission's adoption of Order No. 888, as they relate to the parties' respective entitlements to receive Reactive Power service revenues?

(b) Whether the 1998 PPOA and 2001 PPOA between Doswell and Dominion Virginia Power establish Doswell's sale to Dominion Virginia Power of Reactive Power service revenues from the CC units located at the Doswell Facility.

(c) What is the significance of the fact that the 1998 and 2001 PPOAs for the combined cycle units contain no provision for the sale of Reactive Power, and the 2000 and 2001 PPOAs for the combustion turbine unit contain a specific provision for the sale of Reactive Power?

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<sup>13</sup> The Joint Stipulation also contains one uncontested issue, which is the revenue requirement if, in fact, Doswell is found to be entitled to receive reactive power revenue from PJM for the Doswell Facility CC units. On April 5, 2006, the parties stipulated that the revenue requirement shall be \$1,098,000, and they restated that agreement in the July 11, 2006, Joint Stipulation.

<sup>14</sup> The Combined Cycle Agreement originally filed by Doswell in this matter appears in the record as Exhibit DLP-4, and is entitled Third Amendment and Restatement of the Power Purchase and Operating Agreement by and between Doswell Limited Partnership and Virginia Electric and Power Company, dated August 14, 2001 (hereinafter all references to a Combined Cycle Agreement shall read "PPOA" or "CC PPOA").

<sup>15</sup> The 2001 PPOA was in effect at the time Doswell's proposed rate schedule was accepted for filing subject to refund under the August 12 Order, but terminated as of December 31, 2005 and was superseded by the 1998 PPOA, subject to certain revisions prescribed in the 2001 PPOA. Thus, the 1998 PPOA is the current PPOA under review.

<sup>16</sup> While all of the subissues contained in the Joint Stipulation are treated herein, they are not listed in the same order as they appear in that Joint Stipulation.

(d) What relevance and weight should be attached to the fact that Dominion Virginia Power has been receiving compensation for Reactive Power service for the Doswell CC units?

(e) What is relevant Commission precedent for this proceeding?

### The Entitlement Issue

**Whether Doswell is entitled under the 2001 PPOA and the 1998 PPOA to receive from PJM revenues associated with Reactive Power Service from the combined cycle generating units (CC units) located at the Doswell Facility.**

### POSITIONS OF THE PARTIES

27. In its initial brief, Doswell raises for the first time the argument that “the plain language of the subject agreement contains no provision under which Doswell sells the Reactive Power revenue rights to Dominion.” (Doswell Initial Brief at 11) [hereinafter Doswell IB.] Doswell asserts, “Because the CC PPOA as written is unambiguous, it is unnecessary and inappropriate to consider extrinsic or parol evidence.” *Id.* Doswell also states, “[t]he D.C. Circuit has held: ‘... in the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances.’” (quoting *Papago Tribal Util. Authority v. FERC*, 723 F.2d 950, 955 (D.C. Cir. 1983) (citations omitted).) Thus, says Doswell, the plain language of the CC PPOA requires a holding that Doswell is entitled to the Reactive Power revenues. (Doswell IB at 11.)

28. Doswell argues that Dominion has tried to create ambiguity by disputing the plain language of the PPOAs and then trying to resolve the ambiguity with parol evidence. To support the argument, Doswell cites *Westmoreland-LG&E Partners v. Virginia Electric and Power Co.*, 254 Va. 1, 11 (1997) (hereinafter “*Westmoreland I*”), and *Doswell Limited Partnership v. Virginia Electric and Power Co.*, 251 Va. 215, 222-223 (1996).

29. Dominion counters Doswell’s argument that the PPOAs are not ambiguous with a claim that raising the argument without first having requested rehearing of the August 12 Order is an improper collateral attack on that order and must be denied. (Dominion Reply Brief at 2, 7.)

30. Doswell offers that Dominion has conceded that Doswell, as the owner of the Doswell Facility, is entitled to Reactive Power revenues unless Doswell has sold the rights to those revenues, (citing Tr. 125: )<sup>17</sup> and that Dominion must show that it has in

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<sup>17</sup> References to the Transcript of the July 18, 2006 hearing appear as “Tr” followed by the page number, a colon, and any relevant lines on that page to which reference is made.

some way acquired the right to Reactive Power revenue from Doswell. (Citing Tr. 125:-126:)<sup>18</sup> (Doswell IB at 10.)

31. Doswell argues that Dominion “appears” to concede that Reactive Power is not the energy measured in kilowatt-hours that is sold under Section 2.1 and is not the capacity sold under Section 2.2. (citing Tr. 129: and 130:). Then Doswell avers that Dominion did not identify any provisions of the CC PPOA under which Doswell explicitly sells the right to Reactive Power to Dominion. (Doswell IB at 10, 11.)

32. To support its argument that Reactive Power was never sold to Dominion, Doswell cites *Mirant Chalk Point, LLC*, 96 FERC ¶ 61,310 (2001), wherein the Commission rejected a variety of claims by Potomac Electric Power Company (PEPCO) to Reactive Power revenue for generation units owned by Mirant Corporation (Mirant). Doswell also argues a similar issue has arisen with regard to the value of renewable energy attributes in the form of renewable energy credits (RECs) and analogizes the holding by the Commission in *American Ref-Fuel Co.*,<sup>19</sup> to the issue of whether or not Reactive Power is sold when energy and capacity are sold. (Doswell IB at 12.)

33. Commission Staff states that its analysis of the 1998 PPOA and 2001 PPOA led it to conclude that Dominion owns the rights to Reactive Power revenue generated by the CC units. (Citing Ex. S-1 at 4) (Joint Stipulation at 6.) The Commission Staff states that the services and obligations to provide Reactive Power (through Dominion’s exercise of operational control) first described in the 1987 PPOAs and 1990 PPOAs, which continued in all forms in all amended and bundled restated contracts, show a continuum of Dominion obtaining (by purchase) and exercising (by dispatch) the rights to Reactive Power generated by the Doswell Facility CC units. (Citing Ex. S-1 at 23) (Joint Stipulation at 6.)

### **DISCUSSION, FINDINGS AND CONCLUSIONS**

34. Pursuant to 16 U.S.C. § 8251(a) an aggrieved party may request rehearing of an order the Commission issued under the Federal Power Act, and a party must have made such a request for rehearing within 30 days of filing of the offending Order or be barred from bringing a proceeding to review such Order. Commission Rule 713<sup>20</sup> provides the

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<sup>18</sup> In its treatment of Subissue (a), Doswell argues Dominion’s filing in an unrelated matter seeking a reactive power rate for a facility that Dominion owns is inconsistent with Dominion’s position in the matter at issue herein. (Doswell IB at 19.)

<sup>19</sup> *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003), reh’g denied, 107 FERC ¶ 61,016 (2004), petition for review dismissed sub nom. *Xcel Energy Services, Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005).

<sup>20</sup> 18 C.F.R. § 385.713 (2006). While this section was amended for publication in 2006, the changes are minor and not relevant here.

procedure for filing a request for rehearing of a Commission order. Doswell's assertion that the CC PPOAs are unambiguous and that parol evidence or extrinsic evidence is neither necessary nor proper in this proceeding, was not raised before the Commission when it issued the August 12 Order referring this matter for hearing as a result of ambiguity in the PPOAs, and Doswell failed to timely request rehearing of the August 12 Order on those grounds. Hence, Doswell's attempt to raise this issue at this late date is found to be a collateral attack on the August 12 Order, and is rejected as improper.<sup>21</sup>

35. Even assuming, *arguendo*, that Doswell's argument regarding ambiguity was not barred as an improper collateral attack on a previous Commission order in this matter, Doswell's reliance on *Papago* is misplaced. In that case the Court found that specific language did exist that allowed a party to bring a Section 206 proceeding to amend rates, even though unilateral amendment of rates under Section 205 of the Federal Power Act was barred by the language of the agreement. *Papago*, 723 F.2d at 955. In fact, in *Papago*, the Court noted that it had already ruled in a prior decision that the same agreement provided such an avenue of relief. *Id.*

36. Doswell also misses the mark when it relies on *Mirant* and *American Ref-Fuel Co.* to support its argument that purchases of energy and capacity do not necessarily include Reactive Power rights. While both cases found that sales of energy and capacity did not convey other rights that were not specifically included in the agreement of sale, both cases involved events that occurred only after the 1996 advent of FERC Order No. 888 which unbundled rates. The earliest "history" considered in *Mirant* was the energy production in 1999 and 2000, and the earliest transaction of relevance therein occurred on May 31, 2000. *Mirant*, 96 FERC at 62,197. Similarly, the issues raised in *American Ref-Fuel Co.* arose after FERC adopted regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000).

37. Doswell's argument that Dominion must show that Dominion "in some way" acquired the right to Reactive Power revenue from Doswell rings true; but the extension of that argument goes too far when it says that Dominion must identify a provision of the CC PPOA under which Doswell explicitly sells the right to Reactive Power to Dominion.

