UNITED STATES OF AMERICA 118 FERC ¶ 63,027
FEDERAL ENERGY REGULATORY COMMISSION

Jersey Central Power & Light Company Docket No. EL05-50-003

v.

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

INITIAL DECISION

(Issued March 8, 2007)

APPEARANCES

David Lewis, Esq., Jodi L. Moskowitz, Esq., Vaughn L. McKoy, Esq. and William A. Williams, Esq. on behalf of Public Service Electric & Gas Company

Michael Ward, Esq., Richard Sparling, Esq., Julia Moore, Esq., Petra Walsh, Esq. and Kenneth Jaffe, Esq. on behalf of Jersey Central Power & Light Company

Deborah Royster, Esq. on behalf of Atlantic City Electric Company

Helen M. Hight, Esq. on behalf of Atlantic City Electric Company and Delmarva Power & Light Company

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JOHN P. DRING, Presiding Administrative Law Judge

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PROCEDURAL HISTORY & BACKGROUND

1. This proceeding was initiated on December 30, 2004, when Jersey Central Power & Light Company (JCP&L) filed a complaint pursuant to Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), against Atlantic City Electric Company (Atlantic City), Delmarva Power & Light Company (Delmarva), PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSEG) in Docket No. EL05-50-000. (Atlantic City, Delmarva, PECO and PSEG collectively are referred to as the "LDV Owners.") JCP&L is a public utility subsidiary of FirstEnergy Corp., owns transmission facilities in New Jersey, and is a member of PJM. The LDV Owners are members of PJM and own transmission facilities in New Jersey, Delaware, Maryland, and Virginia.

2. The complaint, and subsequent issues raised in this proceeding, is based on three contracts entered into by JCP&L and the LDV Owners: the LDV Agreement, and its supplemental agreement; the Smithburg Agreement; and the East Windsor Agreement.

3. **The LDV Agreement and the LDV Supplemental Agreement.**[1]
JCP&L and the LDV Owners signed the LDV Agreement on September 13, 1977. The Agreement, in force until 2017, provides that the LDV Owners own in common undivided interests in Peach Bottom Atomic Power Station Units No. 2 and No. 3 (Peach Bottom), and Salem Nuclear Generating Station Units No. 1, No. 2 and No. 3 (Salem). JCP&L was in the process of constructing the Forked River Nuclear Generating Station Unit No. 1 (Forked River), and the Agreement was designed to integrate Forked River into the LDV Owners' fully-interconnected electric supply system. Toward this end, JCP&L agreed to construct and make available the following five facilities:

(1) The New Freedom-Forked River Line, a single circuit 500-kV line extending from New Freedom Substation to the Forked River Switching Station, a distance of approximately 51 miles, and costing an estimated $32,087,000;

(2) The Forked River-Smithburg Line, a single circuit 500-kV line extending from the Forked River Switching Station to the Smithburg Substation, a distance of approximately 32 miles, and costing an estimated $22,499,000;

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[1] The reader will note that JCP&L Exhibit JC-1 does not accurately reflect the distinctions between these agreements, and appears to be an amalgamation of the two. For example, JCP&L Exhibit JC-1 is labeled the LDV Agreement, but contains the language of Schedule 4 as revised in 1990, at the signing of the LDV Supplemental Agreement. In reviewing the evidentiary record, the reader should refer to LDV Owners exhibits LDV-2 and LDV-3, which accurately present the LDV Agreement and LDV Supplemental Agreement, respectively. Hereinafter, exhibits by JCP&L and the LDV Owners will be referred to by the prefixes Ex. JC and Ex. LDV, respectively.

(3) The Smithburg-Deans Line, a single circuit 500-kV line extending from the Smithburg Substation to the Deans Substation, a distance of approximately 18 miles, and costing an estimated $14,842,000;

(4) The Forked River Switching Station, comprised of terminal facilities associated with the transmission lines described in Items 1 and 2 above, and costing an estimated $6,400,000; and

(5) The Smithburg Substation, terminal facilities associated with the transmission lines described in Items 2 and 3 above, and costing an estimated $14,800,000.

4. JCP&L constructed the Smithburg-Deans Line and the Smithburg Substation, but did not construct the three other facilities. These other facilities are known as the "Seashore Loop."

5. The LDV Supplemental Agreement was signed on April 6, 1990 with an effective date of March 1, 1987, and extended the term of the LDV Agreement until 2027. The LDV Supplemental Agreement provided for cancellation of JCP&L's Forked River Generating Station and alternative routing for the 500-kV Seashore Loop.

6. **The Smithburg Substation Supply Agreement (Smithburg Agreement).** The Smithburg Agreement, effective November 2, 1977, provides that JCP&L will make fixed monthly payments, totaling $893,160 annually, in order to use LDV facilities constructed by others to supply capacity and energy to JCP&L's Smithburg substation. The monthly payments are a fixed price, determined as a percentage of the cost of these facilities to the other parties, and not as a usage or variable charge based on JCP&L's usage of the transmission systems of the other transmission owners. The agreement states it will terminate and payments under it will cease when JCP&L places in service the Forked River-Smithburg and New Freedom-Forked River lines, completing the 500 kV loop from New Freedom to Deans via Forked River and Smithburg. Ex. JC-3.

7. **The East Windsor Substation Supply Agreement (East Windsor Agreement).** The East Windsor Agreement, dated April 20, 1990, is similar to the Smithburg Agreement. It states that JCP&L will make fixed monthly payments for use of the LDV facilities provided by others to supply energy and capacity to JCP&L's substation at East Windsor. Like the Smithburg Agreement, these payments are not based on transmission usage, but are fixed annual payments. The annual payment amount is $3,200,000, payable in equal monthly installments, terminating when either JCP&L completes all of the facilities it agreed to provide under Schedule 4 of the LDV Agreement, or upon the termination of the LDV Agreement. Ex. JC-4.

8. JCP&L's complaint requests that the Federal Energy Regulatory Commission (Commission) terminate the Smithburg Agreement and the East Windsor Agreement,

eliminate JCP&L's requirement under the LDV Agreement to construct transmission facilities known as the Seashore Loop, and grant it prospective relief from the date of filing the complaint. JCP&L's complaint states that over the past 23 years it has made approximately $67.6 million in payments to the other LDV parties under the Smithburg and East Windsor Agreements. JCP&L asserts that these payments were "transmission use" payments and that after the restructuring of PJM into an Independent System Operator (ISO), the Commission ordered, and the LDV Supplemental Agreement provided, that transmission usage payments should be made solely under the PJM Open Access Transmission Tariff (OATT). JCP&L, therefore, argues that it should no longer be obligated to make payments under the Smithburg and East Windsor Agreements, or to construct the Seashore Loop pursuant to its obligation under the LDV Agreement.

9. On May 6, 2005, the Commission issued an order (May 6 Order) denying JCP&L's complaint. The May 6 Order found that the payments JCP&L was making to the LDV Owners under the Smithburg and East Windsor Agreements were not transmission use payments that should be governed by the PJM OATT, but that those payments were part of an overall cost sharing agreement among all five LDV system owners, and were intended to compensate those owners for the fact that JCP&L was using LDV Owners' facilities without fulfilling its obligations to provide the Seashore Loop for the LDV Owners' use. May 6 Order at P 19-20. In the May 6 Order, the Commission further found that JCP&L had not proved that it would have been impossible for JCP&L to fulfill its contract obligations with regard to the Seahsore Loop, because the LDV Supplemental Agreement provides that JCP&L could either construct the Seashore Loop or "such alternative facilities as are mutually agreeable among the signatories."

10. On June 6, 2005, JCP&L filed a request for rehearing or, in the alternative, motion for clarification of the May 6 Order.

11. On December 2, 2005, the Commission issued an order, granting and denying rehearing and granting clarification and establishing settlement judge and hearing procedures[2] (December 2 Order), which established this proceeding. The December 2 Order again rejected JCP&L's arguments concerning the effect of Commission's PJM Restructuring Order on JCP&L's payment obligations to the LDV Owners under the Smithburg and East Windsor Agreements. Again, the Commission found that the payments made by JCP&L under the Smithburg and East Windsor Agreements were not transmission use payments, but compensation paid as part of a cost sharing arrangement between JCP&L and the LDV Owners for JCP&L's use of the LDV System before constructing facilities pursuant to Schedule 4 of the LDV Agreement. The December 2

[2] *Jersey Central Power & Light Co. v. Atlantic City Electric Co.*, 113 FERC ¶ 61,237 (2005).

Order also denied rehearing as to whether JCP&L should be relieved of its payment obligations under the Smithburg Agreement due to impossibility of performance, but left that question open as to the East Windsor Agreement.

12. As set by the Commission in the December 2 Order and stipulated by the parties, the primary issues set for hearing in this case are:

> (1) Whether JCP&L's payment obligations under the East Windsor Agreement should be reduced or terminated under Section 3.3 of that Agreement, as a result of its inability to build facilities whether due to impossibility or other reasons?
>
> (2)Whether JCP&L's construction of facilities should be deemed alternative facilities under the LDV agreement?
>
> (3)Whether JCP&L is entitled to credit for facilities that it has constructed?

JCP&L's positions on the issues set for hearing in this proceeding are summarized below.

13. JCP&L argues that it is reasonable to terminate or reduce its payment obligations under Section 3.3 of the East Windsor Agreement because it cannot construct the Seashore Loop. JCP&L reasons that the Seashore Loop must be routed through portions of the New Jersey Pinelands, where the siting of transmission facilities is prohibited by regulations promulgated shortly after the LDV Agreement was executed. JCP&L further argues that although these regulations provide for a waiver under certain circumstances, JCP&L could not get approval from other regulatory authorities, even if it could avoid construction in the Pinelands, because the Seashore Loop is unnecessary. JCP&L concludes that because it cannot obtain the required regulatory authorizations, constructing the Seashore Loop is impossible.

14. As to the issue of alternative facilities, JCP&L argues that it has fulfilled its obligation under the LDV Agreement because it has built alternative facilities to the Seashore Loop as permitted under the LDV Supplemental Agreement's revisions to the LDV Agreement, Schedule 4. JCP&L asserts that it has constructed and now operates facilities that serve the same purpose and function as the Seashore Loop; i.e. delivering generation in the JCP&L area to regional load centers, and increasing import and export capacity between the JCP&L system and the LDV Owners' systems. JCP&L further argues that its construction of alternative facilities is a basis for terminating its payment obligations under the Smithburg and East Windsor Agreements, and that even if the facilities are deemed to be only "partial" alternatives, this fact provides an equitable basis for reducing JCP&L's payment obligations.

15. Concerning the crediting issue, JCP&L argues that since the Commission has ruled that the LDV Agreement is a cost sharing agreement, if JCP&L must share the cost

of the LDV System it should receive a credit against its cost obligations for its East Windsor and Smithburg facilities that it has contributed to the LDV System. JCP&L built these facilities at a cost of $89.7 million, and it therefore should receive an adjustment to any remaining payment obligation to reflect a credit for its contribution of the East Windsor and Smithburg facilities to the LDV System.

16. The LDV Owners contest all of JCP&L's positions, and assert that JCP&L's arguments lack merit, and/or have no contractual or equitable basis.

17. On December 8, 2005, the Chief Administrative Law Judge (Chief Judge) appointed a Settlement Judge, who conducted four settlement conferences. However, in a report issued on May 24, 2006, the settlement judge advised the Commission and the Chief Judge that the parties reached an impasse, and recommended that the proceedings be set for hearing. The Chief Judge issued an order on June 12, 2006, terminating the settlement judge procedures and designating the undersigned to preside over the hearing previously ordered by the Commission. On September 21, 2006, the Commission denied the LDV Owners' request for rehearing of the December 2 Order. On September 26, 2006, I denied a motion for summary disposition and a motion to strike, filed by the LDV Owners. Three days of evidentiary hearings were held from November 13 to November 16, 2006.

BURDEN OF PROOF & LEGAL STANDARD

18. This proceeding was initiated by JCP&L under section 206 of the FPA, and as such, the burden of proof is on JCP&L to produce evidence that an existing charge is no longer just and reasonable.[3] Only if JCP&L provides reliable, probative, and substantial evidence[4] that the existing rates are unjust and unreasonable will a new just and reasonable rate be established.[5] In addition, as JCP&L seeks a unilateral change to the contracts in question in this proceeding, it must show that the change it seeks would be required by the public interest, pursuant to the *Mobile-Sierra*[6] doctrine. The *Mobile-Sierra* public interest standard has been held to be directly applicable to the category of cost sharing contracts among PJM participants that includes the LDV Agreements.[7]

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[3] *Union Electric Co. v. FERC*, 668 F.2d 389, 393 (8th Cir. 1981).

[4] *Administrative Procedure Act*, 5 U.S.C. § 556(d) (2006).

[5] *Public Service Comm'n v. FERC*, 642 F.2d 1335, 1343-45 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981).

[6] *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[7] *PJM Interconnection, L.L.C.*, 116 FERC P 63,007 at ¶ 323 (2006).

SUMMARY OF FINDINGS

19. This case concerns a number of agreements entered into by the LDV Owners and JCP&L. Under Schedule 4 of the original agreement, the LDV Agreement, JCP&L was required to build a 500 kV transmission line known as the Seashore Loop. As a result of difficulties JCP&L faced in building the Seashore Loop, the parties agreed to revise Schedule 4 (at the time of executing the LDV Supplemental Agreement) to allow JCP&L to build either the Seashore Loop or alternative facilities to the Seashore Loop, as mutually agreeable among the parties. The parties also entered into the Smithburg and East Windsor Agreements, which permitted JCP&L to build the Smithburg and East Windsor substations, which it has done. Both of these contracts require JCP&L to make fixed-amount payments to the LDV Owners, in exchange for JCP&L's use of the LDV System. Under both the Smithburg and East Windsor Agreements, the payments JCP&L makes to the LDV Owners will cease upon the termination of the LDV Agreements, or when JCP&L constructs the Seashore Loop or alternative facilities.

20. Section 3.3 of the East Windsor Agreement (Section 3.3) contains a clause allowing for a review and adjustment of these payments in the event that the Seashore Loop or alternative facilities are not built. Section 3.3 contains a reference to Article VIII of the LDV Supplemental Agreement,[8] a reference whose meaning and effect is hotly disputed by the parties.

21. JCP&L now claims that it is impossible for it to build the Seashore Loop or any alternative facilities, and therefore asserts that it is entitled to either a reduction or termination of its payments under the East Windsor Agreement. On this point, JCP&L disputes the LDV Owners' interpretation of the relevant passages of both the East Windsor Agreement and the LDV Supplemental Agreement, and specifically disputes the LDV Owners interpretation of Section 3.3's reference to Article VIII, claiming that Article VIII means Section 8.3, and not Section 8.4 as the LDV owners allege. This is significant because Section 8.3 would appear to have no real effect on a review of the payments made by JCP&L, but would not block the reduction in payments that JCP&L seeks. Section 8.4, however, would prevent JCP&L from obtaining a reduction in its payments.