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<sup>21</sup> *California Independent System Operator Corp.*, 104 FERC ¶ 61,128 at P 13 (2003) (rejecting arguments that should have been made on rehearing, but were not, as an impermissible collateral attack on an earlier Commission order in the proceeding); *Swidler Berlin Shereff Friedman, LLP*, 108 FERC ¶ 61,105 at P 4 (2004) (challenges to the merits of the Commission's underlying directive in a prior Commission order represented an impermissible collateral attack on that order); *Utilicorp United Inc.*, 93 FERC ¶ 61,303, 62,046 (2000) (failure of a party to seek rehearing of an earlier determination in a proceeding barred that party from challenging the earlier determination, as such a challenge was an impermissible collateral attack, on the prior Commission order).

As will be demonstrated in the treatment of Subissue (a), *infra*, the purchase and sale of energy and dependable capacity in the pre-Order No. 888 era, involved bundled rates, and those sales necessarily included Reactive Power.

38. The Entitlement Issue is the ultimate issue to be decided in this matter, and I find that Doswell is not entitled to the Reactive Power revenues it proposes to collect from PJM in the filing at issue herein. Rather, the right to Reactive Power revenues from the CC units at the Doswell Facility resides with Dominion pursuant to the PPOA between Dominion and Doswell in which the purchase and sale of net electrical output and dependable capacity, including Reactive Power as part of bundled ancillary services, was accomplished in 1987 and continued unchanged through three (3) restatements and amendments.

39. Inasmuch as the outcome of the Entitlement Issue turns on the answers to the questions presented in the subissues, I will explain the rationale for my finding regarding the entitlement issue as I treat the subissues in the order set forth, *supra*.

**Subissue (a): What was the meaning and intent of the parties at the time the 1987 and 1990 CC PPOAs were executed, which occurred prior to the Commission's adoption of Order No. 888, as they relate to the parties' respective entitlements to receive Reactive Power service revenues?**

### **POSITIONS OF THE PARTIES**

40. Doswell opens with the assertion that the 1998 PPOA replaced, rather than amended, the prior PPOAs. (Citing Ex. DLP-3 at 4 and Ex. DLP-7 at 7.) Therefore, the intent of the parties in entering the 1987 PPOAs is not probative. Doswell cites *Westmoreland-LG&E Partners v. Virginia Electric and Power Co.*, 259 Va. 319 (2000) (hereinafter "*Westmoreland II*") to hold that a focus on the parties' intent in initial superseded agreements is not proper when a dispute involves a subsequent agreement. (Doswell IB at 15.)

41. Doswell then contends that the intent of the parties at the time the 1987 PPOAs and 1990 PPOAs were executed – and maintained in the 1998 PPOA and 2001 PPOA – was that Doswell was only selling energy and capacity to Dominion and no other rights. More specifically, Doswell asserts that those capacity and energy products were defined products that did not include Reactive Power Service, and thus, Doswell is entitled to receive Reactive Power service revenues from PJM. (Citing Ex. DLP-3 at 3-4 and Ex. DLP-7 at 2.) This position was emphasized by the testimony of Doswell witness Sanchez, when he said, "[w]hile Reactive Power service did not exist as a discrete service in 1987, the 1987 PPA sold defined products[; w]hat was not sold was not sold." (Citing Ex. DLP-7 at 4) (Doswell IB at 18.)

42. Doswell also maintains that Dominion's operational control of the Doswell Facility's CC units does not give Dominion the right to Reactive Power revenue. (Citing Ex. DLP-2 at 3-4; Ex. DLP-6 at 2-3) (Doswell IB at 20-22.)

43. Dominion asserts that the original 1987 PPOAs with Doswell's predecessor in interest and the 1990 PPOAs with Doswell, and the related circumstances and operating procedures related to those agreements, establish that Dominion purchased the right to Reactive Power attributes and voltage control service of the Doswell Facility's CC units as if Dominion owned those units, and that Doswell has been and is currently being compensated for providing the Reactive Power attributes and voltage control service as part of the bundled pricing negotiated under those PPOAs and continued in the 1998 PPOA and 2001 PPOA. (Citing Ex.DVP-1 at 4 and Ex. 13 at 3-8) (Joint Stipulation at 6.)

44. Doswell argues in its initial brief, "contrary to Dominion's fundamental premise that it owned everything of possible value from the Doswell facility under the 1987 CC PPOAs, Dominion subsequently purchased discrete services from Doswell." Doswell points to witness Sanchez who testified that, additional services were included in three separate contracts, in 2000-2002, for peak firing capability for 48 MW of additional capacity from the combined cycle units (Tr. 96:-97:), as well as a reserve standby service sold in 1998 (Tr. 97:), and the right to purchase gas out of storage (Tr. 97:-98:). (Doswell IB at 19-20.)

45. Staff points out in its reply brief that increased peak firing capacity and faster stand-by reserve service related to the Doswell Facility CC units would have to be tied to additional investment in equipment. Such changes, they assert, would not alter the fact that Dominion had, in 1987, purchased the entire output of the Doswell Facility CC units. Staff's reply brief also mentions that changes in the gas storage service would not affect the output of the CC units. (Staff Reply Brief at 8) (hereinafter "Staff RB")

## DISCUSSION, FINDINGS AND CONCLUSIONS

### *The 1986 solicitation and the 1987 PPOA's*

46. I cannot agree with Doswell's characterization that the currently effective PPOAs are new agreements that replaced, rather than amended, the prior PPOAs. For the reasons set forth in the treatment of Subissue B, *infra*, I find that the 1998 and 2001 PPOAs are, in fact, restatements and amendments to the original 1987 PPOAs. Because the 1998 and

2001 PPOAs are silent on the issue of sale of Reactive Power<sup>22</sup> and, therefore, do not provide a clear picture of the parties intent regarding the rights to Reactive Power, it is proper to examine extrinsic evidence of the parties intent, including the background of negotiations leading to the relevant contracts to help resolve that ambiguity. *Cajun Electric Power Cooperative, Inc. v. Federal Energy Regulatory Commission, et al.*, 924 F.2d 1132, 1137 (D.C. Cir. 1991); *South Carolina Electric & Gas Company*, 59 FERC ¶ 61,050 at 61,219 (1992); *Richmond Engineering and Manufacturing Corporation v. F. P. Loth, et al.*, 135 Va. 110 (1923)

47. By mutual consent, Virginia law governs questions of interpretation and performance of the PPOAs at issue herein.<sup>23</sup> In *Westmoreland II* the court said that identical provisions in successive contracts may or may not carry the same meaning in each instance. *Westmoreland II*, 259 Va. at 324 (citing *Galloway Corp. v. S.B. Ballard Constr.*, 250 Va. 493, 502-06 (1995)). The court then reversed the lower court's refusal to consider evidence relevant to the parties' intent in 1991 in addition to, not as a substitute for, evidence of that intent in 1989. Thus, *Westmoreland II* supports the approach taken in this decision, which is to consider the intent of the parties throughout the entire course of negotiations and performance with regard to the 1987, 1990, 1998 and 2001 PPOAs.

48. I begin by considering the 1987 PPOAs and the 1986 solicitation for bids which led to those 1987 PPOAs, and upon review of the testimony and other evidence in the record as a whole, I conclude that the original 1987 PPOAs were contracts that sold the entire net electrical output and dependable capacity of both of the Combined Cycle Units to Dominion as bundled services, including Reactive Power as part of the bundled ancillary services.

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<sup>22</sup> A review of the Operating Procedures attached to Dominion's Request for Rehearing, and included in Exhibit DLP-4 reveals that Reactive Power is contemplated as part of the capability of the Doswell Facilities. Section 4.14 calls for testing of the Reactive Power capability; Exhibit B to the Operating Procedures, entitled Complex Performance Specifications, includes reactive capability measured in MVARs; and Exhibit D to the Operating Procedures, entitled Generator Capability Curves, includes "Rated Reactive Power." The Operating Procedures do not, however, specifically discuss the parties' intent regarding sales of Reactive Power. Thus, even when the Operating Procedures are considered as part of the Combined Cycle Agreements, the agreements remain somewhat ambiguous on this point.

<sup>23</sup> The Choice of Law provision is contained at Article XVI of each of the PPOAs and is identical in all respects among the PPOAs. (Ex. DVP-2; Ex. DVP-3; Ex. DVP-5 and Ex. DLP-4.)

49. The genesis of the current PPOA can be traced to a Solicitation of Bids dated September 23, 1986, in which Dominion sought to acquire by contract from non-utility generators (NUGs) all of the attributes supplied by Dominion's Chesterfield 7 combined cycle unit. (See Ex. DVP-13 at 2, 4; Tr. 193:24-28; *Doswell Limited Partnership*, 50 FERC ¶61,251 at 61,755 (1990).) This solicitation was the basis for the 1987 PPOAs.

50. Under each of the 1987 PPOAs Dominion acquired from Intercontinental Energy Corporation (IEC) exclusive rights to all of the dependable capacity and net electrical output capability from the CC units in exchange for a capacity payment and an energy payment by Dominion, which reimbursed the NUG for capital investment related to financing the Doswell Facility and maintaining the facility's ability to produce and deliver the net electrical output capability and all of its associated attributes (e.g. Reactive Power and voltage support specified by Dominion), just as if Dominion owned the units.<sup>24</sup> (Ex. DVP-13 at 6, 7.)