22. JCP&L also claims that other facilities it has built should qualify as "alternative facilities," even in the absence of any mutual agreement on the facilities by the parties, as the facilities perform the same "purpose and function," as the originally planned Seashore

[8] Hereinafter, references in this Initial Decision to Article VIII, Section 8.3 or Section 8.4 refer to Article VIII of the LDV Supplemental Agreement, and its sub-sections 8.3 and 8.4, respectively.

Loop. In addition, JCP&L claims that it is entitled to a credit, for the costs it has incurred in building the Smithburg and East Windsor facilities, against its payments under the LDV, Smithburg and East Windsor Agreements.

23. I find against JCP&L on all of its claims. JCP&L's impossibility argument is not applicable to the East Windsor Agreement because it is not required to build the Seashore Loop, or alternative facilities, under that agreement. JCP&L is required to build the Seashore Loop, or alternative facilities, under the LDV Supplemental Agreement. Under the East Windsor Agreement JCP&L is only required to make payments, a requirement which JCP&L does not argue is impossible to perform. I disagree with JCP&L's claim that Section 3.3's reference to Article VIII is actually a reference to Section 8.3, and agree with the LDV Owners that this reference is to Section 8.4. In addition, JCP&L has not proved that it is impossible to build the Seashore Loop or alternative facilities. Because JCP&L is not required to build the Seashore Loop or alternative facilities under the East Windsor Agreement, I find that JCP&L will not be excused from making payments under the East Windsor Agreement. I further conclude that because JCP&L's impossibility argument does not apply to the East Windsor Agreement, even if JCP&L proved, which it did not, that it is impossible for it to build the Seashore Loop or alternative facilities, it would still not be excused from making the East Windsor Agreement payments.

24. I find that the parties intended to apply the "electrical equivalence" test to determine which facilities should qualify as alternatives, rather than JCP&L's argued "purpose and function" test. I conclude, therefore, that JCP&L has failed to prove that any of its alleged facilities are legitimate alternatives to the Seashore Loop. I also find that JCP&L has neither a contractual nor an extra-contractual claim to any credit for the facilities it has already constructed. Finally, I find that should the Commission grant JCP&L's crediting request, the application of levelized carrying charge methodology will not in and of itself result in an overcollection, and that the credit would be applicable to the Smithburg and East Windsor facilities, but not the Alloway project.[9]

I. Should JCP&L's payment obligations under the East Windsor Agreement be reduced or terminated under Section 3.3 of that agreement, as a result of its inability to build facilities whether due to impossibility or other reasons?

25. Section 3.3 of the East Windsor Agreement subjects JCP&L's proportional allocation of investment responsibility and its annual payment amount to review and possible adjustment if JCP&L does not place into service the facilities it is under contract

[9] The Alloway Substation Project is a 500/230 kV substation constructed by Atlantic City and connected to the Salem-Deans line, in the Atlantic City zone. It will be placed in service in 2008. Tr. at 218-219, 557.

to build, pursuant to the revised Schedule 4 of the LDV Agreement, by December 31, 2000. The parties disagree over whether considerations that would constitute a "review" under the terms of the contract occurred, (JCP&L Initial Brief at 31 [hereinafter JCP&L I.B.]; LDV Owners Reply Brief at 8 [hereinafter LDV R.B.]), and the Commission stated in the December 2 Order that it had received no information that the review had been performed. December 2 Order at P 56. In the absence of such information, the Commission set for hearing the issue of whether JCP&L's alleged inability to build the Schedule 4 facilities should result in a reduction or termination of the payments that JCP&L makes to the LDV Owners under the East Windsor Agreement. *Id.*

26. Section 3.3 of the East Windsor Agreement, states:

"If any capital improvements, betterments, replacements, reinforcements or additions are made to the Salem-Deans line which are required by any statute or ordinance; judicial degree [sic] or order, rule, regulation, or other lawful requirement of any administrative body or which are deemed necessary by the LDV Administrative Committee that results in a 5% or more increase in the present investment value of the facilities that comprise the Salem-Deans line and associated terminal facilities ($107,109,633), the payment that JCP&L makes to the other signatories of this Agreement will increase to reflect this change.

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

27. At the center of the instant case is the second paragraph of section 3.3, which addresses an adjustment that could be made to the payments JCP&L makes to the LDV Owners in the event that JCP&L has not built the facilities it is under contract to construct, as per the revised Schedule 4 of the LDV Supplemental Agreement. JCP&L argues that it is impossible for it to build the Schedule 4 facilities, and that it should therefore be excused from making the East Windsor Agreement Section 2.1 payments. Assessing the validity of these claims requires consideration of two issues: whether JCP&L is excused from making the payments on the basis of legal impossibility; and, whether it is in fact impossible for JCP&L to build the Schedule 4 facilities. I find the question of legal impossibility a threshold issue, and will address it first.

A. Can JCP&L's payments to the LDV Owners be terminated or reduced under Section 3.3 of the East Windsor Agreement on the basis of legal impossibility?

1. Does Section 3.3 of the East Windsor Agreement provide the authority to terminate or reduce JCP&L's payments?

Positions of the Parties

28. JCP&L asserts that the second paragraph of Section 3.3 of the East Windsor Agreement provides authority to terminate or reduce its payment obligations. JCP&L states that "neither the record nor the LDV Owners provide any basis for concluding that JCP&L's payment obligations under the East Windsor Agreement cannot or should not be terminated or reduced under Section 3.3 of that Agreement," (JCP&L I.B. at 31) and adds that "nothing in Section 3.3 would preclude parties or the Commission from reducing or terminating payments either." *Id.* at 35.

29. The LDV Owners dispute JCP&L's positions. While the LDV Owners do not state that Section 3.3 prohibits a decrease in JCP&L's East Windsor Agreement payments, they do state that the purpose of Section 3.3 was to adjust JCP&L's payments, "most likely up." LDV R.B. at 11-12.

Discussion & Conclusion

30. I find that Section 3.3 of the East Windsor Agreement provides the authority to reduce, but not to terminate, JCP&L's payments. Section 3.3 does not say that in the event that JCP&L does not build the Schedule 4 facilities, the payments will be reduced, or increased, simply that they will be "reviewed." While the LDV Owners state that the purpose of Section 3.3 was most likely to increase JCP&L's payments, even the LDV Owners do not state that a decrease is prohibited by Section 3.3. The contractual language in question, therefore, allows for the possibility that the payments could be adjusted downwards or upwards. I therefore find that under Section 3.3 it is theoretically possible for the payments made by JCP&L to be reduced, and that Section 3.3 of the East Windsor Agreement does provide this authority.

31. Outside of a theoretical reduction of JCP&L's payments to zero under Section 3.3 (a highly unlikely possibility), I find JCP&L has not presented any evidence demonstrating that its payments should be terminated under Section 3.3. Regardless of the merits of JCP&L's arguments regarding a reduction of its payments under Section 3.3, which will be addressed in detail, *infra*, Section 3.2 of the East Windsor Agreement prevents termination of the payments under Section 3.3, based on the current record. Section 3.2 of the East Windsor Agreement clearly states the conditions under which its payments will be terminated: when JCP&L completes construction of the facilities it has contracted for pursuant to the revised Schedule 4 of the LDV Agreement or when the LDV Agreement is terminated. JCP&L has not completed construction of the Schedule 4 facilities, nor has the LDV Agreement terminated.

2. Should JCP&L's payments be reduced under Section 3.3 of the East Windsor Agreement?

Positions of the Parties

32. JCP&L argues that as Section 3.3 permits a reduction in payments under the East Windsor Agreement, it is therefore reasonable to terminate or reduce JCP&L's payments under that section on the basis of impossibility.[10] JCP&L I.B. at 36. JCP&L argues that there is neither guidance in the contracts, nor is there Commission precedent on this issue, and therefore suggests that the New Jersey state case of *Duff v. Trenton Beverage Company*, 73 A.2d 578 (N.J. 1950), should serve as guiding precedent. JCP&L I.B. at 37.

33. In *Duff*, the court applied the defense of impossibility where the defendant wholesale liquor licensee was unable to deliver the latter part of an order as a result of a change in the New Jersey rules regarding price regulations. The court found that where the defendant was unable to obtain a license from the control board for the sale of the alcohol in question, the sale was impossible in law, as contractual liability was made to depend on the approval of the sale by the administrative agency. *Duff*, 73 A.2d at 584. In addition, the court found that as the impossibility was based in the nature of the performance, and not the capacity of the promissor, the defense of objective impossibility, a complete defense, applied and absolved the defendant of any liability. *Id.* at 583-584. JCP&L states that *Duff* stands for the proposition that objective impossibility is a complete defense, unless the risk is assumed by the performer of the contract. JCP&L I.B. at 37. JCP&L argues that it is impossible for it to build the Schedule 4 facilities, and that the East Windsor Agreement payments should be reduced or terminated since "there is no basis to conclude that JCP&L assumed the risk of impossibility [and] the contract specifically provided for an adjustment of payments if the facilities were not built." JCP&L I.B. at 37-38.

34. In furtherance of its assertion that there is no contractual guidance on interpreting Section 3.3, JCP&L argues that not only does Section 8.4 of the LDV Agreement not apply to Section 3.3 as the LDV Owners allege, but it is in fact Section 8.3 to which Section 3.3 refers when it refers to Article VIII. Section 8.4 states that a reallocation of payments shall be made as provided in Article V of the LDV Agreement (Article V) whenever cancellation or delay of installation or completion of the LDV facilities (including the facilities listed in Schedule 4) materially affects the proportional use of the planned LDV facilities on a continuing basis. Article V provides a method for computing monthly charges or credits used in allocating the costs of the LDV investment among signatories to the agreement. JCP&L does not make monthly Article V payments, however, and therefore Article V's reallocation provisions do not apply to it. JCP&L

[10] The facts and assertions underpinning JCP&L's "impossibility" claim, though not relevant to the immediate discussion, are discussed in the following section of the decision.

therefore argues that if Article V does not apply to it, then Section 8.4 must not apply to Section 3.3, leaving Section 8.3 as the only other relevant provision, by default.

35. Section 8.3 states that the LDV System may be used "for purposes compatible with but other than the delivery of energy and capacity from Peach Bottom, Salem and Forked River," and provides that "an appropriate allocation of payments shall be made for such additional use." JCP&L argues that the East Windsor Agreement "whereas" clause that cites allocation of payments under "Article VIII" refers to Section 8.3, and, therefore, concludes that Section 8.3 underlies the payments that JCP&L makes to the LDV Owners. JCP&L asserts that this allocation of payments language authorizes the reduction of its payments to the LDV Owners under the East Windsor Agreement, and that the reference to Article VIII in Section 3.3 has no other meaning, and should be given no further significance by the Presiding Administrative Law Judge. JCP&L I.B. at 36. JCP&L states, "[t]he bottom line is and continues to be that Section 3.3 authorizes 'adjustment' – here, termination or reduction – of Jersey Central's payment obligations under that agreement." JCP&L I.B. at 35-36.

36. The LDV Owners argue that JCP&L cannot claim an impossibility of performance defense under the East Windsor Agreement, as the performance which JCP&L is claiming as impossible is actually contracted for under the LDV Agreement, a completely separate contract from the East Windsor Agreement. The LDV Owners assert that the East Windsor Agreement requires only the annual payment of $3.2 million, which JCP&L has been paying, without disputing its ability to pay. LDV I.B. at 31; Tr. at 91-92.

37. The LDV Owners also contest JCP&L's assertion that there is no guidance with which to assess the adjustment of payments under Section 3.3, and suggest that, in fact, Section 8.4 provides this guidance. In making this argument, the LDV Owners reject JCP&L's contention that it is only Section 8.3 which is relevant to Section 3.3. LDV Owners' witness Mr. Hebson explains that the LDV Owners were concerned JCP&L would increase its proportional use of the LDV facilities, and in that event would want to be able to increase JCP&L's payments appropriately. Ex. LDV-1 at 28. Mr. Hebson argues that the language of Section 8.4 of the LDV Agreement applies to Section 3.3. On cross examination, Mr. Hebson explained that despite the language in Section 8.4 referring to Article V, the East Windsor Agreement "embraces the provisions in Article VIII," and should be read "in that context," and not "narrowly within the confines of the LDV Agreement." Tr. at 402. That is, the LDV Owners maintain that a Section 3.3 review would require application of the "reallocation of payments" provision of Section 8.4, but without regard to Article V.

Discussion & Conclusion

38. I find that JCP&L has not proved that its payments should be reduced under section 3.3 of the East Windsor Agreement. As an alternative to terminating its payments, JCP&L claims that it can reduce its payments under Section 3.3 on the basis of impossibility. JCP&L provides as a rationale for reducing the East Windsor Agreement payments that: (1) reducing the payments is permitted under the contract; and, (2) it is impossible to build the Seashore Loop or alternative facilities. I do not find these arguments convincing, or necessarily even logical. In addition, JCP&L's theory suffers from the fatal flaw that the performance which it claims as impossible is contracted for under an agreement other than the East Windsor Agreement. For the purpose of this discussion, however, I will assume that JCP&L's claim as to the impossibility of constructing the Seashore Loop or alternative facilities is meritorious. The validity of that argument, which will be analyzed in detail, *infra*, is irrelevant to my finding on this issue.

39. JCP&L argues that because it is impossible for it to build the Schedule 4 facilities, it is reasonable to reduce its payments under the East Windsor Agreement. However, as the LDV Owners rightly point out, this argument fails as a matter of law because the obligation which JCP&L contends is impossible (building the Schedule 4 facilities) is not imposed or required by the East Windsor Agreement. LDV R.B. at 11. Article 2.1 of the East Windsor Agreement simply states that JCP&L will make an annual payment of $3.2 million, and that is all that is **presently** required of JCP&L under the East Windsor Agreement. That the East Windsor Agreement also has clauses addressing the termination or adjustment of these payments is irrelevant to JCP&L's impossibility claims, because what JCP&L claims to be impossible is contracted for under a completely separate agreement. In fact, JCP&L has been making these payments continuously since the signing of the East Windsor Agreement contract in 1990, at which time the difficulties in constructing the Seashore Loop were well understood by all parties. LDV I.B. at 31; Tr. at 91-92.

40. In 2004 JCP&L decided that it should be excused from making these payments under the East Windsor Agreement, concluded that it was "impossible" to build the Seashore Loop or alternative facilities, and filed its complaint. JCP&L argues that since the East Windsor Agreement allows for its payments to be terminated after JCP&L completes the LDV Schedule 4 facilities, if it is impossible for it to construct these facilities then this impossibility should excuse it from performance, and thus payment under the East Windsor Agreement**.** Indulging such an interpretation, however, is to misread the East Windsor Agreement and to ignore the Commission's characterization of the payments under the East Windsor Agreement as part of a cost sharing arrangement, a characterization that has gone unchallenged by any party to this proceeding.

41. JCP&L cites the *Duff* case as an example of a party being excused from performing by virtue of impossibility. I find the case of *Duff* inapposite to the instant proceeding. The most important difference between *Duff* and this case is that in *Duff* the defendant was obligated under the contract in dispute to perform the act which was later

deemed impossible. JCP&L is not so obligated, and therefore all issues of impossibility are irrelevant. As the LDV Owners' reply brief points out, JCP&L has not provided a "logical explanation for why its alleged inability to comply with the construction provisions in the LDV Agreement should be read into Section 3.3 as a basis for relieving JCP&L of its payment obligations under the separate East Windsor Agreement."[11] LDV R.B. at 12. JCP&L cites the *Duff* case to support its arguments as it claims that there is no guidance or precedence to assist in interpreting Section 3.3, in contradiction to the LDV Owner's assertions that the Section 3.3 adjustment should be evaluated in accordance with Section 8.4, and in contradiction to the Commission's suggestion that it is Section 8.4 to which Section 3.3 of the East Windsor Agreement refers.[12] It is, in fact, necessary for JCP&L to assert this argument, because if the LDV Owners' position is found credible, JCP&L's payments, as opposed to being decreased, should be increased from $3.2 million annually, to $4.66 million annually.[13] LDV I.B. at 30; Ex. LDV-42 at 2.

42. As Section 3.3 references Article VIII of the LDV Agreement, but does not specify the part of Article VIII to which it refers, this presents an ambiguity in the contract upon which the parties cannot agree. In interpreting contracts, the Commission looks to the law that would apply if the subject matter of the contract were unregulated, absent a significant conflict between federal interests and state law, of which there is none here.[14] Despite JCP&L's assertion to the contrary,[15] the contracts at issue are not all

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[11] I also reject the relevance of the trio of cases the LDV Owners discuss for the general proposition that where there is an alternative method of performance, impossibility is denied as a matter of law. *See* LDV I.B. at 34 (discussing *Yankton Sioux Tribe v. United States*, 272 U.S. 351,358 (1926); *Cook v. El Paso Natural Gas Co.*, 560 F.2d 978, 982 (10th Cir. 1977); *Ashland Oil & Refining Co. v. Cities Serv. Gas Co.*, 462 F.2d 204, 211 (10th Cir. 1972).). In the instant case, the issue is not one of alternative performance, but of performance versus non-performance. As stated previously, the only performance to which JCP&L is obligated under the East Windsor Agreement is to make the payments as specified by section 2.1. These payments are not an alternative to building the Seashore Loop, because building the Seashore Loop is not required under the East Windsor Agreement.

[12] *See* December 2 Order at P 56 n.51.

[13] The LDV Owners do not actually seek to increase JCP&L's payments as a result of this proceeding, but merely point out that far from decreasing JCP&L's payments, if anything, they should be increased.

[14] *Pennzoil Co. v. FERC,* 645 F.2d 360, 387 (5th Cir. 1981)*; Golden Spread Electric Cooperative, Inc.,* 40 FERC ¶ 61,348 at 62,047 (1987) (citations omitted).

[15] *See* JCP&L I.B. at 36.

clearly governed by New Jersey state law, as only the LDV Agreement contains a choice of law provision specifying the application of New Jersey state law. Where no state law is specified, the Commission has held that "general principles" of contract law and federal common law may be used to interpret contracts.[16] However, as the LDV Owners have taken no real exception to this assertion,[17] for the sake of simplicity I will employ New Jersey state law to interpret all of the contracts in question, as New Jersey state law follows general principles of contract law.

43. The New Jersey courts permit a broad use of extrinsic evidence, including oral and documentary evidence, to achieve the ultimate goal of discovering the intent of the parties and uncover the true meaning of contractual terms.[18] In addition, in the state of New Jersey, it is only after the meaning of the contract is discerned that the parol evidence rule comes into play to prohibit the introduction of extrinsic evidence to vary the terms of the contract. *Id.*

44. Neither Party has made a particularly good argument on this issue. However, in the application of New Jersey law, I will rely on the only actual evidence presented in this proceeding which sheds light on this point, the testimony of Mr. Hebson. Additionally, the D.C. Circuit has found that the Commission may properly credit the testimony of those with first hand knowledge of the negotiations.[19] Mr. Hebson testified that he was an active member of the LDV Administrative Committee during all of the negotiations of the 1990 LDV Supplemental Agreement, and played an active role in drafting the contractual language. Mr. Hebson is, in fact, the *only* witness who took part in the negotiations. Therefore, Mr. Hebson's testimony will be given significant weight. At the hearing, JCP&L did not impeach Mr. Hebson's credibility, but merely suggested that Article VIII should be read narrowly, so that the reference to Article V in Section 8.4 would exclude its application to Section 3.3. Tr. at 402. I find Mr. Hebson's testimony credible, and the most logical explanation, the troubling reference to Article V notwithstanding. This finding further diminishes the probative value of JCP&L's arguments for decreasing its East Windsor Agreement payments.

45. Additionally, in setting this case for hearing the Commission addressed the issue of the East Windsor Agreement payments in the December 2 Order, and characterized them as part of a cost sharing arrangement related to the LDV Agreement. The Commission states that Section 8.4 "suggests that payments made as a result of a failure

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[16] *Pennzoil,* 645 F.2d at 384 (1981); *PG&E, et al. v. PG&E, et al.,* 107 FERC ¶ 61,154 at 61,502 (2003).

[17] *See* LDV R.B. at 11.

[18] *Conway v. 287 Corporate Ctr. Associates*, 187 N.J. 259, 901 A.2d 341, 346 (2006).

[19] *See Southwestern Electric Coop., Inc. v. FERC*, 347 F.3d 975, 983 (D.C. Cir. 2003).

to build facilities are cost sharing payments." December 2 Order at P 41. In that Order, the Commission also found "[t]he fact that [the East Windsor Agreement] payments would terminate upon JCP&L's completion of its facilities shows that these payments were a part of the overall cost sharing arrangement, not an independent transmission agreement." *Id*. at P 29. This cost sharing arrangement is based on JCP&L's paying a percentage of the construction cost of facilities built by other signatories under the LDV Agreement. *Id*. at P 28.

46. Mr. Hebson further describes the East Windsor Agreement cost sharing arrangement in his hearing testimony. He states that JCP&L is sharing in the cost of the Deans to Branchburg and Salem to East Windsor transmission lines and appropriate terminal facilities, but that the LDV Owners are not sharing in JCP&L's costs as it has no facilities of any use to the LDV system. Tr. at 391. The LDV Owners additionally state that it is undisputed that Section 3.3 of the East Windsor Agreement was included as a safeguard for the LDV Owners in the event that JCP&L did not build the Seashore Loop or "alternative facilities" by the end of the year 2000 and in the meantime increased its proportional use. LDV R.B. at 11-12; Ex. LDV-1 at 27-28. This agreement can be characterized, therefore, as a cost sharing arrangement, whereby JCP&L is paying a percentage of the costs borne by other parties in constructing facilities under the LDV Agreement for the benefit of all signatories. If JCP&L fails to construct the facilities it has agreed to under the LDV Agreement, it would appear that the least likely outcome under Section 3.3 should be for JCP&L's payments to be reduced.

47. I find that Section 3.3 could authorize a reduction in JCP&L's payments. However, other than stating that this section provides the authority to reduce payments while ignoring that it likewise provides the authority to increase payments, JCP&L has provided no compelling reason why the payments should be reduced, other than because it is impossible for JCP&L to perform under a related, but completely separate agreement. JCP&L's claim to a reduction in payments under Section 3.3 is rejected.

B. Is it factually impossible for JCP&L to construct the Seashore Loop or alternative facilities?

48. JCP&L argues that based on the impossibility of building the Seashore Loop, its payments under the East Windsor Agreement should be terminated or reduced. I have assessed JCP&L's arguments, *supra*, regarding the termination or reduction of payments, as well as impossibility of performance in building the Seashore Loop. I have found that JCP&L's arguments fail as a matter of law, with regard to the issue of impossibility. However, in the interest of a thorough review of JCP&L's claims, I will also assess JCP&L's claims of factual impossibility related to construction of the Schedule 4 facilities, and find that they, too, fail. I reject JCP&L's arguments and find it has not proved that it was impossible for it to build the Seashore Loop, Dove Mill or any alternative facilities.

1. Do regulatory barriers make it impossible for JCP&L to construct the Seashore Loop or alternative facilities?

49. JCP&L presents several arguments supporting its assertion that it is impossible to build the Seashore Loop or alternative facilities in the New Jersey Pinelands.[20] These include: (i) it is impossible for JCP&L to obtain the authorizations necessary to build a transmission line through preservation areas and forest areas; (ii) JCP&L could not obtain an intergovernmental memorandum of agreement to build the Seashore Loop through preservation, special agriculture and forest areas; (iii) the LDV Owners' examples of projects built in the Pinelands provide no support for arguments that JCP&L could have obtained authorization to build the Seashore Loop; (iv) the Commission should not require JCP&L to engage in futile efforts to obtain authorization for the Seashore Loop as a prerequisite to a finding of impossibility; (v) PJM has never included the Seashore Loop in the PJM RTEP process;[21] (vi) JCP&L cannot build the Seashore Loop as a transmission owner identified project(TOI); and (vii) changed circumstances present significant impediments to the construction of the Seashore Loop.

a. Should JCP&L be excused from trying to obtain regulatory authorization to build the Schedule 4 facilities because doing so would be futile and wasteful?

Positions of the Parties

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[20] The New Jersey Pinelands are a National Reserve and a U.S. Biosphere Reserve of the Man and the Biosphere Program. Ex. JC-21 at 5. The Pinelands National Reserve was created by Congress in 1978. In 1979, the state of New Jersey formed a partnership with the federal government to preserve and protect the New Jersey Pinelands. New Jersey has also promulgated certain environmental regulations making development of the Pinelands much more difficult. In addition, New Jersey created the Pinelands Commission to preserve and protect the Pinelands, and to govern growth and development within its borders under a "Comprehensive Management Plan" (CMP). *Id.* at 6. The CMP allows for some exceptions to the restrictions on Pinelands development, granted through the waiver of strict compliance and intergovernmental memorandum of agreement. *Id.*; JCP&L I.B. at 19 (citing Ex. JC-51, §7:50-4.52(b)).

[21] As the regional transmission operator for the area that includes all of the LDV Owners' facilities and the JCP&L system, PJM determines the need for transmission system upgrades and new transmission projects under its Regional Transmission Expansion Planning process (RTEP). Ex. JC-1 at 30.

50. The Schedule 4 facilities construction project known as the Seashore Loop was originally planned before the creation of the Pinelands National Reserve, in a part of the Pinelands which eventually became heavily restricted to development. As originally planned, the Seashore Loop would traverse restricted Preservation, Special Agriculture and Forest Areas for 90% of the length of the project, presenting what JCP&L alleges are "insurmountable legal hurdles." JCP&L I.B. at 11. JCP&L asserts that although the CMP allows for exceptions in which normally prohibited projects can be undertaken, JCP&L does not qualify for the requisite waiver of strict compliance, nor would the Pinelands Commission enter into an intergovernmental memorandum of agreement with other relevant government agencies to approve the Seashore Loop project. JCP&L I.B. at 13. JCP&L's initial brief and prefiled direct testimony provide exhaustive record evidence as to the difficulties it would have in satisfying the requirements for either of these exceptions under the CMP. JCP&L I.B. at 13-19. In addition, at trial witnesses Miller, Clark and Halpern testified credibly as to the inability of JCP&L to satisfy the criteria for obtaining exceptions to the CMP.

51. JCP&L also argues that as the evidence establishes the "insurmountable legal hurdles" that JCP&L would have to overcome in order to build the Seashore Loop, it would be entirely wasteful to force JCP&L to attempt to obtain regulatory approval. JCP&L I.B. at 24. JCP&L observes that the Commission has never required utilities "to engage in futile efforts to prove a negative…that regulatory authorizations will not be granted." JCP&L I.B. at 24. JCP&L cites *Midwestern Gas*[22] for the proposition that ratemaking principles discourage this behavior, as they prohibit recovery of "imprudently incurred" costs. JCP&L concludes that "nothing could be more obviously wasteful than pursuit of an impossible regulatory approval." JCP&L I.B. at 24.

52. The LDV Owners argue that JCP&L has failed to demonstrate factual impossibility as to construction in the Pinelands, since JCP&L has not even attempted to secure the necessary regulatory authorizations. The LDV Owners assert that JCP&L cannot argue impossibility when it has not even attempted to build this project. LDV I.B. at 41. At the hearing, LDV witness Jubic described the process by which entities apply for permits and other regulatory authorizations, explaining that project planning and construction is an iterative process in which the entities respond to regulatory hurdles by constantly adjusting construction plans to overcome such challenges. Mr. Jubic further testified that to his knowledge JCP&L had not attempted any of the steps he had described, and thus had not taken any concrete actions to obtain the necessary regulatory authorization for construction in the Pinelands. LDV I.B. at 41; Tr. at 537, 539.

Discussion & Conclusion

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[22] *Midwestern Gas Transmission Co.*, 30 FERC P 61,260 at 61,543 (1985) (Midwestern Gas).

53. JCP&L has shown that as a result of the environmental regulations promulgated to protect the Pinelands, obtaining the necessary regulatory authorizations and exemptions would be very difficult. Witnesses Miller, Clark and Halpern provided valuable testimonial evidence describing the regulatory difficulties to be encountered in building in the Pinelands. The study prepared by Mr. Halpern, in addition to his discussion with the Pinelands Commission, also substantiated these difficulties. Exs. JC-21 at 6-7, JC-22. This proceeding, however, is an evidentiary hearing initiated by JCP&L, and as such, it is JCP&L that bears the burden of proving that building the Schedule 4 facilities is impossible. In the absence of any attempts to obtain the necessary authorization to build in the Pinelands, JCP&L has failed to provide evidence that it is factually impossible to build the Schedule 4 facilities, and its argument that it should not be required to try is completely unsupportable.

54. JCP&L argues that it should be excused from attempting to obtain such authorizations because Commission precedent does not require utilities "to prove a negative," in this case meaning that it should not have to attempt to get regulatory authorization in order to prove that obtaining it is impossible. JCP&L I.B. at 23-24. This is, indeed, very peculiar logic. A better method for JCP&L to demonstrate impossibility would be to actually try and fail to get even one of the regulatory approvals. JCP&L states that the CMP exceptions are cumulative, and not disjunctive, so that failing even one of the criteria would prevent JCP&L from any chance of satisfying its requirements. JC I.B. at 17. Yet JCP&L did not attempt to do even this. Instead, JCP&L would prefer that based on the opinions of its experts, its argument should be accepted in the absence of any evidence of effort on its part**.**

55. To substantiate this claim, JCP&L cites the case of *Midwestern Gas*, as discussed, *supra*. I find this case inapposite, however. *Midwestern Gas* concerned a dispute over whether Midwestern Gas Transmission Company's cost of storage gas losses were prudently incurred and should therefore be reflected in its cost of service. JCP&L asserts that based on *Midwestern Gas*, the Commission will allow utilities to pass through to ratepayers only costs that are prudently incurred, and that are non-wasteful expenditures. JCP&L argues that nothing is more obviously wasteful than pursuit of an impossible regulatory approval. JCP&L I.B. at 24.