51. *Westmoreland I* briefly treated the issue of trade custom and usage in the interpretation of contracts and confirmed the Virginia Supreme Court's previous approach to use of trade custom or usage in *Doswell Limited Partnership v. Virginia Electric and Power Co.*, 251 Va. 215 (1996) (hereinafter the "Doswell case"). In the Doswell case, the court examined the same 1990 PPOAs between Dominion and Doswell that are involved in the matter before me, and found that Section 10.3 of the PPOAs was unambiguous as it related to the Fuel Transportation Charge. Ironically, Doswell had argued in that case that the court should use extrinsic evidence of trade custom and usage to interpret the intent of Section 10.3 of the 1990 PPOAs. The Court stated that evidence that contract phrases or terms have acquired, by custom in the locality, or by usage of the trade, a peculiar meaning not attached to them in their ordinary use is admissible even though the phrases or terms themselves are unambiguous. *Id.* at 225 (citing *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 94-95 (1895) and Va. Code Ann. § 8.2-202(a) (2006)). In the instant case, evidence of trade custom is critical to an understanding of the intent of the parties regarding Reactive Power when they entered into the 1987 PPOAs, because the PPOAs are silent on that specific point.

52. Electric power consists of two components. The first component, "real" power (expressed in terms of watts), is the active force that causes electrical equipment to perform work. The second component, "reactive" power, (expressed in terms of volt-amperes reactive (VARs)) is necessary to maintain adequate voltages so that "real" power can be transmitted. *Southern Company Services, Inc.*, 80 FERC ¶61,318 at 62,080 (1997).

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<sup>24</sup> The testimony regarding the facts on this point was uncontroverted and was presented by the only witness on either side who was actually involved in the negotiations for the 1987 and 1990 PPOAs. It is given significant weight.

53. Reactive Power is needed to support the voltages that must be controlled in order to provide reliable, stable electric power to the end-use customer. (Ex. DVP-11 at 4, 5.) From the perspective of a transmission owner, Reactive Power is necessary to make the transmission system work, and without the proper amount of Reactive Power, the electric energy generated from distant generation plants cannot be delivered to loads located at geographically diverse locations. (Ex. S-1 at 17.)

54. Dominion, as the operator of the transmission system, was required (under voluntary obligation) to operate its transmission system in a reliable manner, which involves tightly controlling the amount of Reactive Power on the portion of the transmission system that Dominion controls and operates, so that proper voltages are maintained within the system. (Ex. S-1 at 16.) Dominion's expectation was that the NUGs would be responsive to direction from Dominion's staff, including adhering to voltage schedules, and that Dominion would have operational control of the NUGs equivalent to that of a unit owned by Dominion. (Ex. DVP-11 at 7.) The 1987 PPOAs reflect this expectation regarding voltage control and Reactive Power supply at Sections 6.4 and 6.5, wherein Doswell warrants that the units will be operated in accordance with voltage and Reactive Power control, which cannot be accomplished without producing or absorbing Reactive Power.<sup>25</sup> (Ex. DVP-11 at 8.)

55. In 1987, functional unbundling of electrical service did not exist. Bundled electric service in 1987 meant that all ancillary services necessary to produce energy and dependable capacity (as the Commission defined ancillary services in Order No. 888) were included in providing generation and transmission service. In 1987 the 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 Service, and Reactive Power was a product subsumed within the definition of capacity and energy under the bundled service. In a bundled regime, prior to Order No. 888, there was no explicit revenue stream from Reactive Power.<sup>26</sup> Reactive Power was implicitly included in the capacity and energy payments, and when one purchased Reactive Power, they purchased the right to revenue generated by that Reactive Power. (Ex. S-1 at 17; Tr. 218:22-219:14.)

56. In developing rates in 1987, a prudent owner of a utility generator would include wear and tear on the machinery from the need to reset Reactive Power, and those costs

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<sup>25</sup> While I find Doswell persuasive when it argues that operational control of the Doswell Facility's CC units does not, in and of itself, give Dominion the right to reactive power revenue, I also note that the operational control provisions are not inconsistent with Dominion's position that it purchased Reactive power as a service bundled with energy and dependable capacity.

<sup>26</sup> This fact was recognized by Doswell witness Sanchez, when he asserted, "While reactive power service did not exist as a discrete service in 1987, the 1987 PPA sold defined products. What was not sold was not sold." (Ex. DLP-7 at 4.)

would be included in the bundled rate as was customary for all bundled rates of that time. (Tr. 221:17-222:14; Tr. 222:21-223:5; Ex. S-1 at 15; Order No. 888 at 31,706.) Thus, when “dependable capacity” and “net electrical output” was sold by IEC to Dominion (circa 1987), Dominion also purchased the bundled ancillary services, including Reactive Power generated by the CC units. (Ex. S-1 at 17.)

57. In Order No. 888, the Commission recognized the foregoing state of the industry when it found:

“[Reactive Supply and Voltage Control Service from generation sources] 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.” (Order No. 888 at 31,716 (emphasis added)).

58. The fact that Dominion and Doswell later negotiated separate agreements regarding increased peak capacity, reserve standby service and changes in the gas storage service have no impact on the basic underlying fact that Dominion purchased all of the net electrical output and dependable capacity of the Doswell Facility CC units extant in 1987 and paid for it in a bundled rate. The recitals of all of the various PPOAs support this view, since all of them indicate the Parties’ intent that the PPOAs contemplate sales of Net Electrical Output and Dependable Capacity “exclusively” to Dominion. (Ex. DVP-2; Ex. DVP-3; Ex. DVP-5 and Ex. DLP-4.) I find the Staff’s position on this point to be persuasive when they assert that increased peak firing capacity and faster stand-by reserve service related to the Doswell Facility CC units would have to be tied to additional investment in equipment, and would not alter the fact that Dominion had, in 1987, purchased the entire output of the Doswell Facility CC units. (Staff RB at 8.)

59. When the foregoing evidence is viewed as a whole, it is clear to me that in 1987, Doswell’s predecessor in interest, IEC, as a prudent owner of a utility generator, would necessarily include the costs of providing Reactive Power in its bundled rate calculations, because Reactive Power is a necessity when one provides electric power to a transmission system. It is the element necessary to insure that net energy is reliable and controlled, and it must be included in the purchase and sale of electrical energy and

dependable capacity. Therefore, in 1987, when the PPOAs called for the bundled sale of the net electrical output and dependable capacity produced by the Doswell Facility CC units, that sale included the Reactive Power necessary to produce the reliable and controlled energy that IEC committed to deliver to Dominion.

*The 1990 PPOA's*

60. Upon consideration of the 1990 PPOAs, and upon review of the testimony and other evidence in the record as a whole, I conclude that nothing in the 1990 PPOAs altered the sale of the entire net electrical output and dependable capacity of both of the CC units sold as bundled services to Dominion. Hence the sales in the 1990 PPOAs continued to include Reactive Power.

61. The language of both 1987 PPOAs and both 1990 PPOAs regarding the sale of net electrical output and dependable capacity of the Doswell Facility CC units is identical.<sup>27</sup>(Tr. 212:24.)

62. The 1990 PPOAs restructured the energy and capacity payments to include, in addition to a capacity payment and an energy payment, a fixed fuel transportation charge and a fuel holding charge. (Ex. DVP-13 at 8.) This change was brought about because, in 1989, Dominion changed the arrangements for transporting fuel to Chesterfield 7, and offered Doswell and other gas-fired cogenerators that resulted from the same 1986 solicitation of bids, the opportunity to modify the 1987 PPOAs to reflect that change in the fuel arrangements.<sup>28</sup> Separation of the Chesterfield 7 costs into the new charges resulted in lower monthly capacity charges. (Ex. DVP-13 at 8, 9.) There was no change to the obligations created by the 1987 PPOAs regarding Reactive Power. (Ex. DVP-13 at 9.)

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<sup>27</sup> Ex. DVP 3 at 13-15, Sections 2.1 and 2.2 of each of the documents entitled, "First Amendment and Restatement of the Power Purchase and Operating Agreement by and between Doswell Limited Partnership as Successor in Interest to Intercontinental Energy Corporation and the Virginia Electric and Power Company (Facility No. 1) January 3,1990" and "First Amendment and Restatement of the Power Purchase and Operating Agreement by and between Doswell Limited Partnership as Successor in Interest to Intercontinental Energy Corporation and the Virginia Electric and Power Company (Facility No. 2) January 3,1990" (the 1990 PPOAs). The 1990 PPOAs also contain language in section 2.3 that provides contingencies that must be met by Doswell for the anticipated newly completed Doswell Facility before Dominion would be required to purchase the energy and dependable capacity listed in Sections 2.1 and 2.2. Those contingencies are not relevant here.

<sup>28</sup> The parties obligations under the revised fuel transportation charge were the subject of the litigation in the Doswell case.