56. The instant case, however, is not about JCP&L's rate base but instead concerns, in part, whether it is impossible for JCP&L to build a 500 kV transmission line in the New Jersey Pinelands. Part of showing that this is impossible would be for JCP&L to try, and fail, to obtain "impossible" regulatory approval. In fact, following JCP&L's line of reasoning, such an effort conceivably could benefit ratepayers as the expenditure involved in trying and failing to obtain regulatory approval could end up saving JCP&L $3.2 million per year under the East Windsor Agreement. Based on the facts of the instant case, I do not find that *Midwestern Gas* supports JCP&L's position that it should

be excused from trying to obtain regulatory approval. Furthermore, JCP&L must prove its case with substantial evidence. Based on the facts of the instant case, such a burden will require that before a finding of impossibility of performance can be made, JCP&L must demonstrate that it has made some concrete effort to actually perform under the contract, instead of just making some effort to show that performing would be difficult. Indeed, case law examples such as *Stock & Grove, Inc. v. US,*[23] support this requirement.[24]

57. In *Stock & Grove,* a road building contractor contracted with the Department of Transportation (DOT) to obtain stone from a particular quarry for use in a road building project in Alaska. The plaintiff appealed an adverse decision by the DOT Contract Appeals Board (Appeals Board) on various bases. Among its arguments, plaintiff asserted that it was impossible to provide an adequate quality of stone from the contract-specific "Quarry No. 1," and so it therefore opted to provide the stone from "Quarry No. 2." The plaintiff argued that rock samples from blasting stations 531-535 at Quarry No. 1 demonstrated that the entire rock formation was unsuitable, and did not attempt the much more difficult and costly quarrying from blasting stations 535-539, as the defendant would have preferred. The Court of Claims noted that the defendant's strongest point was the plaintiff's failure to blast from stations 535-539 and that, as in the instant case, "[t]he record must be examined to determine whether the plaintiff's conviction of futility that led to its abandonment of Quarry No. 1 was justified." The court observed that "…this is primarily a question of fact [with] legal overtones." *Stock & Grove,* 493 F.2d at 632, 643.

58. The Court of Claims found, however, that the plaintiff's experience in encountering a deteriorated rock quality beneath the face of those parts of Quarry No. 1 it had worked between stations 531-535, the high cost and uncertainty of quarrying the high ledge of rock at station 537, and the more accessible and equally promising rock source at nearby Quarry No. 2, justified the plaintiff in its election to abandon Quarry No. 1 without exhausting the entire location. *Id.* at 644.

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[23] *Stock & Grove, Inc. v. US,* 493 F.2d 629 (Ct. Cl. 1974).

[24] *See also Jennie-O Foods, Inc. v. US,* 580 F.2d 400, 411 (Ct. Cl. 1978) (finding that where plaintiff had not done more than provide charts and other indicia of disease of turkeys in its supply chain that it was under contract to deliver, as opposed to making efforts to obtain an alternative supply, a commercial impracticability defense could not be supported); *Guy F. Atkinson Construction Co. v. WMATA,* 2006 U.S. Dist. Lexis 53468 at 71-80 (D.D.C. 2006) (affirming Army Corps of Engineers Board of Contract Appeals decision that in dispute over excavation project, plaintiff could not succeed on an impossibility theory where it had not been shown that plaintiff made a serious effort to meet "drawdown" requirements in attempting to "dewater" in an excavation site).

59. Unlike the plaintiff in *Stock & Grove*, JCP&L has chosen to, metaphorically speaking, stare at the cliff face, conclude that its stone will not be of an adequate quality without blasting at any station, and attempt to abandon its contractual obligations. In *Stock & Grove* the plaintiff made real efforts to perform the contract and determined that going forward in Quarry No. 1 was impossible, and was therefore not required to take the additional expensive and difficult steps the defendant would have preferred. JCP&L on the other hand, has only provided evidence of how difficult it probably would be to obtain the necessary regulatory authorization for the Seashore Loop. JCP&L did not make any attempts to obtain the Schedule 4 facilities authorizations at all. LDV I.B. at 41; Tr. at 537, 539. In the absence of a showing of reasonable, good faith effort, I cannot find that the record supports JCP&L's claim of factual impossibility. In addition, even if building the Seashore Loop were impossible, this still would not satisfy JCP&L's evidentiary burden, as the Seashore Loop is neither the only option available to JCP&L, nor the only option proposed by JCP&L, that would satisfy its Schedule 4 contractual obligations.

b. Has JCP&L shown that building alternatives to the Seashore loop is also impossible?

Positions of the Parties

60. JCP&L devotes most of its effort in this case to proving the impossibility of building the Seashore Loop, and presents a compelling argument that this would be very difficult. JCP&L, however, spends almost no time explaining why the impossibility issue should be determined almost solely on the basis of the Seashore Loop. The revised Schedule 4 of the LDV Supplemental Agreement, which was entered into by the parties in 1990, just prior to the signing of the East Windsor Agreement states that JCP&L "shall construct and make available the following LDV facilities or such alternative facilities as are mutually agreeable among the signatories with respect to Items 1, 2 and 4 (the Seashore Loop)." The insertion of the alternative facilities language at JCP&L's suggestion indicates that the Seashore Loop was not the only option for JCP&L, and indeed, no party disputes this characterization. In fact, JCP&L itself proposed an alternative, the Dove Mill project.

61. Although JCP&L suggested the Dove Mill project as an alternative to the Seashore Loop, it alleges that that the Dove Mill project is not a true alternative. JCP&L I.B. at 2. However, JCP&L also claims that the Dove Mill project, even if it did qualify as a true alternative, would be impossible to build for the same reasons as the Seashore Loop: it would have to traverse at least two of three critical areas in the Pinelands (Preservation, Special Agriculture or Forest); and, it would be impossible to obtain the authorization to build. JCP&L I.B. at 38. Finally, JCP&L states that "in order to traverse the affected Preservation and Forest Areas in the Pinelands, the Dove Mill project owner would need to establish that the facilities: (i) are critically needed or necessary for the public health

and safety; and (ii) are the exclusive means of serving the electric needs of existing Pinelands residents," and continues by stating that "[t]he evidence presented by the LDV Owners provides no basis for concluding" that these exceptions could be met. JCP&L I.B. at 39.

62. The LDV Owners express doubt as to the commitment of JCP&L to actually perform under the agreements, and allege that JCP&L never intended to build Dove Mill, but were instead intent on obtaining low-cost access to the LDV System. LDV R.B. at 11-12, 14-15. In addition, the LDV Owners state that the regulatory impediments connected to building the Schedule 4 facilities were readily foreseeable, noting that at the time that that the Dove Mill project was proposed, JCP&L had abandoned the Seashore Loop project as a result of regulatory difficulties. LDV R.B. at 14. The LDV Owners also note that New Jersey law permits the consideration of foreseeability as a disqualifying factor in an impossibility analysis.[25]

Discussion & Conclusion

63. It is not the burden of the LDV Owners to demonstrate how Dove Mill could traverse the Pinelands, but rather the burden of JCP&L to show how it could not. JCP&L attempts to show that it would be impossible to build Dove Mill, based primarily on Mr. Halpern's study assessing the feasibility of alternative routes to the Seashore Loop (JCP&L I.B. at 38), and his speculation that Dove Mill would have the same regulatory problems as the Seashore Loop. This, however, ignores the fact that JCP&L itself proposed Dove Mill as a way to avoid the regulatory problems associated with the Seashore Loop. It also ignores the fact that although Mr. Miller's undisputed testimony is that the Dove Mill project was secretly cancelled in 1991 (Tr. 140-142), Mr. Halpern was hired and he conducted his study in 2006, in anticipation of this litigation.

64. Mr. Halpern presents a compelling argument as to the environmental and other regulatory complexities associated with building in the Pinelands. Mr. Jubic, however, presents uncontradicted testimony that JCP&L never initiated any effort to obtain the necessary authorizations and permits for building any of the projects in question here: the Seashore Loop, Dove Mill, or any other alternatives. Furthermore, as the LDV Owners

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[25] *See* LDV R.B. at 14 (citing *Dworman v. Mayor of Morristown*, 370 F. Supp. 1056, 1071 (D.N.J. 1974) (stating that defendants' impossibility argument becomes untenable where events upon which they rely to claim impossibility, the failure to secure approval of their bond issue and a federal grant, were both reasonably foreseeable and in the reasonable contemplation of the parties at the time of contracting) and 14 Corbin on Contracts §74.15 at 95-96 (rev. ed. 2001) (stating that "[i]f the court concludes that the problem was or should have been anticipated by the party seeking discharge, the impossibility argument inevitably fails…")).

accurately point out, Mr. Halpern's assertion that 48% of the Dove Mill right of way would be located within the Pinelands (Ex. JC-21 at 29) cannot be reconciled with the map of Dove Mill project prepared by JCP&L for the LDV Administrative Committee (Ex. LDV-15 at 5), which shows only a small segment of the proposed Dove Mill line traversing lands within the Pinelands on a route which is along existing LDV or JCP&L rights-of-way. Tr. 128-30.

65. In addition, the history of events leading up to this proceeding casts doubt on JCP&L's actual commitment to fulfilling its contractual obligations to construct any more transmission projects related to the LDV Agreements. Despite claiming that the Dove Mill project is not a true alternative (JCP&L I.B. at 26), on June 27, 1989, JCP&L proposed the Dove Mill project as an alternative to the Seashore Loop, and as a potential solution to the environmental and regulatory problems that JCP&L was facing in connection with the Seashore Loop. Ex. LDV-14 at 3. Mr. Miller testified at trial that the Dove Mill project, at an estimated cost of approximately $228.6 million, was developed by JCP&L, approved by the JCP&L and GPU boards, and presented to the LDV Administrative Committee as a solution to the problems posed by the Seashore Loop. LDV R.B. at 16; Tr. 127-30. On April 6, 1990, in acknowledgment of substantial regulatory hurdles associated with construction of the Seashore Loop, the parties to the LDV Agreement signed the LDV Supplemental Agreement, which amended the language of Schedule 4 so as to permit for the construction of alternative facilities to the Seashore Loop, such as Dove Mill, and to therefore allow JCP&L to fulfill its contractual obligations. Fourteen days later, on April 20, 1990, these same parties entered into the East Windsor Agreement, in which JCP&L, *inter alia*, again acknowledged its obligations to construct the Seashore Loop or alternative facilities.

66. In 1991, however, only one year after obtaining the LDV Owners' approval to construct the East Windsor substation on the LDV System and providing reassurances that it would complete an alternative to the Seashore Loop, Dove Mill, like the "grin without a cat" simply disappeared.[26] JCP&L cancelled the Dove Mill project without informing the LDV Owners,[27] and cancelled it after having already deferred the project for four years in 1990. Tr. at 139. JCP&L did not cancel Dove Mill because of an adverse response from either the Pinelands Commission or the New Jersey Board of

[26] Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter 6 (1865).

[27] The first and only mention of Dove Mill's cancellation is the May 2, 1991 minutes of the regular meeting of the Board of Directors of General Public Utilities Corporation, which reflect JCP&L's cancellation request to its corporate parent. Ex. LDV-22 at 3. In fact, as late as 2000, the LDV Owners were under the impression that were JCP&L to build a 500kV line, the Dove Mill project still would be considered the optimal plan, (Tr. at 150) as Dove Mill was still recognized within JCP&L as "the 500 kV reinforcement in the area that best optimizes the impacts on the transmission reliability, the cost and any ROW/land development." LDV I.B. at 35; Ex. LDV-60 at LDV712; JCP&L I.B. at 22.

Public Utilities (Tr. at 141-142), but for reasons that JCP&L failed to explain on the record. Despite multiple discovery requests from the LDV Owners, JCP&L was unable to find any documents describing the rationale for defunding this $228 million project. Tr. at 140-142.

67. Finally, casting further doubt on JCP&L's credibility and intentions, the difficulties associated with constructing the Seashore Loop were apparent with the creation of the Pinelands protection area. Although JCP&L virtually ignores the foreseeability of regulatory problems in connection with building any Schedule 4 facilities, the LDV Owners accurately state that, "[i]f there ever was a case where the asserted impediment to performance was foreseeable at the time the contract was entered into, it is this one." LDV R.B. at 14. JCP&L might have argued "impossibility" at any time up until 1990 when it chose to revise the language of Schedule 4, and enter into the LDV Supplemental and East Windsor Agreements, but JCP&L did not do that. Instead, JCP&L continued making the East Windsor Agreement payments up until 2004, at which point it decided that the Seashore Loop, a project it had scrapped for all intent and purpose when it proposed Dove Mill, was impossible to build, and thus provided justification for JCP&L to abrogate its contractual obligations.

68. I conclude from the evidence that following the cancellation of the Forked River nuclear facility, JCP&L demonstrated no meaningful intent to construct the Seashore Loop, Dove Mill or any other alternative facility, nor has it demonstrated any meaningful attempt to obtain the necessary regulatory approval for any of these projects. JCP&L certainly has not shown that building the Dove Mill project is impossible. JCP&L's actions are consistent with furtherance of its own corporate interests, but to the operational detriment of the LDV Owners to the extent that JCP&L has been unwilling to perform its obligations under the contracts here at issue. I, therefore, find that JCP&L has failed to prove that constructing the Seashore Loop or an alternative is factually impossible due to regulatory impediments.

2. Do other reasons make it impossible for JCP&L to construct the Seashore Loop or alternative facilities?

69. In its initial brief, JCP&L also asserts several "other reasons" (other than the environmental regulatory obstacles to building in the Pinelands) which would make it impossible for JCP&L to build the Seashore Loop, and thus justify a termination or reduction of JCP&L's payments under the East Windsor Agreement. JCP&L's arguments are that changed circumstances prevent it from constructing the Seashore Loop; PJM has never included the Seashore Loop in the PJM RTEP process; and, that JCP&L cannot build the Seashore Loop as a TOI project. JCP&L I.B. at 25-29. I will not address the details of all of these arguments, but I reject all of these putative justifications for reducing or terminating the East Windsor Agreement payments.

Discussion & Conclusion

70. JCP&L argues that changed circumstances present significant impediments to the construction of the Seashore Loop. JCP&L states that when the parties executed the original LDV Agreement in 1977, and when they executed the LDV Supplemental Agreement in 1990, they were vertically integrated utilities, and they planned and improved their own transmission systems. JCP&L I.B. at 29. JCP&L argues, however, that since the 1997 PJM restructuring, JCP&L has lost control of these functions on its transmission system, and that the purpose of the LDV System has changed. *Id.* at 29-30. JCP&L states that it is, therefore, "in the difficult position of trying to comply today with contractual obligations that were formed under very different assumptions and under very different circumstances," and concludes that "[i]n short, the changes that have occurred since the execution of the LDV Agreement are significant impediments to JCP&L's compliance with its contractual obligation to construct the Seashore Loop." *Id.*

71. I will note that in discussing this issue, nowhere does JCP&L mention the Dove Mill project or any other possible alternative. JCP&L is not required to build the Seashore Loop under the East Windsor Agreement, and under the revised Schedule 4 it is authorized to build alternative facilities. JCP&L has focused singularly on the Seashore Loop. Thus, even if this argument were completely meritorious, without an explanation for this argument applying to alternative facilities, JCP&L has failed to present any reason as to why the East Windsor Agreement payment should be terminated or reduced. Additionally, I do not find this argument meritorious, since as I have discussed at length, *supra***,** JCP&L's intentions to build any Schedule 4 facilities after cancellation of the Forked River plant is in doubt. Furthermore, given that in 1991, for some **unexplained** reason JCP&L cancelled Dove Mill, its only proposed alternative facility, its arguments that the PJM restructuring in 1997 and changed purposes of the LDV System make it difficult for JCP&L to comply with its contractual obligations are unpersuasive.

72. JCP&L also argues that the PJM RTEP process precludes it from building the Seashore Loop or Dove Mill projects and that, contrary to the suggestions of the LDV Owners, it would not be possible for JCP&L to propose these as TOI projects. JCP&L argues that because PJM has found the Dove Mill project "unnecessary," and has never included it in any of its RTEP reports, it would be impossible to build this project. As for building the project as a TOI, JCP&L states that it would be "absurd" to propose such a project to PJM, and asserts that "the record establishes that PJM would probably" reject any such attempt by JCP&L. JCP&L I.B. at 27-28.

73. However, as addressed, *infra*, the LDV Owners discuss the PJM planning process and length of its planning horizon, as well as the recognition by both PJM and the Department of Energy's Congestion Study that there are both congestion and reliability issues that exist in New Jersey in refuting JCP&L's assertions that the Dove Mill project is "unnecessary." LDV R.B. at 37-39. I also note that at the hearing, Mr. Miller admitted

that JCP&L never proposed Dove Mill to PJM as a possible project (Tr. at 187), and JCP&L relies on the fact that PJM has never included this project in any RTEP plans to attempt to prove it is unnecessary. Mr. Miller also admits that other transmission projects have been proposed in the same area where Dove Mill was planned. LDV R.B. at 37-38; Tr. at 196-197.

74. I will address the PJM RTEP and TOI issues in substantial detail, *infra*, but I will apply my conclusions on these issues to the instant discussion. JCP&L has not made a persuasive argument as to the RTEP process precluding building either the Seashore Loop or Dove Mill, or that JCP&L could not build Dove Mill as a TOI project. JCP&L's arguments are largely based on rhetoric and speculation. Because JCP&L carries the burden of proof in this case but has failed to provide persuasive arguments or to provide authority to bolster its case, I reject its claims.

75. I find that JCP&L has failed to satisfy its burden in proving that its payments to the LDV Owners under the East Windsor Agreement should be reduced or terminated due to changed circumstances, the PJM RTEP process or TOI project criteria. I deny JCP&L any and all relief under Section 3.3 of the East Windsor Agreement.

II. Alternative Facilities Issues

A. What is the definition of "alternative facilities?"

Positions of the Parties

76. JCP&L's witness Mr. Miller notes that the LDV Agreement contains no definition of "alternative facility," but simply states that with respect to the three Seashore Loop facilities, JCP&L "shall construct and make available the following LDV facilities or such alternative facilities as are mutually agreeable among the signatories."[28] Mr. Miller observes that the Agreement does not require that such facilities be of any particular voltage class or that they be cited along any particular path. Ex. JC-1 at 14.

77. JCP&L asserts that the only logical test for determining whether facilities are "alternative facilities" under the Agreements should be whether the facilities serve the same purpose and function as the Seashore Loop, taking into account changed circumstances. JCP&L suggests that the "changed circumstances" include cancellation of the Forked River plant, construction of generation on the JCP&L system, JCP&L's

[28] Although Mr. Miller refers to the LDV Agreement as containing the "alternative facilities" language, that provision first appears some thirteen years later in the LDV Supplemental Agreement. Collectively, both contracts are referred to as "the Agreements."

deregulation from a vertically integrated company, and PJM's role in transmission expansion planning. It also asserts that the record establishes that this purpose and function test is the "industry practice or standard test" for determining alternative facilities. JCP&L I.B. at 40-43.

78. JCP&L's witness Mr. Clark explains further that the primary purpose of a transmission system is to deliver energy from generation to load, within accepted reliability standards. He asserts this should be accomplished at costs that are reduced through use of transmission interconnections that allow power to be dispatched from shared generation facilities. Ex. JC-12 at 10.

79. Mr. Clark supports his assertion that the "purpose and function" test should be applied in determining whether facilities are "alternative facilities" by providing examples of other situations in which this test is employed. He states that agencies such as the New Jersey Board of Public Utilities (BPU) require an applicant seeking to construct a transmission line to show that the proposed transmission line is the best choice among available alternatives that provide the same purpose and function. He therefore concludes that "'alternative' must mean facilities that serve the same purposes and functions, namely delivering power from generators to customers and allowing for transfers between systems to support generation sharing." Ex. JC-12 at 4.

80. Mr. Clark also supports use of the "purpose and function" test by comparing it to criteria used in other law. For instance, he notes that in evaluating "feasible alternatives" under the National Environmental Protection Act, the test of feasible alternatives is whether they serve the same purpose and function as the proposed project, and urges a similar purpose and function evaluation in determining alternatives to the Seashore Loop. Similarly, Mr. Clark notes that under the Uniform Commercial Code (UCC), a seller of goods may provide commercially reasonable substitute performance if performance of a sale of goods is rendered impractical. He also cites the UCC provision that allows a buyer to "cover" with substitute goods, if a seller fails to deliver goods under a sales contract. Such goods, while not identical, are commercially usable as reasonable substitutes. JCP&L I.B. at 42.

81. Mr. Clark opines that the Seashore Loop was designed to deliver power from generation on the JCP&L system to regional load centers and nearby systems, and to interconnect the 500 kV LDV System with the JCP&L system. He concluded that any projects serving these same functions would qualify as "alternative facilities." Ex. LDV-12 at 9. At the hearing, Mr. Clark confirmed his opinion that the purpose and function of the Seashore Loop was to deliver generation to regional load centers, but noted also that it would allow imports and exports on the LDV System. Tr. at 273.

82. LDV Owners witness Mr. Hebson observes that during a June 21, 1989, LDV Administrative Committee Meeting, Mr. Richard O. Bright, Vice-President, GPU Service

Corporation (the parent corporation of JCP&L), submitted a letter to the LDV Administrative Committee suggesting the Dove Mill project as an alternate routing for the cancelled Seashore Loop. The letter stated that Dove Mill would provide the same "electrical benefit to LDV as the originally intended Seashore Loop with the exception of generation not being connected directly to the 500 kV." Ex. LDV-12 at 1. Shortly thereafter, on June 27, 1989, Mr. Bright met with the LDV Administrative Committee to describe the Dove Mill project in detail. Ex. LDV-14 at 3. Mr. Bright distributed a handout at that meeting which contained a summary stating: "(a)lternative Seashore Loop-Dove-Mill-Smithburg is at least electrically equivalent to the original Seashore Loop(-) New Freedom-Forked River-Smithburg(.)" Ex. LDV-15 at 10.

83. At the hearing, Mr. Miller acknowledged that this 1989 letter from GPU to the LDV Administrative Committee was the origin of the "alternative facilities" language included in the LDV Supplemental Agreement. Although the letter proposed the Dove Mill project as a replacement for the Seashore Loop, because the projected 1993 completion date for Dove Mill was not soon enough to meet JCP&L's projected supply requirements, Mr. Bright also requested in that same letter authorization for JCP&L to connect to the LDV System at East Windsor. Tr. at 135.

84. Mr. Hebson also observes that JCP&L suggested the "alternative facilities" language that appears in the LDV Supplemental Agreement. Ex. LDV-1 at 32. In explaining the purpose of this language, on January 26, 1990, JCP&L proposed that the following be included in the Agreement's transmittal letter to the Commission: "Given that a firm alternative has not been committed to at this time, the revision to Schedule 4 simply reflects the potential for alternative routing of the 500 kV Seashore Loop." Ex. LDV-20 at 7.

85. At the hearing, Mr. Hebson testified that JCP&L's language was incorporated into the "whereas" section of the LDV Supplemental Agreement which states: "Whereas it is desired to amend the agreement to provide for---the cancellation of the Forked River generating station and alternative routing for the 500 kV Seashore Loop." Tr. at 378; Ex. LDV-3 at 4.

86. In response to questioning concerning whether the parties to the LDV Supplemental Agreement drafted the "alternative facilities" language to accommodate a "broader and flexible approach to defining alternative facilities," Mr. Hebson responds:

"No, they didn't. I was personally involved in drafting this. The quid pro quo for Jersey Central's access to a $260 million transmission grid comprising 245 miles of 500 kV transmission was the provision of a significant enhancement to the LDV system provided by the others. Had that been done, there would have been no payments required for Jersey Central's access. Their contribution was to have been a continuous 500 kV transmission line from New Freedom to Deans. That was the quid pro quo. The LDV

Owners who constructed the LDV system at a cost of $260 million would not have accepted an alternative that did not provide the same benefits to LDV or which was the electrical equivalent thereto." Tr. at 383.

87. Mr. Hebson also explains that the LDV Supplemental Agreement did not specify the Dove Mill project as the anticipated alternative to the Seashore Loop because the signatories were unable to predict potential requirements to change the route, and wanted to avoid the need to modify the contract as routing changes developed. Tr. at 376-377.

88. LDV Owners witness Mr. Khadr states that Mr. Clark's assertion that the "purpose and function" test is the "industry standard" is unfounded, and that the test would be too vague to be meaningful. In contrast, Mr. Khadr suggests that within the context of the 1977 LDV Agreement, the analysis of "alternative facilities" must focus on the Seashore Loop's high voltage transmission capability and examine whether proposed alternatives provide equivalent benefits to the LDV System. Ex. LDV-24 at 4. As further indication that "electrical equivalence" is the test that the LDV Administrative Committee intended to be used in determining what constitutes "alternative facilities," Mr. Khadr notes that the LDV Technical Advisory Group (TAG) focused on a number of electrical transmission considerations in finding that Dove Mill was at least electrically equivalent to the Seashore Loop. For instance, the TAG noted that since Dove Mill was shorter than the Seashore Loop, it would have lower north-south impedance, which represents a stronger path. The TAG also found that since a stronger north-south path also promotes stability during contingency outages, it would enhance the stability of the Salem/Hope Creek generators if, for instance, the Hope Creek-Keeney line were out of service. Mr. Khadr observed that 500 kV transmission lines have better voltage performance and stability than 230 kV or lower voltage lines. *Id*. at 8-9.

89. At the hearing, Mr. Khadr testified that Mr. Clark's "purpose and function" test was so vague and general that any transmission facility installed in the system could meet it. That is, under Mr. Clark's definition, if a transmission facility can move power from a generator to a load center, it is an alternative facility. Mr. Khadr opined that the Seashore Loop was designed to move power to load centers in the JCP&L and LDV systems from all of the generation units, including the Forked River facility, the Peach Bottom units, the Salem units, and the interconnections of the 500 kV LDV System with the other 500 kV systems in PJM. The test for alternative facilities involves a showing that a project supports specific 500 kV generation and transmission. Tr. at 419-424.

Discussion & Conclusion

90. I find that all parties to the LDV Supplemental Agreement originally intended that the "electrical equivalence" test be applied to proposed facilities in determining whether they qualify as "alternative facilities." Therefore, I find that "alternative facilities" are defined as facilities that are electrically equivalent to the Seashore Loop.

91. The 1989 LDV Administrative Committee and TAG discussions of alternatives to the Seashore Loop culminated in the LDV Supplemental Agreement, signed April 6, 1990, that contains the "alternative facilities" language here in dispute. The entire context for this agreement was GPU's proposal to substitute Dove Mill for the cancelled Seashore Loop. GPU promised a 1993 completion date for Dove Mill, and also convinced the LDV Administrative Committee to sign a companion agreement shortly thereafter, on April 20, 1990 (the East Windsor Agreement), allowing JCP&L to construct its East Windsor facilities on the LDV Owners' 500 kV line. Both the Dove Mill project and the East Windsor substation were 500 kV facilities, and neither GPU nor any other member of the Committee raised the possibility that "alternative facilities" within the context of the LDV Supplemental Agreement meant anything but 500 kV facilities. Indeed, GPU's own handout summary of the Dove Mill project encouraged the Committee to accept it as an alternative to the Seashore Loop on the assurance that it was "at least electrically equivalent to the original Seashore Loop." Further, GPU conceived of the idea to provide an alternative to the Seashore Loop, convinced the LDV Owners' governing committees to accept it, and actually drafted the agreement's language on alternative facilities. It would be reasonable to expect that in doing so, GPU at least would have mentioned "purpose and function," and perhaps 230 kV transmission facilities as well, in committee discussions and the contract language if GPU thought that either was critical--or even useful--to the definition of "alternative facilities."

92. If the record documentation on this point were not clear enough as to the meaning of the term "alternative facility," Mr. Hebson's testimony alone would have been sufficient for me to conclude that the LDV Owners' interpretation is the correct one. As discussed, *supra,* Mr. Hebson testified that he was an active member of the LDV Administrative Committee during all of the negotiations of the 1990 LDV Supplemental Agreement, and that he played an active role in drafting the contractual language. He testified very credibly, and with complete self-assurance that all parties to the Agreement intended "electrical equivalence" to be the only test in determining whether a facility qualifies as an "alternative facility" under that Agreement. He testified that there was no discussion of any alternative to this interpretation, and certainly no discussion of JCP&L's "purpose and function" test. In contrast to Mr. Hebson's testimony, Mr. Miller, who was employed by GPU Services Corporation as an engineer, working on power system analysis and bulk transmission planning from 1984 to 1992, testified that he did not know what the parties intended by the term "alternative facilities," because he was not there when the agreement was written. Ex. JC-1 at 1-2; Tr. at 156.

B. JCP&L's pre-PJM Restructuring Order facilities

93. JCP&L argues that the December 2 Order "determined that it is irrelevant whether the LDV Owners have agreed that the alternative facilities are mutually agreeable or whether mutual agreement was explicitly achieved for any or all (of) those

facilities." Ex. JC-1 at 15. During the hearing, JCP&L witness Mr. Miller agreed with the LDV Owners' assessment that the requirement that alternative facilities be mutually agreeable among the signatories of the LDV Supplemental Agreement means that JCP&L cannot make unilateral decisions as to whether any facilities it was going to construct would qualify as "alternative facilities." Tr. at 163. He also acknowledges that the Agreement did in fact provide a mechanism for the LDV Owners to determine for themselves whether any facilities that JCP&L proposed would provide the same benefits as the Seashore Loop. Ex. JC-1 at 165. However, Mr. Miller concludes that the Commission Order found that the "mutual agreement" language was irrelevant. *Id.* at 166. The LDV Owners assert, however, that none of the JCP&L facilities at issue is an alternative facility because JCP&L did not obtain mutual agreement as to "alternative facility" status. Ex. LDV-1 at 38.

94. I do not agree with JCP&L's assessment that the Commission order rendered irrelevant the contractual language requiring "mutual agreement." The Commission does note that PJM's restructuring into an ISO and now a RTO may have provided a disincentive to the LDV Owners to provide "mutual agreement" for any JCP&L potential alternative facilities. December 2 Order at P 57. The Commission does not state that this renders the "mutually agreeable" language irrelevant, however, but requires that the trier of fact assess whether facilities constructed or to be constructed by JCP&L qualify as reasonable alternatives under the LDV Agreements. *Id.* The Commission also noted the importance of such an assessment in the light of the LDV Owners statement that there will be no agreement on this issue. December 2 Order at P 57. Accordingly, I will assess whether the projects claimed by JCP&L qualify as alternative facilities, and I will consider the effect of PJM's RTEP process on the characterization of JCP&L's facilities. *Id.* at P 58.