63. At the time the parties entered into the 1990 PPOAs, Order No. 888 had still not been issued, and the conditions related to Reactive Power and detailed in paragraphs 52 through 56 inclusive, *supra*, were still extant.

64. The 1990 PPOAs were the first restatements and amendments to their respective 1987 PPOAs, as evidenced by their titles and by the recital in each of the PPOAs stating, “WHEREAS, the Parties wish to amend and restate the Original Agreement ... and have agreed that from and after the effective date, Original Agreement ... shall be deemed to have been amended and restated so that complete texts thereof shall be as set forth below.” (Ex. DVP-3 at 4.)

65. Based upon the foregoing, I find that the 1990 PPOAs were the first restatements and amendments to their respective 1987 PPOAs and continued the sale to Dominion of the same bundled net electrical output and dependable capacity, including Reactive Power, that was established in the 1987 PPOAs.

**Subissue (b): Whether the 1998 PPOA and 2001 PPOA between Doswell and Dominion Virginia Power establish Doswell’s sale to Dominion Virginia Power of Reactive Power service revenues from the CC units located at the Doswell Facility.**

#### POSITIONS OF THE PARTIES

66. Doswell contends that the 1998 PPOA and 2001 PPOA sell energy and capacity to Dominion – not Reactive Power service – and thus allow Doswell to receive from PJM Reactive Power service revenues from the Doswell Facility’s CC units. (Citing Ex. DLP-3 at 3-4.) Doswell states that Dominion did not offer to purchase Reactive Power from the CC units, that Doswell did not intend to sell any service or product associated with these units that was not specifically sold in the 1998 PPOA or 2001 PPOA, and that Reactive Power service was not specifically sold and therefore, as a generator, Doswell is entitled to receive the Doswell Facility CC units’ Reactive Power service revenues from PJM. (Citing Ex. DLP-2 at 4; Ex. DLP-3 at 3-4 and Ex. DLP-6 at 2) (Joint Stipulation at 6.)

67. Central to Doswell’s argument is its position that the 1998 PPOA is an entirely new agreement rather than a continuation of the prior 1987 and 1990 PPOAs.<sup>29</sup> Doswell argues that the terms of the 1998 PPOA specifically abrogate all of the terms of the 1987 and 1990 PPOAs unless they are specifically discussed in the 1998 PPOA. In support of

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<sup>29</sup> Doswell states, however, that the 1990 PPOAs were “amended, restated and combined into a single CC PPOA in 1998.” (Doswell IB at 2.)

this argument, Doswell points to the “Entirety” provisions of the 1998 PPOA and contrasts those provisions with those found in the 1987 and 1990 PPOAs.<sup>30</sup>

68. Doswell argues that, since the 1998 PPOA is an entirely new agreement, formed after the issuance of FERC Order No. 888, the silence in that new agreement regarding Reactive Power demonstrates that it was not sold to Dominion in 1998’s new era of unbundled rates, because it would necessarily have been listed as an ancillary service at that point in order to have been sold. The parties both knew this, and their silence was an indicator that there was no intent to purchase or sell Reactive Power as an ancillary service.

69. Dominion asserts that its solicitation that led to the 1987 PPOAs sought a power contract for the CC units at the Doswell Facility that would allow Dominion to operate the Doswell Facility as if Dominion owned and operated it, and accordingly, based contractual compensation on an avoided costs basis to its Chesterfield 7 generating unit (Citing Ex. DVP-11 at 7-13; Ex. DVP-13 at 3-7 and Ex. DVP-14) (Joint Stipulation at 7.)

70. Dominion asserts it acquired the exclusive rights to the Reactive Power attributes of the Doswell Facility CC units in its original 1987 contracts with Doswell’s predecessor in interest, and that the exclusive entitlement was retained by Dominion in each of a series of successor restatements and amendments of the original 1987 PPOAs, including the 1990 PPOAs, 1998 PPOA and 2001 PPOA, and the operating procedures under those PPOAs. (Citing Ex. DVP-1 at 4 and Ex. DVP-13 at 3-12) (Joint Stipulation at 7.)

71. Doswell points out that the 1998 PPOA made changes in the prior PPOAs by changing the energy price terms; compensation for fixed costs associated with storage and transportation of natural gas; the carrying costs of Doswell’s stored fuel; dispatch operation and standby status of the facility; the capacity payment reduction calculation; and maintenance outage terms. (Doswell IB at 17.)

72. The Commission Staff stated that its analysis of the 1998 PPOA and 2001 PPOA led it to conclude that within an historical regulatory context, with due regard for the principles of electrical engineering, that Dominion acquired the exclusive rights to the Reactive Power revenues generated from the operation of the Doswell Facility CC units in 1987. (Citing Ex. S-1 at 13) (Joint Stipulation at 7.)

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<sup>30</sup> The “Entirety” provisions appear at Article XIX, Section 19.1 of all of the PPOAs. (Ex. DVP-2; Ex. DVP-3; Ex. DVP-5 and Ex. DLP-4.)

73. The Commission Staff also stated that it determined that the issuance of FERC Order No. 888 did not abrogate or change existing contracts and, therefore, Doswell cannot rely upon the unbundling of ancillary services in that Commission Order to create a new entitlement with respect to an existing contract. (Citing Ex. S-1 at 22) (Joint Stipulation at 7.)

## DISCUSSION, FINDINGS AND CONCLUSIONS

### *The 1998 PPOA*

74. Upon review of the 1998 PPOA, considering its language as a whole, and the context within which it was drafted, I find that the 1998 PPOA is, in fact, a restatement and amendment of the prior 1987 and 1990 PPOAs and is not a new contract that abrogates its predecessors.

75. As stated previously, by mutual consent Virginia law governs questions of interpretation and performance of the PPOAs at issue herein. In Virginia, where the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. *TM DelMarVa Power, L.L.C., et al. v. NCP of Virginia, L.L.C.*, 263 Va. 116, 119 (2002). Contracts must be considered as a whole "without giving emphasis to isolated terms." *American Spirit Ins. Co. v. Owens*, 261 Va. 270, 275 (2001). Words used by the parties are to be given their usual, ordinary and popular meaning, unless it can be clearly shown in some legitimate way that they were used in some other sense, and the burden of showing this is always upon the party alleging it. *Kate Walker Ames, et als. v. American National Bank of Portsmouth*, 163 Va. 1, 73 (1934). Finally, no word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract. *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 135-136 (1995). In the matter at hand, the parties' intent regarding integration is clear on its face and will be interpreted in accordance with basic rules of interpretation.

76. The 1998 PPOA is entitled, "Second Amendment and Restatement of the Power Purchase and Operating Agreement by and between Doswell Limited Partnership and The Virginia Electric and Power Company, June 29, 1998." In addition, the recitals of the 1998 PPOA clearly recognize the original (1987) agreements and the First Amendments and Restatements of the Original Agreements of 1990, and state the Parties' intent that they "wish to amend and restate the First Amendments on the terms and conditions set forth [in the 1998 PPOA]."

77. Section 19.1 of the 1998 PPOA states:

“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 references the terms and conditions of the Original Agreements or the First Amendments*, [a]ll prior written or oral understandings, offers or other communications of every kind pertaining to the sale of energy and Dependable Capacity hereunder to Virginia Power by Operator or to Virginia Power by Intercontinental Energy Corporation *or [Diamond Energy, Inc.]* are hereby abrogated and withdrawn.” (Emphasis added.)

78. With the exception of the italicized language set forth in the preceding paragraph, all of the language contained in the 1998 PPOA Entirety provision is identical to the language of the Entirety provisions of the 1987 PPOAs and the 1990 PPOAs. (*See* Section 19.1 of the 1987, 1990 and 1998 PPOAs; Ex. DVP-2; Ex. DVP-3 and Ex. DVP-5.) Thus, the 1998 PPOA adds a reference that includes the Operating Procedures as part of the PPOA and, beginning with the word “[e]xcept” provides limiting language regarding the broad abrogation of prior oral understandings, offers or other communications. The effect of that new phrase is that anything appearing in the 1987 PPOA and the First Amendment to it that also appears in the 1998 restatement and amendment remains in effect and is *not* abrogated. This includes the Article II provisions for “Sale and Purchase of Energy and Capacity” which are, as Doswell admits, virtually identical as they appear directly in all of the PPOAs. (Doswell IB at 18.)

79. Conversely, the 1998 PPOA no longer contains the Section 2.3 language from 1990 providing contingencies from Dominion’s obligation to purchase power. The CC Units were up and running by 1998, and this is an example of language in the 1990 PPOAs that does not appear in the 1998 restatement and amendment, directly or by reference, and is thereby abrogated by the 1998 PPOA. (Ex. DVP-5 at Article II.)

80. The lack of change in the rates charged for energy and dependable capacity in the 1998 and 2001 PPOAs further demonstrates that the Parties intended those PPOAs to be restatements and amendments to the prior PPOAs, rather than new agreements. If the 1998 PPOA had been an entirely new agreement, the Parties would have been required under Order No. 888 to file the relevant tariffs as unbundled rates at that time. The fact that they did not do so demonstrates that the Parties intended that the PPOAs be treated as prior existing agreements under Order No. 888, in which the Commission specifically stated that it would not abrogate such agreements. Order No. 888 at 31,729 and 31,730.