1. Do any of JCP&L's facilities placed in service before PJM Restructuring qualify as "alternative facilities?"

Positions of the Parties

95. JCP&L's witness Mr. Miller states that JCP&L has constructed a total of ten "alternative facility projects" comprised of three East Windsor transmission projects and seven "Other Central JCP&L Transmission Projects." Of these projects, eight were placed in service prior to the Commission's November 25, 1997 PJM Restructuring Order. Ex. JC-1 at 16. The first East Windsor transmission project was the June 1990 installation of a temporary substation on the Salem-Deans 500 kV line. This substation had a single 500/230 kV transformer. JCP&L justifies "alternative facility" status for this project by arguing that it increases reliability and power transfer capability on the LDV System and on the regional transmission systems. Mr. Miller also notes that the JCP&L system is highly integrated with the LDV System at both 500 kV and 230 kV voltages. The East Windsor substation provides another path from the transmission supply system

to JCP&L's and the LDV Owners' regional load centers. *Id*. at 17.

96. There are seven other transmission projects placed in service prior to PJM Restructuring. These projects, with their in-service dates and Mr. Miller's assessment as to their purposes are:

(1) and (2) Larrabee/Atlantic 230 kV capacitors; in-service dates of 1986 and 1989, respectively. These two separate projects are shunt capacitor installations at two 230 kV substations. They provided static reactive sources, thereby improving the voltage profile in the Central JCP&L area and on the LDV System.

(3) Pleasant Valley-Smithburg 230 kV rating upgrade; in-service date of 1988. This circuit reconfiguration improved the current carrying capacity of an import path into Central JCP&L, improving the supply capability to the Central JCP&L area and the LDV Owners' systems. This project also reduced losses by lowering the impedance path.

(4) Atlantic 230 kV substation static VAR compensator; in-service date of 1989. This project consisted of installing shunt capacitors and a variable reactor at this substation. It improved voltage profile maintenance in the Central JCP&L area and on the LDV System, and reduced loss.

(5) Van Hiseville-Whitings-Manitou 230 kV line; in-service date of 1990. This project is a new 230 kV circuit in the southern portion of the Central JCP&L area that incorporates a new 230 kV substation at Whitings, and allows service to this area at a higher voltage level, which reduces losses. The project benefits the LDV Owners by reducing MW and MVAR requirements.

(6) A second Smithburg 500/230 kV transformer; in-service date of 1992. JCP&L installed a second Smithburg transformer to function as a spare. This reduced the exposure of the 230 kV systems of JCP&L and the LDV Owners to risks related to long-term outage of the 500 kV supply.

(7) Larrabee-Smithburg-Englishtown 115 kV to 230 kV upgrade; in-service date of 1992. This voltage upgrade in the central part of JCP&L's service area improves system capability, lowers losses on the JCP&L system, and benefits the LDV Owners by reducing MW and MVAR requirements.

Id. at 19-21; Ex. LDV-23.

97. JCP&L has placed in service four new generation units and deferred retirement of two others. Although JCP&L does not claim "alternative facility" status for generation facilities, it does assert that new JCP&L generation projects within its service area has

lessened the need for the 500 kV Seashore Loop transmission lines. In his pre-filed direct testimony, Mr. Miller describes these generation projects as follows:

(1) The Forked River combustion turbines, which are connected to a JCP&L 230 kV substation and consist of two generating units totaling 86 MW (in-service date 1989);

(2) Four Parlin generating units, which are connected to a JCP&L 230 kV transmission line and total 114 MW (in-service date 1992);

(3) Three South River generating units, which are connected to a JCP&L 230 kV transmission line and total 260 MW (in-service date 1992);

(4) Three Lakewood generating units, which are connected to a JCP&L 230 kV transmission line and total 260 MW (in-service date 1994);

(5) Various Sayreville and Werner steam and combustion units, which are connected to a JCP&L substation and total 730 MW (deferred retirement);

(6) An Oyster Creek 650 MW generating unit, which is connected to a JCP&L 230 kV substation (deferred retirement).

See Ex. JC-1 at 27-29; Ex. LDV-23.

98. Mr. Miller asserts that all of these projects benefit both JCP&L and the LDV System by supplying load to grid during peak conditions, providing supply for export during peak conditions, providing voltage support and supplying power for export over LDV facilities during periods of high load levels. These attributes lessen the need for new 500 kV transmission line construction, such as the Seashore Loop, and increase the utility and relevance of 230 kV lines in the alternative. Ex. JC-1 at 26-27.

99. Mr. Miller maintains that the JCP&L transmission facilities it built as an alternative to the Seashore Loop perform the same function as that planned facility, in that both the alternative facilities and the Seashore Loop interconnect generation to JCP&L's transmission system and transmit it to JCP&L's and LDV Owners' customers over the regional transmission network. The alternative facilities allow for the transmission of almost 80 percent more generating capacity than the Forked River Station would have generated. These alternative transmission facilities also increase load deliverability and improve the voltage profile on the LDV System, decrease LDV System imports and losses and thereby enhance the LDV System reliability. Ex. JC-1 at 23-24.

100. Mr. Clark argues that the East Windsor facilities and the combination of all of the other Central JCP&L area transmission projects are superior to the Seashore Loop in terms of reliability and import/export capability. Additionally, he contends that the LDV

Owners' transmission systems use the JCP&L transmission system continuously, just as would have happened had the Seashore Loop been built. Mr. Clark takes this as further proof that the Central JCP&L transmission projects serve the same purpose and function as the Seashore Loop would have. Ex. JC-12 at 11, 15 and 16.

101. Mr. Clark argues that replacing the two long transmission lines of the Seashore Loop with JCP&L projects increases reliability. He notes that an outage of the Seashore Loop transmission line between the Forked River Station and the Smithburg Station, an "N-1" contingency since it is the loss of one circuit, would have the functional impact of an "N-2" contingency (the loss of two circuits) since both the Forked River power and any power imports would be re-routed to Deans and Smithburg. *Id*. at 12.

102. Mr. Clark opines that the East Windsor substation's interconnection to the 500 kV Salem-Deans line provides added reliability, since an outage on the Salem-Deans line on either side of the East Windsor substation would leave the other side of the line open and available for the LDV circuit. Further, the Seashore Loop would have had only one 500 kV interconnection, at Smithburg, while the East Windsor substation provides an additional 500 kV interconnection to the LDV System. Mr. Clark also claims that a system of short lines is inherently more reliable than one long line, since outage of any one of the shorter lines would have little impact on reliability of the entire system. *Id*. at 13.

103. Mr. Clark asserts that the East Windsor and Central JCP&L transmission projects are at least equivalent to the Seashore Loop in terms of import and export capability. The combination of the 1,700 MVA nominal rating of the two East Windsor transformers and the 1,219 MVA continuous rating of the 230 kV line from Smithburg to East Windsor to PSEG at Pleasant Valley is equivalent to the capability that the Seashore Loop 500 kV line would have provided.[29] JCP&L has two case studies of worst-case contingency power flows, both of which involve an outage of the Smithburg-Deans line as the limiting contingency. In the first study, with the East Windsor tie in place, the thermal rating of the 230 kV line between East Windsor and Smithburg limits the imports. In the second study, with the Seashore Loop in place, voltage collapse in the JCP&L system would limit imports. While the limitations in both cases could be removed, the solution in the case of the Seashore Loop would be far more costly. *Id*. at 15.

104. In support of its contention that JCP&L's "as-built" facilities should be considered alternative facilities under the Agreements, Mr. Clark argues that the purpose of these facilities is not to enable JCP&L to use the LDV System, but rather to support that system. However, Mr. Clark asserts, while the JCP&L system does not use the LDV System, the LDV Owners use the JCP&L system continuously. Since JCP&L's system is

[29] Apparent power (MVA) is equal to the square root of the sum of the squares of real power (MW) plus reactive power (MVar).

at the east end of the LDV System, it has little opportunity to use the LDV System. JCP&L must import power fewer than 200 hours per year, but has excess power for export for 8,560 hours per year. Mr. Clark notes, furthermore, that importing and exporting power is routine and does not constitute use of the LDV System. Loop flow is a "use" of a system, but this occurs only on JCP&L's own system, as it generates power and delivers power within its system.[30] There is no indication of loop flow of JCP&L power on the LDV lines. Conversely, power flow studies show that the LDV Owners make substantial use of the JCP&L system through loop flow under all operating conditions. *Id*. at 17; Exs. JC-16, JC-17. Construction of the Seashore Loop would have increased the LDV Owners' use of the JCP&L system when compared to the JCP&L transmission and generation projects here at issue, because the Seashore Loop would have provided a more direct path for power to flow into the JCP&L system. In fact, Mr. Clark maintains that all of the flow on the Seashore Loop would have been due to LDV Owners' use of the JCP&L system. Ex. JC-12 at 18.

105. At the hearing, Mr. Clark explained that loop flow on the 500 kV transmission lines on the LDV System is being labeled as JCP&L imports, when it is not imports. Mr. Clark however acknowledged that JCP&L did ask to be connected to the LDV System at Smithburg and East Windsor so it could import power over the LDV System's 500 kV lines. Tr. at 299.

106. LDV Owners' witness Mr. Khadr responds that Mr. Clark's analysis of alternative facilities only examines the "as-built" projects for what they add to the JCP&L system, and provides no analysis of the LDV System. Mr. Khadr states that he does not agree with Mr. Clark's conclusion that the LDV Owners' alleged use of the JCP&L's "as-built" projects, with associated purported benefits, comprises an appropriate test for determining whether those projects are alternative facilities under the Agreements. However, even if these were components of the correct test, Mr. Clark mistakenly argues that JCP&L is a net exporter on the LDV System. The generation that JCP&L has added is from smaller capacity, higher cost units, and therefore economic dispatch will prevent them from operation at any level approaching full capacity during non-peak times. Additionally, the deferred retirement units are generally inefficient, with low utilization. Therefore, these generators will not be used for significant power exports. Mr. Khadr states that his study of JCP&L southern zone annual capacity, demand and imports from 2002 through 2005 shows that JCP&L imported about 40 percent of the energy used to serve its load during that period. The study also shows that the LDV Owners use little or no generation from JCP&L's generation facilities. Exs. LDV-27 and LDV-24 at 12-14.

107. As for JCP&L's claims that the "as-built" facilities provide the LDV System with

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[30] The term "loop flow" refers to "the unscheduled transmission flows that occur on adjoining transmission systems when power is transferred in an interconnected electrical system." Order No. 2000, 81 FERC ¶ 61,285 at 31,128 n.505 (1997).

more reliability, Mr. Khadr argues that any such improvement relates solely to the JCP&L system and not the LDV System. *Id*. at 16. Mr. Khadr also maintains that East Windsor was built to provide JCP&L with import capability, and does not provide any benefit to the LDV System. JCP&L uses the LDV System to import power to its system through its East Windsor and Smithburg substations. *Id*. at 17-18.

108. Mr. Khadr analyzed power flows at seven ties between the JCP&L and LDV Systems for the years 2004 through 2006. Ex. LDV-28. The analysis shows that JCP&L uses the LDV System far more than the LDV Owners use the JCP&L system. In 2005, for example, "power was flowing into the JCP&L system 99 percent of the hours during 2005 at a(n) average rate of 787 KW/hr, and was flowing out of the JCP&L System to the LDV Owners only one percent of the hours, at an average rate of only 96 KW/hr." Ex. LDV-24 at 19.

109. Mr. Khadr disputes JCP&L's claims that its projects placed in service before PJM Restructuring serve the same purpose and function as the Seashore Loop, and therefore benefit the LDV Owners, as discussed, *supra*. Mr. Khadr responds to these claims by examining the benefits of each of the individual projects, and describing them as follows:

"First East Windsor transformer. The first transformer, installed in 1990, is a tap into the Salem-Deans line and is used 100 percent of the time to import power to the JCP&L system. A 1988 internal JCP&L memorandum to request funding from its parent corporation stated that without the project, 65,000 JCP&L customers would lose power if an outage occurred on the Deans-Smithburg line during peak load levels. Prior to the East Windsor tap, the Deans-Smithburg line was JCP&L's only 500 kV import line. Further, the East Windsor substation was constructed under the East Windsor Agreement and therefore cannot be considered an alternative to the Seashore Loop."

"Other Central JCP&L Transmission Projects:
The second Smithburg 500/230 kV transformer. The design of this transformer is unique to the JCP&L system, and cannot be used anywhere on the entire PJM system other than at the Smithburg substation. JCP&L justified the cost of installing this transformer to its Board of Directors by stating that it was necessary to increase bulk power reliability for JCP&L Southern area customers in case of long-term outages of the transformers at Smithburg or East Windsor. The Smithburg substation was constructed under the LDV Agreement and therefore cannot be considered an alternative to the Seashore Loop, as Mr. Miller acknowledged (Ex. JC-1 at 49) in his pre-filed direct testimony."

"Larrabee-Smithburg-Englishtown 115 kV to 230 kV upgrade. This was a routine voltage upgrade. It has no significant effect on losses on the LDV System, but did reduce losses on the JCP&L system."

"Van Hiseville-Whitings-Manitou 230 kV line. This line has no flow to the LDV network. It improves service in JCP&L's Whitings area by providing an alternative 230 kV line into that area to alleviate overloads."

"Larrabee/Atlantic 230 kV capacitors and the Atlantic 230 kV static VAR compensator. These were reinforcement projects in JCP&L's Southern Area, required to increase its import capability by providing voltage support to the JCP&L system. These are not close to any LDV circuit and so cannot provide voltage support or any other benefit to the LDV System."

"Pleasant Valley-Smithburg 230 kV rating upgrade. This routine upgrade provided increased power imports to JCP&L's Southern Area transmission systems for peak period demand."

See Ex. LDV-24 at 27-35.

110. Mr. Khadr concludes that JCP&L's "as-built" transmission facilities are not equivalent to the Seashore Loop for several reasons. The proposed alternative facilities do not provide redundancy for the Salem-Deans line because rather than reinforce that line, the "as-built" facilities are in various locations throughout the JCP&L service area. Further, these facilities provide only 32,600 MVA miles through central New Jersey, while the Seashore Loop would have provided 250,000 MVA miles in the same area. Mr. Khadr explains that an MVA mile is determined by multiplying the length of the circuit in miles times its normal summer rating, and is a common measure of transmission capability. Finally, the proposed alternative transmission facilities are comprised of only 230 kV lines, which do not carry large amounts of power as efficiently over long distances as the Seashore Loop's 500 kV transmission lines would. Ex. LDV-24 at 25.

111. Mr. Hebson suggests that as part of the benefit of the bargain in the LDV Agreement, JCP&L's construction of the Seashore Loop would have improved its import capability by improving access to the regional 500 kV transmission grid to Pennsylvania and the Midwest. Before the LDV Owners built their system, JCP&L's closest interconnection point to a 500 kV grid was in western New Jersey. However, construction of the LDV System allowed JCP&L to access much closer 500 kV interconnects via the Smithburg and East Windsor substations. Ex. LDV-1 at 12.

112. At the hearing, Mr. Khadr explained that the LDV Owners are concerned that JCP&L is a net importer of energy. It is important to the LDV System that there be additional 500 kV supply lines to New Freedom and Deans because LDV, like JCP&L, imports energy heavily at those two locations. LDV needs redundancy at those two points so that if a circuit is lost, imports can continue. Tr. at 452-454. While another 500 kV line would provide such redundancy, so would additional 230 kV lines. However, quite a few parallel 230 kV lines would be required to replace one 500 kV line. Tr. at

443. Mr. Khadr disagreed with JCP&L's assertion that the purpose of the Seashore Loop was to move energy from a single source, the Forked River plant. He also disagreed with JCP&L's position that following cancellation of that project, replacing it with multiple generation plants at multiple sites was more efficient than utilizing 500 kV lines in moving energy to the LDV System. Mr. Khadr explained that moving the Forked River plant's power was not the primary reason for constructing the Seashore Loop. Tr. at 61.

113. Mr. Khadr testified that the LDV System would need JCP&L's generation only during peak hours, but JCP&L has no generation at those times. During off-peak hours, JCP&L is not going to be running generation because it is extremely expensive, with the exception of Oyster Creek, and PJM is not going to dispatch generation if it is out of order. Therefore, JCP&L's generation would only support its own reliability needs, and not those of the LDV System. Tr. at 480-481. Mr. Khadr stated that based on his technical analyses, the JCP&L enhancements to its system are not alternatives to the Seashore Loop. Tr. at 431.

Discussion & Conclusion

114. I find that none of the JCP&L transmission facilities interconnected to the LDV System from 1977, the date of the LDV Agreement to November 25, 1997, the date the Commission issued the PJM Restructuring Order, is an "alternative facility" within the meaning of the LDV Agreements.

115. JCP&L management's 2004 collective epiphany that the company had performed its obligations under all of the LDV Agreements through aggregation of a multitude of routine upgrades is a creative interpretation of its contractual obligations, but one that does not withstand scrutiny. As concluded, *supra*, the test for determining whether facilities are alternative facilities under the LDV Supplemental Agreement is whether they are electrically equivalent to the Seashore Loop. JCP&L ignores this test, promoting instead the concept of "purpose and function," which is so sweeping in scope as to include all of the transmission projects that JCP&L undertook for its own benefit since 1986. Having considered the electrical characteristics of each of the transmission facilities here at issue, I note that there is no single project, nor is there any combination of projects that achieves electrical equivalence to the Seashore Loop, which was to be a 500 kV "backbone" transmission project. JCP&L's aggregation of 230 kV transmission lines utilizes the LDV 500 kV system for power imports, but does little if anything to add transportation capabilities to the LDV System. Perforce, JCP&L's argument that its generation projects have changed the test for "alternative facility" status by making new 500 kV transmission lines less relevant to load service is without merit. I also note that JCP&L's generation projects are of little use to the LDV System, since they produce high cost power that cannot compete economically with other power sources outside of JCP&L's service area.

116. As discussed, *supra*, on April 20, 1990, the LDV Owners and JCP&L entered into the East Windsor Agreement. That agreement required JCP&L to (1) build the East Windsor facility; and, (2) make monthly payments totaling $3.2 million annually to the LDV Owners. JCP&L built the East Windsor facilities, thereby satisfying one of its requirements, but remained obligated to make the $3.2 million annual payments. According to Section 3.2 of the East Windsor Agreement, JCP&L will be relieved of the obligation to make these payments when either the LDV Agreement terminated, or JCP&L had fulfilled its obligations to build the Seashore Loop or mutually agreeable alternatives, pursuant to revised Schedule 4 of the LDV Supplemental Agreement, which was entered into by the parties two weeks prior to the execution of the East Windsor Agreement, on April 6, 1990. JCP&L now attempts to bootstrap its separate obligation to construct the East Windsor transformer into a partial satisfaction of its unrelated obligations under the near-contemporaneous LDV Supplemental Agreement. I reject JCP&L's classification of the East Windsor facility as an alternative facility.

C. JCP&L's post-PJM Restructuring Order facilities

1. Do any of JCP&L's post-PJM Restructuring Order facilities qualify as alternative?"

Positions of the Parties

117. JCP&L also claims that other transmission projects that it placed in service between 2002 and 2006, after the Commission's PJM Restructuring Order, qualify as alternative facilities. JCP&L describes the spare Smithburg transformer, with an in-service date of 2002, and states that construction work enables that transformer to be placed in service quickly, in case the existing energized bank or bus work failed. Placing the transformer in service quickly reduces the exposure of the 230 kV systems of JCP&L and the LDV Owners to the risks related to the long-term outage of the 500 kV supply. JCP&L further alleges that the LDV Owners benefit from this project because their systems are highly-interconnected with the JCP&L system. JCP&L also describes the Werner 230/115 kV transformer, located at the Werner Generating Station in the Central JCP&L area and with an in-service date of 2004, stating that the purpose of this transformer is to provide a parallel path to relieve any overloads on the Raritan River 230/115 kV transformer if the Smithburg-Englishtown 230 kV line is out of service. JCP&L further states that the recently installed Cookstown and Manitou 230 kV capacitors, with in-service dates of 2006, should also qualify as alternative facilities. *See* Ex. JC-1 at 19, 21; Ex. LDV-23.

118. As noted, *supra*, JCP&L does not claim any of its generation projects qualify as alternative facilities, but argues that they all lessen the need for the Seashore Loop. JCP&L states that the Red Oak generating units, with an in-service date of 2002, consist of four generating units, totaling 765 MW, connected to the Raritan River-Atlantic and

Raritan River-Leisure Village 230 kV lines in the southern Central JCP&L area. JCP&L states that the Red Oak units supply load to grid during peak conditions; supply voltage support to the central New Jersey area, thereby reducing the need for JCP&L to import power; and, make power available for export outside the JCP&L system, over LDV facilities during periods of high load levels. JCP&L also states that the Ocean Peaking Power Facility, with an in-service date of 2002, consists of two generating units, totaling 300 MW, connected to one of the Larrabee-Leisure Village 230 kV lines in the southern part of the Central JCP&L area. JCP&L states that the Ocean Peaking Power Facility fulfills the same purposes as the Red Oak units and provides the same types of benefits. *See* Ex. JC-1 at 28; Ex. LDV-23.

119. The LDV Owners note that the transmission facilities include two East Windsor transmission projects, one Smithburg transformer project, and one Southern area reinforcement project. Ex. LDV-23.

120. As for the East Windsor projects, JCP&L's witness Mr. Miller observes that the second 500/230 kV East Windsor transformer, placed in service in 2001, was designed to further improve the supply capability to the Central JCP&L area. Since this second transformer is connected in parallel with the first one, it also increases the reliability of supply to the 230 kV system. In 2004, JCP&L installed a four-breaker 500 kV ring bus at the East Windsor substation, to reconfigure a three-terminal line configuration with two two-terminal lines. This ring bus improved the reliability of the bulk transmission system by preventing a single fault from interrupting both of the 500 kV transformers, and by allowing any LDV Owner to perform 500 kV breaker maintenance without interrupting the two 500 kV lines and transformers. Ex. JC-1 at 17-18.

121. During the hearing, Mr. Miller stated that the addition of the ring bus made the East Windsor facility a permanent installation instead of a temporary one. Further, the ring bus provides flexibility, reliability and redundancy to the entire Salem-Deans line by allowing maintenance or repair work on the line between Deans and East Windsor without causing the entire Salem-Deans line to be taken out of service. Tr. at 254.

122. LDV Owners witness Mr. Khadr argued that JCP&L installed the second transformer so that it could import energy to meet its load requirements. JCP&L also installed this transformer to resolve reliability and deliverability deficiencies discovered when JCP&L failed PJM RTEP and MAAC tests in its own zone.[31] As for the ring bus, it

[31] The Mid-Atlantic Area Council (MAAC) was formerly one of ten Regional Reliability Councils which formed the North American Reliability Council (NERC). The Councils have since been reorganized into eight. Together the Councils promote reliability of the electric supply for North America by helping participants from all sectors of the electric utility industry work together. The former MAAC, now part of Reliability*First* Corporation, was responsible for the mid-Atlantic region, including all or parts of

too mitigated reliability shortcomings in JCP&L's service area. As a result of JCP&L's use of the LDV System through the East Windsor tap on the Salem-Deans line, any failure on the Salem-Deans line would result in significant problems in serving the JCP&L customers who benefited from that tap. That is, the ring bus was needed to correct JCP&L's reliability problems caused by its own East Windsor transformers. Ex. LDV-24 at 28-29.

123. At the hearing, Mr. Khadr testified that had JCP&L constructed the Dove Mill project, bulk power supply deficiencies in the GPU-JCP&L Zone would not have arisen. The 1999 Baseline RTEP Report for the period 2001-2006 finds that additional East Windsor and Smithburg transformers are needed to meet power transfer capability requirements into the JCP&L service area. Mr. Khadr observes that Dove Mill would have provided the required reinforcement. Tr. at 507-508; Ex. LDV-34 at 7.

124. The LDV Owners state that when JCP&L requested permission to connect to the Salem-Deans line at East Windsor, and agreed to pay for the connection until it constructed an alternative to the Seashore Loop, JCP&L recognized that the East Windsor substation was not an alternative. JCP&L also acknowledged this in its 1990 transmittal letter to the Commission when it filed the LDV Supplemental Agreement. In that letter, JCP&L stated that the purpose of the contract was to provide an opportunity to obtain agreement on an alternative route for the Seashore Loop. LDV I.B. at 49-50.

Discussion & Conclusion

125. I find that none of the projects discussed in this section qualifies as an alternative facility, because these projects are not electrically equivalent to the Seashore Loop either singly or in any combination. My reasoning for finding that none of the pre-PJM Restructuring Order facilities qualifies as "alternative facilities," discussed, *supra*, also applies to all of these projects. As for the second East Windsor transformer and the ring bus, while these additions may be similar to the Dove Mill alternative to the Seashore Loop in that all are 500 kV projects, that similarity is not enough to justify a conclusion that the second transformer or the ring bus is an alternative facility. The second East Windsor transformer and the ring bus are projects that benefit the LDV Owners only to the extent that they prevent reliability and transmission problems that might be caused by JCP&L's imports through its East Windsor substation. I see no reason to reward JCP&L for solving potential problems that may arise only because the LDV Owners allowed JCP&L to access the Salem-Deans line through the construction of the East Windsor substation. Further, I note that had JCP&L constructed the Dove Mill project as it had proposed, the second transformer and ring bus would have been unnecessary.

126. In addition, I agree with the Commission's opinion that as of November 25, 1997,

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Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and the District of Columbia.

the PJM Restructuring Order eliminated any incentive for the LDV Owners to agree to accept facilities as alternatives to the Seashore Loop, since restructuring enabled the LDV Owners to obtain access to JCP&L facilities by paying their zonal charges under the PJM OATT.[32] Therefore, I find that as of November 25, 1997, any transmission project that JCP&L constructs that is "electrically equivalent" to the Seashore Loop fulfills JCP&L's contractual obligations under the Agreements in this case, without regard to the "mutual agreement" provision.

a. Does the fact that PJM has not included the Seashore Loop or any alternative to it in the RTEP process make JCP&L's system upgrades more reasonable alternatives to the Seashore Loop?

Positions of the Parties

127. JCP&L's witness Mr. Miller notes that PJM has not included the Seashore Loop in its RTEP process. Mr. Miller concludes from PJM's apparent lack of interest in the Seashore Loop that the JCP&L system upgrades herein at issue are more reasonable alternatives to the Seashore Loop. Further, Mr. Miller attributes PJM's lack of interest in the Seashore Loop or Dove Mill to the positive effect that JCP&L's projects have had in maintaining MAAC Reliability Principles and Standards on the LDV System. Ex. JC-1 at 34. Mr. Miller maintains that PJM rejected the Dove Mill project in 2004 because it did not solve Eastern MAAC reliability problems identified in the then-latest RTEP report. Ex. JC-25 at 25. Mr. Miller cited to an e-mail from a PJM employee as proof that PJM had rejected the Dove Mill project. Ex. JC-30.

128. During the hearing, Mr. Miller acknowledged that the PJM e-mail that addressed the Dove Mill project referred to a study of transmission problems in northern New Jersey, which is not applicable to the JCP&L area. Tr. at 199. He agreed that if the transmission projects in the "national interest transmission corridors" that the Department of Energy (DOE) proposes for the Mid-Atlantic corridor are built, the 500 kV and 765 kV projects that would deliver power into Salem and Deans, respectively, will require reinforcement of the transmission grid between those two points. He also agreed that this reinforcement project would be in the same location as the planned Seashore Loop and the Dove Mill project. *Id*. at 196-197.

129. Mr. Miller also dismissed the LDV Owners' suggestion that if PJM does not identify the Seashore Loop as a needed expansion project, JCP&L should propose the Seashore Loop or the Dove Mill project to PJM as a TOI project. He suggests that the only legitimate and compelling need for such a project would be a failure to meet reliability criteria, and states that PJM rejected the Dove Mill project because it did not

[32] *See* December 2 Order at P 57.

meet these criteria. Mr. Miller cited to the same June 30, 2004 PJM e-mail mentioned, *supra*, as support for his conclusion. Ex. JC-25 at 25.

130. LDV Owners assert that the only JCP&L facilities eligible for consideration as reasonable alternatives to the Seashore Loop would be those constructed after the 1997 PJM Restructuring Order, since JCP&L did not attempt to have any pre-RTEP facilities treated as alternative facilities before placing them in service. However, Mr. Hebson clarifies that he does not consider any of the post-RTEP projects to be reasonable alternatives since their character is no different than the projects placed in service prior to the restructuring order. Ex. LDV-1 at 40.

131. Mr. Khadr observes that until recently PJM had only a five-year planning horizon, and so within that process PJM addressed only immediate problems. As such, PJM has not considered projects such as the Seashore Loop or alternatives to it. Mr. Khadr alleges that several projects PJM identified as necessary would not have been needed had JCP&L built the Seashore Loop or an alternative. These include the Alloway substation, a third 500 kV/230 kV transformer at Branchburg, a fourth 500 kV/230 kV transformer at New Freedom and reinforcement of the Buckingham-Pleasant Valley circuit. Ex. LDV-24 at 36.

132. Mr. Khadr notes that in 2005 PJM approved its first RTEP process that utilizes a fifteen year planning horizon. The PJM Board approved its first set of plans under that new process in June 2006. Those plans included an evaluation of ten major backbone transmission proposals that were identified in response to a DOE Notice of Inquiry regarding "National Interest Electric Transmission Corridors." In completing the baseline reliability criteria analysis for this lengthened planning horizon, PJM identified reliability criteria violations, including numerous violations within the JCP&L service area. PJM noted that that these violations align with designated DOE transmission corridor projects, which suggests the need for new backbone transmission facilities rather than a series of lower voltage transmission upgrades. Ex. LDV-40 at 1, 3, 14 and 15.
In response to Mr. Miller's assertions regarding TOI's, Mr. Khadr states that transmission owners in PJM are free to identify projects that they wish to construct, and if PJM determines the projects do not impair the reliability of the grid, the owners are free to construct them. Ex. LDV-24 at 37.