81. While extrinsic evidence on the unambiguous meaning of the Entirety clause is unnecessary, such evidence is appropriate on the ambiguous point of the Parties' intent regarding the continued purchase and sale of energy and capacity, bundled with ancillary services, including Reactive Power. In that regard, Doswell's witness, Sanchez, admitted that in negotiating the 1998 PPOA there was no discussion either between the parties or even within the Doswell negotiating team on the subject of Reactive Power. (Tr. 79:15-23 and Tr. 87:13-88:8.) Mr. Sanchez testified that the 1998 PPOA was the product of a settlement of litigation between Dominion and Doswell, and there was an extensive term sheet of changes to the 1990 PPOA that were the essence of that settlement. (Tr. 90:25-91:7.) He identified Scott Hathaway as the lead negotiator in 1998 for FPL in negotiating the PPOA. Mr. Sanchez said that he and Mr. Hathaway discussed a number of services that the Doswell Facility was capable of and that they could sell in the future; but they did not discuss Reactive Power. (Tr. 87:18-88:14.)

82. Mr. Hathaway, testifying for Dominion, confirmed that during the negotiations that produced the 1998 PPOA, neither Dominion nor Doswell discussed or proposed revisions to the 1990 PPOA's to address in any way Doswell's right to compensation for any ancillary services, including for Reactive Power service, or to make any change in Doswell's obligations under the 1990 PPOA's with respect to Reactive Power service or compensation for such service. (Tr. 119:7-120:3; Ex. DVP-21 at 4:6-15.)

83. Hence, it is clear from the testimony of both Mr. Sanchez and Mr. Hathaway, that neither party introduced the issue of changing the previous arrangement regarding bundled rates or the unbundling of Reactive Power into the drafting of the 1998 PPOA, and those arrangements continued unchanged in the 1998 PPOA. To change those important provisions of the PPOAs would have required at least a discussion and meeting of the minds.<sup>31</sup>

84. The 1998 PPOA is an amendment and restatement of prior agreements and not an entirely new agreement. Further, the Purchase and Sale of Energy and Capacity set forth in Article II, Sections 2.1 and 2.2 are virtually identical in all four PPOAs. The bundled sale of net electrical output and dependable capacity, including Reactive Power as an ancillary service attached to that generated power, continued unabated in the 1998 PPOA.

#### *The 2001 PPOA*

85. The Parties agree that the 2001 PPOA did not effect a change to the 1998 PPOA in the purchase and sale of energy and dependable capacity. The arguments, discussion and findings regarding the nature of the 1998 PPOA as a restatement and amendment to the

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<sup>31</sup> Put another way, "What was not discussed, was not changed."

prior PPOAs rather than a completely new agreement that abrogated the provisions of the prior agreements are completely relevant to the 2001 PPOA as well, and I adopt them as if stated herein.

86. Therefore, I find that the 2001 PPOA, during its brief life, did not alter the Purchase and Sale of Energy and Capacity set forth in Article II, Sections 2.1 and 2.2 of the prior PPOAs. The bundled sale of net electrical output and dependable capacity, including Reactive Power as an ancillary service bundled with that generated power, continued unabated in the 2001 PPOA and remained unchanged when it expired on December 31, 2005, and the 1998 PPOA again took effect.

**Subissue (c): What is the significance of the fact that the 1998 and 2001 PPOAs for the combined cycle units contain no provision for the sale of Reactive Power, and the 2000 and 2001 PPOA's for the combustion turbine unit contain a specific provision for the sale of Reactive Power?**

### POSITIONS OF THE PARTIES

87. Doswell asserts that the CC PPOAs contain no provision for the sale of Reactive Power, in contrast to the Combustion Turbine agreements<sup>32</sup> which do. (Citing Ex. DLP-3 at 4-5 and Ex. DLP-7 at 3) (Joint Stipulation at 5.) Doswell states that it was aware of the Reactive Power issue when the 1998 and 2001 CC PPOAs were negotiated. *Id.*

88. Doswell states that the 2000 CT Agreement (Ex. DVP-8) included changes to the 1998 CC PPOA and could have included a provision for the sale of Reactive Power service if the parties had decided to do so. (Citing Ex. DLP-7 at 3.) Doswell argues that the existence of Section 5.16 in the 2000 and 2001 CT Agreements, which provides for the purchase and sale of ancillary services, including Reactive Power supply and voltage control from generation sources, illustrates not only Doswell's intent in those agreements to sell those ancillary services; but Doswell's lack of intent in the 1998 and 2001 PPOAs to do so. (Doswell IB at 14, 15.)

89. Doswell argues that the 2000 CT Agreement was "directly tied" to the 1998 PPOA, and points to Mr. Sanchez's testimony that the 2000 CT Agreement actually amended the 1998 PPOA and then follows with the comment, "[i]f the parties had intended for Doswell to sell, and Dominion to purchase, Reactive Power revenue rights to the CC units it would have been a simple matter for the 2000 [CT Agreement] to have included that as yet one more amendment to the 1998 CC PPOA." (Citing Ex. DLP-7 at 3 and Ex. DVP-15 at 11) (Doswell IB at 15.)

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<sup>32</sup> To avoid confusion, I will refer to the agreements related to the Combustion Turbine unit as "CT Agreements" and the agreements related to the Combined Cycle units as the "CC PPOAs."

90. Doswell's witness, Sanchez testified that Doswell was aware that Reactive Power was unbundled by Order No. 888 when it negotiated both the CT Agreements and each of the 1998 and 2001 PPOAs. Mr. Sanchez testified that it was no accident that the Reactive Power provisions did not appear in the PPOAs, and Doswell did not intend in those PPOAs to sell Reactive Power to Dominion. (Ex. DLP-3 at 5.) On cross-examination, however, he admitted that in negotiating the 1998 PPOA there was no discussion either between the parties or even within the Doswell negotiating team on the subject of Reactive Power. (Tr. 79:15-23 and 87:13-88:8) Mr. Sanchez also admitted that during the 1998 CC PPOA negotiations Doswell was not aware of the Section 5.16 provision in the 2000 CT agreement, since it occurred after the 1998 negotiations had occurred. (Tr. 85:7-86:9.)

91. Dominion asserts that it acquired the right to Reactive Power service revenues for the Doswell Facility's CC units under the existing provisions of predecessor agreements that were continued in the 1998 CC PPOA and 2001 CC PPOA. (Citing Exhibit DVP-15 at 8.) Dominion states that in the case of each successive version of the CC PPOAs, the parties did not re-negotiate each provision of the previous agreement but only made such changes as were necessary to accomplish the specific purpose for which a new amendment and restatement was being created. (Citing Ex. DVP-15 at 8-9) (Dominion Initial Brief at 10.)(hereinafter "Dominion IB")

92. Dominion asserts that there were no changes in Doswell's obligations under the 1990 PPOAs to provide voltage support/Reactive Power to Dominion (a bundled contract entered into prior to the issuance of FERC Order No. 888). Dominion emphasizes that the parties did not negotiate a new provision in the 1998 or 2001 PPOAs addressing such obligations (Citing Ex. DVP-15 at 19) (Joint Stipulation at 5.)

93. Dominion states that the 2000 CT Agreement came about when Doswell agreed to construct a new gas-fired 185 MW combustion turbine generator at the Doswell Facility, and Dominion agreed to purchase all of the electrical capability of that CT unit. (Citing Ex. DVP-15 at 10:17-19) (Dominion IB at 49.)

94. Dominion contrasts the 2000 CT Agreement, which it states was an entirely new agreement begun from scratch following a separate solicitation, entered into in the post-FERC Order 888 regulatory regime, involving a different type of service (peaking) and a different type of generation unit (simple cycle CT), and states that there were no predecessor CT agreements to be continued in this new agreement. (Citing Ex. DVP-15 at 10; *see also* Ex. DVP-8) (Dominion IB at 49-50.)

95. Dominion states that the 2001 CT Agreement was negotiated entirely separately, and almost a year before the 2001 CC PPOA. (Citing Ex. DVP-15 at 11.) Dominion summarizes that the CC PPOAs and the CT Agreements are separate agreements, were

not negotiated contemporaneously, and are for different services and a different type of generation unit (Citing Ex. DVP-15 at 10-13) (Dominion IB at 49-50.)

96. The Commission Staff supports the position taken by Dominion.

### DISCUSSION, FINDINGS AND CONCLUSIONS

97. I have previously concluded herein<sup>33</sup> that the original 1987 PPOAs were contracts that sold the entire net electrical output and dependable capacity of both of the Combined Cycle units to Dominion, including Reactive Power as part of bundled ancillary services.

98. I have also concluded that the 1998 PPOA is, in fact, a restatement and amendment of the prior 1987 and 1990 PPOAs and is not a new contract that abrogates its predecessors. I found that the Purchase and Sale of Energy and Capacity set forth in Article II, Sections 2.1 and 2.2 are virtually identical in all four PPOAs, and the bundled sale of net electrical output and dependable capacity, including the Reactive Power attached to that generated power, continued unabated in the 1998 PPOA. Inasmuch as, the 2001 PPOA changed nothing from the 1998 PPOA related to Article II, Sections 2.1 and 2.2, I concluded that the bundled purchase and sale of Net Electrical Output and Dependable Capacity in that agreement, including Reactive Power, was unchanged during its brief lifespan.<sup>34</sup>

99. I turn now to the question of what, if any, significance attaches to the fact that the CT Agreements specifically mention the purchase and sale of Reactive Power by Doswell to Dominion, while the CC PPOAs do not.

100. The true importance of this Subissue (c) is that it contrasts the CC PPOAs with the CT Agreements. The former originated in the pre-Order No. 888 world of bundled rates for energy and capacity that included all necessary ancillary services, including Reactive Power. The latter are agreements that originated post-Order No. 888 in the era of Open Access Transmission Tariffs and the six unbundled ancillary services created in that order, including Reactive Power service.

101. In adopting Order No. 888, the Commission stated:

“We note that because we are not abrogating existing requirements and transmission contracts generically and because the functional unbundling requirement of the Final Rule applies only to new wholesale services, the terms and conditions of the Final Rule pro forma tariff do not apply to service under existing requirements contracts. However, if a customer’s

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<sup>33</sup> See the Discussion, Findings and Conclusions regarding Subissue (a), *supra*.

<sup>34</sup> See Discussion, Findings and Conclusions regarding Subissue (b), *supra*.

existing bundled service (transmission and generation) contract or transmission-only contract expires, and the customer takes any new transmission service from its former supplier, the terms and conditions of the Final Rule tariff would then apply to the transmission service that the customer receives.” Order No. 888 at 31,665.

102. The foregoing language demonstrates that, the Commission intended that continuing agreements created prior to the adoption of Order No. 888 would include bundled rates, while agreements that were entered after the adoption of Order No. 888 would be required to reflect unbundled ancillary services, including Reactive Power. This difference is the relevant demarcation between the CT Agreements and the CC PPOAs. It is clear that the latter, being a series of restatements and amendments to the original agreement executed in 1987, continued to provide Reactive Power service as a part of bundled services and rates. The former, were agreements that originated with the 2000 CT and were required by Order No. 888 to provide Reactive Power as an unbundled ancillary service, just as was done in Section 5.16.<sup>35</sup>

103. Doswell argued that, “[i]f the parties had intended for Doswell to sell, and Dominion to purchase, Reactive Power revenue rights to the CC units, it would have been a simple matter for the 2000 CT [Agreement] to have included that as yet one more amendment to the 1998 CC PPOA.” (Doswell IB at 15.) It is, at best, a non sequitur. Review of the 2000 CT Agreement (Ex. DVP-8) reveals that the parties recognized that Doswell was to construct the CT unit at the Doswell Facility, co-located with the CC units, and contemplated the use of “Common Facilities” as defined therein. (Ex. DVP-8 at Recitals; Ex. DVP-8 at § 1.1 definitions of “Common Facilities” and “Facility”; Ex. DVP-8 at §§ 5.1 and 8.1.) The amendments made to the CC PPOAs by the 2000 CT Agreement were limited to those necessary to accommodate this co-location of the CT unit with the CC units. *Id.* The 2000 CT Agreement did not otherwise amend the existing CC PPOAs. It is, therefore, obvious that an amendment to the CC PPOAs to reflect, as Doswell suggests, a new set of rates for the CC units, including unbundling of Reactive Power, would have been irrelevant, superfluous and inappropriate in the 2000 CT Agreement.

104. I find that the 2000 CT Agreement and its restatement and amendment (the 2001 CT Agreement) originated after the advent of Order No. 888, and were thereby required to provide Reactive Power service as an unbundled ancillary service, precisely as accomplished in Section 5.16 therein.

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<sup>35</sup> See Order No. 888 at 31,654; 31,703; 31,707; 31,715 and 31,716. At 31,715, the Commission distinguished two groups of ancillary services, one of which was comprised of ancillary services that transmission providers are required to provide and transmission customers are required to purchase. “Reactive Supply and Voltage Control from Generation Services” is included in that required group.

105. I find that the 1998 and 2001 CC PPOAs were separate agreements from the CT Agreements and those CC PPOAs related only to the CC units at the Doswell Facility. At the time the CT Agreements were negotiated and executed the 1998 CC PPOA was a continuing agreement entered prior to Order No. 888, and it included bundled ancillary services and rates, including Reactive Power.

106. I find that the amendments to the 1998 CC PPOA by the 2000 CT Agreement were properly limited to those necessary to accomplish the co-location of the CT unit with the CC units at the Doswell Facility.

107. I find that there is no other significance, relevant herein, to the fact that the 1998 and 2001 PPOAs for the combined cycle units contain no provision for the sale of Reactive Power, and the 2000 and 2001 PPOA's for the combustion turbine unit contain a specific provision for the sale of Reactive Power.

**Subissue (d): What relevance and weight should be attached to the fact that Dominion Virginia Power has been receiving compensation for Reactive Power service for the Doswell CC units?**

#### **POSITIONS OF THE PARTIES**

108. Doswell states that it was not served with any of the Dominion Virginia Power filings under which Dominion Virginia Power included the Doswell Facility's CC units in its calculation of an overall charge for Reactive Power service, and that Doswell had no knowledge of such filings by Dominion Virginia Power. (Citing Ex. DLP-3 at 6 and Ex. DLP-7 at 3-4) (Doswell IB at 24.)

109. Doswell argues that notice provided in the *Federal Register* of Dominion's filings seeking, and receiving, Reactive Power Service compensation in 1996, 2004, and 2005 was constitutionally inadequate. Doswell takes special issue with the 1996 compliance filing made by Dominion in connection with Order 888 in Docket No. OA96-57-000. In that filing, which occurred shortly after the issuance of Order 888, Dominion proposed a Schedule 2, which included compensation for Reactive Power Service from the Doswell CC units. Doswell argues that it was entitled to actual notice of the OA96-57-000 filing by Dominion, and subsequent filings, rather than the constructive notice provided by publication in the *Federal Register*.

110. Doswell supports its argument by stating that the filing notice in the *Federal Register* contained only "a one-line docket number and utility name among 213 other filings by other utilities," with "no information about the contents of the filing other than an introductory statement in the notice that the 214 filings were made pursuant to Order Nos. 888 and 889," and the *Federal Register* notice "did not provide any indication that Dominion's filing asserted, by implication, a contractual right to receive reactive power

revenue from non-utility generators.” (Citing DLP-10) (Doswell IB at 24-25.) Doswell asserts that “such a notice cannot meet minimal due process requirements,” and cites *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 786 (5<sup>th</sup> Cir. 1978), to support its position. In *North Alabama*, a trucking company filed to expand its existing service with the Interstate Commerce Commission, and the court found the *Federal Register* notice inadequate, stating, “[p]ut simply, an interested member of the public should be able to read the published notice of a motor carrier's application and understand the essential attributes of that application.” *North Alabama*, 585 F.2d at 789. The court in *North Alabama* also stated that “[i]n the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them.” (Doswell IB at 24) (quoting *North Alabama*, 585 F.2d at 786.) Doswell asserts that *Federal Register* publication is not sufficient to meet this requirement.

111. Both Staff and Dominion cite authority to establish that publication in the *Federal Register* is sufficient to satisfy due process notice requirements. Dominion states that Commission Rule 2009<sup>36</sup> requires notice of rate filings by publication in the *Federal Register*. Rule 2009 states in relevant part:

“Unless actual notice is given or unless newspaper notice is given as required by law, notice by the Commission is provided by the Secretary only by publication in the *Federal Register*...”

112. In addition to Rule 2009, Dominion cites a number of authorities in its Initial Brief treating the adequacy of *Federal Register* notice.<sup>37</sup>

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<sup>36</sup> 18 C.F.R. § 385.2009 (2006). I note that Rule 210, 18 C.F.R. § 385.210 (2006), requires rate filings to be noticed by the Secretary in accordance with Rule 2009. The language of this code section reflects no amendments or changes from the 2005 version.

<sup>37</sup> Dominion cites: 44 U.S.C. § 1507 (2005); *Great Lakes Gas Transmission Company*, 4 FERC ¶ 61,103 (1978) (citing *Buckner Trucking, Inc. v. U.S.*, 354 F.Supp. 1210, 1219-1221 (S.D. Texas 1973); see also *Texas Gas Transmission Corp. and Texas Exploration Corp.*, 27 FERC ¶ 61,116 (1984) (actual notice not required and publication of an order in the *Federal Register* constitutes adequate notice to all parties subject to or affected by its contents); *Duke Power Co.*, 48 FERC ¶ 61,225 (1989) (publication of notice in the *Federal Register* constitutes constructive notice); *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040 (1990) (procedure of notice of filing and publication in *Federal Register* provides all interested parties notice of such filing and an opportunity to respond); see generally 49 U.S.C.A. §§ 1421, 1423; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384- 85 (1947)(appearance of rules and regulations in the *Federal Register* gives legal notice of their contents regardless of ‘the hardship resulting from innocent ignorance’ of

113. Doswell states that the Order No. 888 filing that initiated the Dominion charge was resolved by a settlement which has no precedential weight. Doswell alleges that the Commission has rejected Dominion's claim that it is entitled to Reactive Power revenue by virtue of those past filings (Citing October 3 Order at 18) (Doswell IB at 26.)