Discussion & Conclusion

133. JCP&L asserts that under PJM's construction criteria, transmission facilities may not be built unless they are identified as necessary in an RTEP report. On the other hand, the LDV Owners argue that the PJM project identification and authorization process allows transmission owners to construct facilities not so identified as long as they do not compromise the reliability of the grid, and that PJM will allow construction of such projects if a transmission owner identifies a project as a TOI. Neither JCP&L nor the

LDV Owners cite any authority in support of either position. JCP&L must carry the burden of proof as the complainant in this case, and I find that its assertion without any documentary support is insufficient to carry the burden on this point.

134. Mr. Miller's assertion that the PJM e-mail contained in Exhibit JC-30 supports his conclusion that PJM rejected the Dove Mill project because it was not a solution to the Eastern MAAC reliability problem is a misleading and strained interpretation of a very short message. The e-mail from an employee in the PJM Transmission Planning Department to GPU is a mere three sentences in length, and states in part: "While (the Seashore Loop) definitely helps, more is needed." This is not a rejection of the Seashore Loop for the reasons Mr. Miller alleged, but rather a suggestion that the Seashore Loop would be a component in a solution to an identified reliability problem in northern New Jersey, outside of the JCP&L service area.

135. Even though the DOE transmission corridor study did not identify the Seashore Loop as a critically-needed project, it did conclude that backbone transmission projects, rather than a series of lower voltage transmission upgrades, are needed to solve eastern PJM reliability challenges. Therefore, the aggregate of lower voltage upgrade projects that JCP&L has constructed is not a significant part of the solution to the reliability problem. In contrast, the Seashore Loop or another 500 kV alternative to it would be an appropriate response to the problems that the DOE study identifies in the JCP&L and LDV Owners' service areas. As such, I find that JCP&L's alleged "alternative facilities" do not constitute a reasonable alternative to the Seashore Loop.

III. Is JCP&L entitled to credit for facilities it has constructed?

A. Is there any basis under the terms of the contracts to conclude that JCP&L is entitled to a credit?

Positions of the Parties

136. JCP&L maintains that if its payment obligations are not terminated, those payments should be reduced because JCP&L is entitled at least to a credit against its remaining payment obligations under the LDV, Smithburg and East Windsor Agreements, for the $87.9 million it spent in constructing the Smithburg facilities and the East Windsor facilities. JCP&L I.B. at 57. At the hearing, Mr. Miller testified that this claim is based entirely on the Commission's December 2, 2005 Order. Tr. at 228. Mr. Miller's reasons that the Commission found that JCP&L's payments under the Smithburg and East Windsor Agreements are part of the general cost-sharing obligation imposed on all the parties by the LDV Agreement, and that therefore JCP&L is entitled to participate in cost-sharing under the LDV Agreement. Under the LDV Agreement, the parties share in the costs of the LDV System through a system of charges and credits. While JCP&L

has paid approximately $74 million in "charges," and thus shared in the costs of the LDV facilities that the LDV Owners constructed and has itself constructed $87.9 million in LDV facilities, it has never received any credits for these facilities from the LDV Owners.

137. Mr. Miller explains that the facilities at issue are the Smithburg-Deans Line and the Smithburg Substation, both required under Section 4 of the LDV Agreement; and, the two transformers and the ring bus at the East Windsor Substation. Mr. Miller argues that these facilities are an integral part of the LDV System, and provide another point of interconnection between the 500 kV and 230 kV systems of JCP&L and the LDV Owners. Further, the East Windsor ring bus improves the reliability of the LDV System and provides additional import capability. Because these facilities improve the reliability and operational capacity of the LDV System, JCP&L argues that it is appropriate to include them in the cost sharing obligations under the Agreements and in the calculation of the credit that JCP&L should receive. Ex. JC-1 at 48-49.

138. In response, Mr. Hebson contends that there is no provision in any of the Agreements permitting this type of crediting. He states that such crediting makes no sense, since the construction of those facilities, and their connection to the LDV System created JCP&L's payment obligations in the first place. The LDV Agreement has no provision that could be construed as permitting JCP&L to receive a credit for the facilities it constructed at Smithburg or East Windsor. The LDV Agreement provides for cost sharing only among the "Station Owners."[33] Only the Station Owners were responsible for the costs of the original system, and only the Station Owners were subject to the true up mechanisms of Article V and Schedule 11. Instead of sharing in the costs of the rest of the LDV System, JCP&L's obligation was to construct the Seashore Loop, which was to be its in-kind contribution to the LDV System. Even had JCP&L completed its construction obligations, it would not have been subject to the true-up mechanism of the LDV Agreement and would have neither made cost sharing payments to the Station Owners nor received any payments from the Station Owners. The LDV Agreement does not anticipate JCP&L receiving some kind of "credit" for constructing the facilities it has used to connect to the LDV System. Ex. LDV-1 at 41.

139. During the hearing, Mr. Miller acknowledged that the LDV Agreement, Article V and Schedule 11 are the only "cost-sharing" provisions in the contracts, and apply only to "Station Owners," a term which does not include JCP&L. Without further justification or explanation, Mr. Miller asserted that Schedule 11 "could be used by Jersey Central, as I've done," although he later admitted that the Commission in its December 2 Order recognized that Schedule 11 did not include JCP&L. Tr. at 231-233.

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[33] "Station Owners" is a term that is synonymous with "LDV Owners." See the LDV Agreement, Exh. JC-2 at 1.

Discussion & Conclusion

140. I find that there is no contractual basis to support JCP&L's arguments for crediting for the facilities it has constructed on the LDV System. While it is correct that the parties to the LDV Agreement share in the costs of the LDV System through a system of charges and credits, this contractual cost-sharing is reserved for Station Owners only. Article V and Schedule 11 of that Agreement are in fact the only cost-sharing provisions in any of the contracts at issue in this proceeding, and since it is not a "Station Owner," JCP&L has no contractual right to crediting. In the December 2 Order, the Commission found that neither Article V nor Schedule 11 applies to JCP&L. December 2 Order at P 42-43.

141. Furthermore, finding that JCP&L is not entitled to a credit based on the specific contractual cost sharing provisions of Article V and Schedule 11 does not contradict the Commission's finding that the Smithburg, East Windsor and LDV Agreements constitute a cost sharing arrangement between JCP&L and the LDV owners. As discussed in section I.A.2, *supra*, in characterizing the relationship between the LDV Owners and JCP&L as cost sharing arrangements in the context of the Smithburg and East Windsor Agreements, the Commission is distinguishing, and rejecting, JCP&L's argument that those contracts are transmission use agreements. What the Commission is *not* doing is inserting JCP&L into sections of the LDV Agreement that all parties agree do not apply to JCP&L.

B. Is there any extra-contractual basis for concluding that JCP&L is entitled to a credit?

Positions of the Parties

142. The LDV Owners argue that the Commission may amend the contracts at issue in this proceeding to effectuate JCP&L's crediting proposal if, and only if, JCP&L can show that this action satisfies the requirements of the *Mobile-Sierra* Doctrine. To meet this burden, JCP&L must show that a contract term affecting a rate is contrary to the public interest. Such a contract term "might impair the financial ability of the public utility to continue its service, cast upon consumers an excessive burden, or be unduly discriminatory."[34] LDV I.B. at 24-25.

143. JCP&L argues that it should be relieved of its payment obligations under the Smithburg and East Windsor Agreements because when the Alloway project goes on line in 2008, Atlantic City Electric will be able to use the LDV System at Alloway "for free," while under the PJM cost allocation methodology, JCP&L will be required to pay for 19 percent of the cost of that project. JCP&L argues that the disparity in treatment between its payment obligations under the Smithburg and East Windsor Agreements and the cost

[34] *Sierra*, 350 U.S. at 355.

allocation methodology PJM is using in assigning costs of construction to users of the Alloway substation result in unjust, unreasonable and unduly discriminatory rates. "Grandfathered cost-sharing agreements that are exempt from the broad-based transmission pricing structure of PJM" have yielded discriminatory and inequitable cost-shifting. JCP&L I.B. at 65; Ex. JC-1 at 42-43. JC concludes that the only means to correct this inequity is for the Commission to relieve it from its payment obligations under the Smithburg and East Windsor Agreements.

144. JC also alleges discrimination arising from its payment obligations under the Agreements when compared to Delmarva's treatment. Although Delmarva's investment in the LDV System is less than one-half of JCP&L's, Delmarva makes no payments to the other LDV Owners, and in fact receive a monthly payment of approximately $193,751. JCP&L notes that Delmarva's investment in LDV facilities is specified in Schedule 11 of the LDV Agreement. Ex. JC-1 at 44.

145. LDV Owners argue that there is no basis for JCP&L to include the costs associated with the Alloway project in any cost calculations associated with the LDV Agreements since the Second Addendum to the LDV Agreement locks in the investment allocations of LDV facilities as of December 31, 1998. The LDV Owners executed the Second Addendum to the LDV Agreement in response to the PJM cost allocation methodologies, which in turn were established in response to the Commission's PJM Restructuring Order. JCP&L's proposal to reallocate the Alloway project costs under the LDV Agreement contravenes those cost allocation methodologies. Ex. LDV-41 at 16-17.

Discussion & Conclusion

146. I find that JCP&L has failed to prove that the PJM cost allocation for the Alloway project is unduly discriminatory. Regarding the *Mobile Sierra* Doctrine's "public interest" test, JCP&L has not alleged that PJM's allocation of Alloway project costs results in the impairment of JCP&L's financial ability to continue its service, or that it imposes upon consumers an excessive burden. As for the assertion that PJM's allocation of the Alloway project costs is discriminatory, JCP&L's arguments amount to collateral attack on the Commission's PJM Restructuring Order, and as such are beyond the scope of a complaint filed pursuant to Rule 206 of the Commission's Procedural Rules. 18 C.F.R. § 385.206 (2006).

147. JCP&L also apparently is operating under the misperception that the December 2 Order provides an opportunity for it to challenge the Commission's decision not to eliminate transmission use payments from cost-sharing agreements entered into prior to the effective date of the PJM Restructuring Order. To the contrary, in its May 6 Order, the Commission restated from the PJM Restructuring Order: "Elimination of the support charges would relieve those that chose support payments of any further cost responsibility, while at the same time increasing the cost responsibility of those that

chose construction. We believe this would be unreasonable."[35] The December 2 Order left this restatement unchanged, and clarified that to the extent that the PJM Restructuring Order applies to the instant proceedings, it is only to the possible extent that it may influence the LDV Owners' willingness to agree to construction projects that JCP&L may offer as "alternative facilities," and whether this might "serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3."[36]

148. In summary, JCP&L's assertions that the Alloway cost allocation is discriminatory, and that the solution to this discrimination is to relieve it of its contractual obligations under all of the Agreements are without merit. The Commission rejected JCP&L's proposal in Orders in this proceeding. The proposal also constitutes a collateral attack on the Commission's PJM Restructuring Order.

C. If JCP&L is allowed a credit, what is the appropriate standard for calculating such a credit?

Positions of the Parties

149. JCP&L argues that a credit based on the "carrying charge" methodology is reasonable. This is the same methodology used in the Agreements, and is used to calculate JCP&L's payments to the LDV Owners. Ex. JC-1 at 50. Although JCP&L also asserts that it is equally entitled to use the cost-sharing methodology of Schedule 11 of the LDV Agreement, it does not propose to use that methodology. *Id*. at 56.

150. In calculating the credit, Mr. Miller reduced the LDV Owners' investment amounts by the costs of JCP&L's investment. This is the only change he made to the LDV Owners' carrying charge methodology, but it resulted in the LDV Owners owing JCP&L $1,107,906 annually under the Smithburg Agreement, and JCP&L owing the LDV Owners $2,177,252 annually under the East Windsor Agreement. Under this formulation, JCP&L's net annual payment is reduced by $3,023,814, from $4,093,160 to $1,069,346. *Id*. at 52.

151. Mr. Miller also argues that JCP&L should receive additional credit resulting from the construction of the Alloway Substation Project, after its scheduled June 2008 in-service date. The computation of that credit results in a further reduction of JCPC&L's annual payment obligation to the LDV Owners to $870,901. This result is derived from multiplying 650 MW (the rating of the first East Windsor transformer) times the quotient of 650 MW divided by 1650 MW (the 1000 MW rating of the Alloway transformer plus the 650 MW rating of the first East Windsor transformer) times 0.80 (the percentage of

[35] May 6 Order at P 22.
[36] December 2 Order at P 56.

the capacity of the Salem-Deans line *not* used by JCP&L). The product of this computation is 0.08. Mr. Miller's final computation subtracts $34,534,554 (JCPC&L's investment in East Windsor) from $107,109,633 (LDV Owners' total investment in the LDV System), multiplies this by 0.08 (derived, *supra*), times 0.15 (the carrying charge used by the LDV Owners in all of the Agreements). The product of this calculation is the $870,901 in annual payments due the LDV Owners when factoring in JCP&L's credit for the Smithburg, East Windsor and Alloway projects. *Id*. at 53.

152. LDV Owners argue that JCP&L's use of a levelized carrying charge crediting mechanism will result in an overcollection. The LDV Owners implemented a levelized carrying charge, based on gross plant, at the beginning of the agreements. This methodology allows for a lesser depreciation amount in the early years, but at some point in time, a greater annual recovery of the charge begins to occur. If JCP&L is allowed to recover costs through the crediting mechanism it suggests, the LDV Owners note that this would involve depreciating assets at different time periods. Tr. at 571-572.

Discussion & Conclusion

153. I find that if the Commission grants JCP&L's crediting request, the application of levelized carrying charge methodology will not in and of itself result in an overcollection. Even though some generational inequities might result, the LDV Owners have not supported their overcollection theory. I also find that the credit would be applicable to the Smithburg and East Windsor facilities, but not the Alloway project. PJM has employed its own cost allocation methodology to allocate all costs of the Alloway project among transmission entities that will use that substation. JCP&L has not shown how this allocation would result in its overpayment, or why any reallocation of costs is necessary for this or any other post-RTEP process project. Additionally, JCP&L's complaints with PJM's allocation of the Alloway project costs are beyond the scope of these proceedings.

ORDER

154. 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.

155. A consideration of the record has led to the conclusion that the complainant JCP&L has not borne its burden of proof. It has not demonstrated by reliable, probative, and substantial evidence that complainant should be relieved of its obligation, a) to either make payments under the Smithburg and East Windsor Agreements; or, b) to construct the Seashore Loop pursuant to its obligation under the LDV Agreement or alternative

facilities under the LDV Supplemental Agreement. As such, JCP&L has not proved that the existing rates are unjust and unreasonable, as per section 206 of the FPA, and a new just and reasonable rate will, therefore, not be established. JCP&L's complaint, described at paragraph 8, *supra,* is hereby denied.

It is so **ORDERED.**

John P. Dring
Presiding Administrative Law Judge