114. Doswell argues in the alternative that even if Dominion's previous filings, and subsequent receipt of reactive power service compensation, do satisfy due process, it does not preclude Doswell from making the section 205 filing in this proceeding. (Doswell IB at 24.) Doswell argues that Dominion's position that Doswell is precluded from making the section 205 filing on the basis of Dominion's filings establishing Dominion's right to Reactive Power Service compensation fails an issue preclusion analysis. (Doswell IB at 27.) Doswell summarizes by stating that "because the notice of the 1996 proceeding gave no indication of implicating contractual rights, and because none of the requirements for issue preclusion are met by that proceeding, Doswell is not precluded by the proceeding from filing for reactive power compensation under the currently effective CC PPOA and PJM tariff." *Id.*

115. Doswell asserts that there was no way for it to be compensated for Reactive Power until Dominion Virginia Power joined PJM in May of 2005, unless Dominion Virginia Power had agreed to purchase Reactive Power from Doswell, which it did not do. (Citing Exhibit DLP-3 at pages 5-6) (Joint Stipulation at 8.)

116. Dominion states that "seeking and receiving reactive power service compensation for the CC units continuously since the first opportunity to do so post order 888 (and Doswell's failure to protest those claims) supports Dominion's position on the entitlement issue," that it is entitled to the Reactive Power Service compensation from PJM. (Dominion IB at 44) In addition, Dominion states that its "prior filings and authorizations to receive Reactive power Service compensation related to the Doswell CC units are relevant to the intent of the parties and should be given consideration as to the entitlement issues in this proceeding." (Dominion IB at 47.) Dominion states that: (i) the filings are relevant to show that it believed the intent of the original PPOAs and solicitation entitled it to related compensation for reactive power attributes of the CC units as if it owned them, and that Dominion believed that it contracted for all the output of the CC units, including reactive power; (ii) Doswell's failure to mount any kind of challenge to these filings is persuasive as to Doswell's lack of belief in its own entitlement to the compensation, and (iii) asserts that the Schedule 2 filings demonstrate that the pre-Order 888 PPOAs were bundled contracts which included reactive power. (Citing Ex. S-1 at 17:17-19) (Dominion IB at 48.)

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such notice); *Yakus v. United States*, 321 U.S. 414, 435 (1944) (citing 44 U.S.C. § 307, now codified at 44 U.S.C. § 1507) (regulations published in the Federal Register gives constructive notice of their contents to all person affected by them).

117. Dominion states that it has been collecting Reactive Power service revenues related to the Doswell Facility's CC units ever since the opportunity to receive such compensation was created upon the issuance of FERC Order No. 888 in 1996, and Doswell has not objected to such Commission-approved rate schedules during the ten years since first effective.<sup>38</sup> (Citing Ex. DVP-1 at 4 and Ex. DVP-11 at 14-15, 17-20) (Dominion IB at 44-45.)

118. In making its case, Dominion states that it has filed for, and received authorization from the Commission to receive, compensation from its transmission customers for the provisions of Reactive Power Service from the CC units, and has received such compensation continuously since that initial filing for the past 10 years. (Dominion IB at 44.) Dominion describes the history of its Reactive Power Service compensation filings as follows: In 1996, as part of its compliance filing pursuant to Order 888, Dominion filed a proposed Schedule 2, which included compensation for Reactive Power Service on the CC units. *Id.* (Citing Ex. DVP-11 at 14:8-13.) In 2004 Dominion made renewed filings for this compensation including the introduction of a formula rate. (Citing Ex. DVP-11 at 15.) In 2005 Dominion again filed for Reactive Power Service compensation as part of its integration into PJM (citing Ex. DVP-11 at 17); and most recently, in 2006, Dominion filed for such compensation as part of an updated revenue requirement based on its current costs for Reactive Power Service. (Citing Ex. DVP-11 at 18.) Dominion maintains that in all of the above filings it provided Doswell with adequate notice, by way of publication in the *Federal Register*, and in the case of the 2006 filing, provided Doswell with actual notice. Dominion notes that at no time did Doswell ever protest or intervene in any of the aforementioned proceedings before the Commission. (Citing Ex. S-1 at 20:12-22) (Dominion IB at 45.)

119. The Commission Staff noted that Dominion filed for Reactive Power service revenues as part of its ancillary services rates following issuance of FERC Order No. 888 in 1996, and that Doswell did not raise any issue of its entitlement at that time or over the following 10 years, in subsequent similar Dominion filings that included a Reactive Power service revenue requirement from the Doswell Facility CC units. (Citing Ex. S-1 at page 20; Ex. DVP-1 at 4; Ex. DVP-11 at 14-15, 17-20.) Staff asserts that "while not determinative with respect to the 1998 PPOA, these facts nonetheless have relevance to the entitlement issue." *Id.* Staff also argues that the filings are relevant to the intent of the parties and the meaning given by each party to Dominion's previous filings for Reactive Power Service compensation. *Id.* Staff posits that the inference to be drawn from the filings is Dominion's belief in its right to the reactive power revenue, and that Doswell's lack of protest to the filings indicates its lack of belief that it was entitled to the reactive power revenue. (Staff Initial Brief at 23-24) (hereinafter "Staff IB")

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<sup>38</sup> The claim includes the most recent filing by Dominion for such compensation in *Virginia Electric and Power Company*, FERC Docket No. ER06-554, originally filed January 27, 2006, as discussed in Exhibit DVP-11 at page 18.

120. Staff also supports the due process adequacy of *Federal Register* notice, and cites *Williams Natural Gas Company*, 54 FERC ¶ 61,190 (1991).

### DISCUSSION, FINDINGS AND CONCLUSIONS

121. As discussed in treating the Entitlement Issue, *supra*, I reject Doswell's opposition to the use of parol and extrinsic evidence to determine the intent of the parties regarding the purchase and sale of Reactive Power service in the CC PPOAs.

122. Doswell's inadequate notice argument is both legally unsound and factually spurious. Doswell's cited authority, *North Alabama*, involved trucking companies, not energy companies, and the court was concerned with assuring notice was provided in such a way that interested members of the public could understand that their rights could be affected. *North Alabama*, 585 F.2d at 790.

123. Contrary to Doswell's position, it is a well-settled principle of law that notice by publication in the *Federal Register* pursuant to 44 U.S.C. § 1507 and Rules 2009 and 2010 constitutes adequate notice to all parties subject to or affected by its contents [and] actual notice is not required. This principle was restated in *Great Lakes Gas Transmission Company*, 4 FERC ¶ 61,103 (1978) (citing *Buckner Trucking Inc. v. U.S.*, 354 F. Supp 1210 (S.D. Texas 1973)), when the Commission denied a motion for late intervention by a member of the public.

124. In *Williams*, where a natural gas company made a regulatory filing to the Commission under section 7(c) of the Natural Gas Act, the Commission also noted that it would not be responsible for making sure that "notice regulations translate into actual awareness by all parties with interests affected by Commission proceedings," describing any such requirement as "a standard impossible to meet." *Williams*, 54 FERC at 61,572.

125. In the matter before me, the only interested parties are sophisticated energy companies who know or should know about *Federal Register* publication and to investigate its contents. Indeed, the Commission stated in *Williams* that *Federal Register* publication is sufficient notice to make a party aware that its interests are possibly at stake, and that further investigation is warranted. *Id.* I find the same responsibility on Doswell's part to exist on the facts before me.

126. Despite Doswell's spurious protestations of inadequate notice, the *Federal Register* publication in 1996 adequately addressed the compliance filings of Dominion and 18 other entities, including Doswell, which addressed the proposed Schedule 2 (ancillary services) pursuant to Order No. 888. (Dominion IB at 47.) Dominion's filings are listed as OA96-52-000 and OA96-89-000 and Florida Power and Light Company (read "Doswell") is shown as OA96-39-000. Like Dominion's filing, Florida Power & Light's filing also included a section on reactive power compensation for NUGs, strongly

suggesting that FPL Energy knew that the Order 888 compliance filings, such as Dominion's, were highly likely to include claims for reactive power compensation for NUGs. (Dominion IB at 46.) The Notice (Ex. DLP-10) specifically states that the filings listed therein are made pursuant to Order No. 888, include compliance filings (open access tariffs), and invites interested parties to intervene. The notice also notes that the filings are on file with the Commission and are available for public inspection. Staff persuasively states that "it strains credulity to contend that nobody at Doswell or FPL, its parent, ever saw the public notices in the *Federal Register* regarding these filings..." (Staff IB at 24.)

127. Doswell is a sophisticated energy company, and it is not credible that Doswell, unlike parties who intervened in the Dominion compliance filing, was not aware of, and could not discern the implications of the compliance filing. More damning to Doswell's position is that Doswell's own affiliate, Florida Power and Light, made a similar compliance filing and was listed just above Dominion in the same *Federal Register* publication.

128. I find that the publication of notice Dominion's compliance filing in the *Federal Register* (Ex. DLP-10) provided constitutionally adequate notice to Doswell of the nature of the filings and proceedings listed in that notice.

129. Doswell's alternative argument that even if the filings satisfy constitutional requirements of due process, any relevance they may have with regard to the Reactive Power Service compensation should be ignored on the basis of issue preclusion also fails to persuade. Doswell's argument erroneously assumes that Dominion continues to assert that the reactive power compensation that resulted from its filings, and especially the settlement of Docket No. OA96-57-000 (the 1996 filing), establishes *per se* Dominion's right to Reactive Power Service compensation from the CC units, and thus precludes Doswell from making its section 205 filing.

130. While Dominion made the issue preclusion argument when this matter was before the Commission, the Commission order setting this case for hearing addressed this issue. In rejecting Dominion's argument on issue preclusion, the Commission pointed out that Dominion stated no precedent supporting its contention that Doswell's failure to protest precludes it from raising this issue, and stated "that litigation of rate issues is not precluded by a prior Commission determination on the same subject, particularly when the issue has not been presented and addressed by the Commission." The Commission found that "this is an issue that must be decided at the hearing where both parties can present evidence on the meaning and interpretation of actions taken in prior filings." August 12 Order at P17 and 18.

131. Dominion did not argue at the hearing or in its briefs that the prior filings of themselves entitle it to reactive power revenue compensation, without concern for, and

apart from, the 1998 contracts. Dominion merely stated that the filings *support* its position with regard to the entitlement issue, not that they create the right to reactive power compensation. (Dominion IB at 44.)

132. Doswell also asserts that the “fatal flaw” of Dominion’s position is that it is necessarily claiming that past filings entitle it to reactive revenue independent of the PPOA terms and independent of the PPOA expiration. (Doswell IB at 27.) I do not find that Dominion makes this claim, and Doswell’s assertion is a red herring.

133. Although the filings in question are not relevant *per se* to establish whether or not Dominion is entitled to the Reactive Power revenue at issue in this proceeding, they are relevant to the cumulative parol evidence record establishing the parties course of performance under the CC PPOAs, and thus shed light on the parties’ intent and beliefs when entering into the contract.

134. Course of performance parol evidence examines the actions of the parties subsequent to entering into the contract. Under Virginia law, the actions of the parties in performing a contract, which is later found latently ambiguous, serve to interpret the meaning of the contract. *Portsmouth Gas Co. v. Martin Shebar, et al.*, 209 Va. 250 (1968). In *Portsmouth* the court found that a plaintiff’s acquiescence to the defendant’s actions established the meaning of the contract.

135. Virginia law also holds that “the parties’ interpretation and dealings with regard to contract terms are entitled to great weight and will be followed unless doing so would violate other legal principles,” and that “uncertain rights of parties may be determined and fixed by their practical dealings with each other.” *Video Zone, Inc. v. KF&F Properties, L.C.*, 267 Va. 621, 627 (2004). In that case, a tenant’s business came under new management that refused to pay maintenance costs that the tenant had been paying throughout the course of the lease. The court found that the actions of the parties after entering into a lease with ambiguous terms established that the tenant was responsible for the maintenance costs based on the tenant’s having paid for said maintenance during the course of the lease. *Id.*

136. In assessing the actions of the parties, I will discard the 2006 filings as irrelevant to supporting Dominion’s argument. While it is true that in the 2006 filing Doswell was provided with actual notice, it is also true that this filing was made, as Doswell points out, after the initiation of this proceeding to determine the entitlement issue. (Doswell Reply Brief at 129.) Therefore, I will not assign any relevance or weight to the 2006 filing and Doswell’s failure to object to it. However, even in the absence of the 2006 filing, the 1996, 2004 and 2005 filings, and Doswell’s failure to object to them, provide substantial evidence of the intent of the parties and meaning of the contract. Therefore, in accordance with Virginia law, I find that Doswell’s acquiescence to Dominion’s filings is relevant evidence to support Dominion and Staff’s claim that the intent of the parties

under the contracts was that Dominion acquired a right to Reactive Power Service compensation. This evidence does not, of itself, establish Dominion's entitlement to the compensation, but will be given weight as an indicator of the parties belief regarding the intent of the PPOAs on the subject of their respective rights to Reactive Power revenue.

137. Additionally, I find that Dominion's argument that the Schedule 2 filings demonstrate that the pre-Order 888 PPOAs were bundled contracts which included reactive power is well supported. As discussed previously, Order 888 unbundled certain ancillary services, including Reactive Power Service. Order 888 also established a pro forma OATT that includes Schedule 2 to cover the provision of Reactive Power Service by transmission providers and compensation for providing that service. (Dominion IB at 20.) When Dominion filed a proposed Schedule 2, this action underscored its belief that it had acquired a right to Reactive Power Service compensation when it entered into the bundled service CC PPOA. Doswell's failure to object to this filing is an indicator of its belief that the pre-Order 888 contracts are bundled contracts which included reactive power. As Dominion filed a Schedule 2 in the belief it had acquired a right to do so under the 1987 agreement and 1986 solicitation, to which Doswell did not object or otherwise comment, these practical dealings of the parties strongly support their common belief that the pre-Order 888 bundled contracts indeed included reactive power.

138. Doswell's failure to file for Reactive Power compensation until 2005 also supports Dominion's position. Doswell asserted that there was no way for it to be compensated for Reactive Power Service until Dominion joined PJM in May of 2005, unless Dominion had agreed to purchase Reactive Power Service from Doswell, which it did not do.<sup>39</sup> (Citing DLP-3 at 5-6) (Staff IB at 25.) Witness Gross, however, testified credibly that there is Commission precedent establishing that Doswell could have filed certainly as early as 2001, for Reactive Power Service compensation. (Citing Ex. S-1 at 21-22) (Staff IB at 25.) Doswell's actions are not consistent with a belief that it had a right to Reactive Power compensation throughout the course of performance of the CC PPOAs. (Joint Stipulation at 8.)

139. For the foregoing reasons, I find that Dominion's filing of reactive power tariffs in 1996, 2004 and 2005, as ancillary services and Doswell's failure to intervene are relevant to the issue of the parties' intent with regard to the purchase and sale of reactive power in the CC PPOAs. I find that the parties' actions (acquiescence in Doswell's case) provide evidence that supports a finding that it was the intent of the parties that Dominion's acquisition of the Net Electrical Output and dependable capacity included the bundled ancillary service of Reactive Power, and that Dominion is entitled to the concomitant Reactive Power compensation from PJM.

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<sup>39</sup> Doswell's witness Sanchez actually testified at the hearing that this was the first time it was "worth the effort" to file for Reactive Power compensation, although he was aware that another company had filed at least a year prior to Doswell. (Tr. 82:16-83:15.)

**Subissue (e):           What is relevant Commission precedent for this proceeding?**

### **POSITIONS OF THE PARTIES**

140. In the Joint Stipulation, Doswell asserted that the Commission has held that the contractual right of a purchaser to certain products, such as capacity, does not entitle the purchaser to Reactive Power revenue and cites *Mirant Chalk Point* in support of that position. Doswell also contended that Commission precedent on entitlement to renewable energy attributes is relevant and cites *American Ref-Fuel Co.* in support.

141. Dominion Virginia Power did not believe that this was an issue of fact and stated that it would address the legal issue on brief.

142. The Commission Staff stated that it would address this issue on brief.

### **DISCUSSION, FINDINGS AND CONCLUSIONS**

143. The issue of relevant Commission precedent is set forth in detail in the “Position of the Parties” portion of each Issue and Subissue, *supra* and is appropriately treated in the “Discussion, Findings and Conclusions” portion of the Entitlement Issue and each of the Subissues (a) through (d), *supra*.

### **MATTERS NOT DISCUSSED**

144. This Initial Decision’s failure to discuss any matter raised by the parties, or any portion of the record, does not indicate that it has not been considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial or meritless. Arguments made on brief which were otherwise unsupported by record evidence or legal precedent have been accorded no weight.

**ORDER**

145. Wherefore, it is ordered, subject to review by the Commission on exceptions or on its own motion, as provided by Commission Rules of Practice and Procedure, that Virginia Electric and Power Company d/b/a Dominion Virginia Power is entitled to receive Reactive Power revenue from the Combined Cycle units at the Doswell Facility pursuant to Schedule 2 of PJM's approved Open Access Transmission Tariffs, and Doswell Limited Partnership's filing for Reactive Power compensation for the CC units at the Doswell Facility is rejected as unjust and unreasonable.

**IT IS SO ORDERED.**

**ROBERT K. ROGERS, JR.**  
**Presiding Administrative Law Judge**